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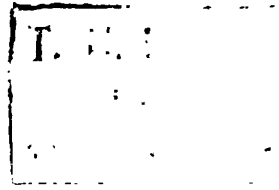
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INTERSTATE COMMERCE REPORTS

VOL. IV. ²³²⁹
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VOL. IV. ²³²⁹
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DECISIONS AND PROCEEDINGS,
^{U.S.} OF THE
INTERSTATE COMMERCE COMMISSION,
UNDER THE
INTERSTATE COMMERCE ACT
OF FEBRUARY 4, 1887,
AND AMENDMENTS,
TOGETHER WITH ALL
DECISIONS OF THE COURTS
RELATING TO
INTERSTATE COMMERCE,
WITH NOTES.

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INTERSTATE COMMERCE REPORTS.

INTERSTATE COMMERCE COMMISSION.

HON. WILLIAM R. MORRISON, of Illinois, *Chairman.*

HON. WHEELLOCK G. VEAZEY,
OF VERMONT.

HON. JAMES W. McDILL,
OF IOWA.

HON. MARTIN A. KNAPP,
OF NEW YORK.

HON. JUDSON C. CLEMENTS,
OF GEORGIA.

EDWARD A. MOSELEY, Esq., *Secretary.*

INTERSTATE COMMERCE COMMISSION.

THE ANTHONY SALT COMPANY

v.

THE MISSOURI PACIFIC R. CO.

THE ANTHONY SALT COMPANY

v.

THE ST. LOUIS & SAN FRANCISCO R. CO.

SAMUEL MATTHEWS

v.

THE UNION PACIFIC R. CO., THE MISSOURI PACIFIC R. CO.

SAMUEL MATTHEWS

v.

THE ATCHISON, TOPEKA & SANTA FÉ R. CO., THE CHICAGO, SANTA FÉ &
CALIFORNIA RAILWAY COMPANY, THE GULF, COLORADO & SANTA
FÉ RAILWAY COMPANY.

EDUARDE BARTON

v.

THE CHICAGO, ROCK ISLAND & PACIFIC R. CO.

(Nos. 300, 301, 302, 303, 306.)

The continued reduction of relative rates when brought about by the removal of artificial and unnatural differences is not undesirable, but where the difference results from dissimilar circumstances and conditions, and the true difficulty appears to be a real and natural advantage which the one region has and enjoys over the other, such continuing disturbances of rates ought not to be inaug-

urated, especially when the charges are commodity rates not shown to be unreasonable in themselves.

2. Salt requires and gets a commodity rate lower than class rates, and the roads should only be limited as to such lower rating by the rule that a commodity shall not be carried at such unremunerative rates as will impose burdens upon other articles trans-

ported to recoup loss incurred in carrying that commodity.

8. On complaints of relatively unreasonable and discriminating rates on salt from Kansas fields to various points as compared with rates to the same points from the salt fields of Michigan, *Held*, That any advantages which inure to Michigan salt manufacturers from rates to points in Iowa, Illinois, Missouri and Nebraska are advantages arising from natural situation, and that the low rate to Missouri river points is influenced by conditions which are beyond the defendant's

control and existed before Kansas salt was discovered. *Held, further*, That rates on salt to points south and southwest of Hutchinson, Kansas, and St. Louis, Missouri, do constitute undue preference in favor of Michigan as against Kansas salt, and that they should be readjusted by the Santa Fé company so that, while observing the law as to the long and short haul, the advantages of distance belonging to Kansas salt fields shall be given to them in any territory supplied by its lines which lies as near or nearer to Hutchinson than St. Louis.

Complaints filed May 29, 1891.—Answers filed June 16 to November 5, 1891.—Heard June 18, 1891.—Briefs filed November 27, 1891, to March 12, 1892.—Decided April 23, 1892.

RELATIVE rates on salt from Kansas and Michigan fields.
See Complaint, 8 Inters. Com. Rep. 679.

Messrs. Swigart, Martin & Crawford, Traber, Vandever & McNeil and James Humphreys for complainants.

Messrs. Britton & Gray for Atchison, Topeka & Santa Fé, Chicago, Santa Fé & California, Gulf, Colorado & Santa Fé, and St. Louis & San Francisco Railway Companies.

John S. Blair for Missouri Pacific Railway Company.

Messrs. T. S. Wright and M. A. Low for Chicago, Rock Island & Pacific Railway Company.

John M. Thurston for Union Pacific Railway Company.

Joy, Morton & Co. Intervenor's protesting against the claim of the plaintiffs.

REPORT AND OPINION OF THE COMMISSION.

McDill, Commissioner:

The general complaint made by all these plaintiffs is that the several defendants give an undue advantage in rates to the manufacturers of salt in and about Saginaw, Michigan, over that enjoyed by the manufacturers of salt at Hutchinson and other salt producing points in Kansas. Some mention is also made of New York salt as being granted similar and undue advantages over Kansas salt.

Instances are given in the complaint as follows:

Rate on Bay City, Michigan, salt to St. Louis, Missouri, 611 miles per hundred pounds,.....	10 cts.
New York salt pays to St. Louis, Missouri, 806 miles per hundred	18
While Anthony, Kansas, salt pays to St. Louis, Missouri, 575 miles,...	23½
Rate on Michigan salt from St. Louis, Mo., to Fairbury, Nebraska, per hundred pounds, distance 504 miles,.....	15½
Hutchinson, Kansas, to Fairbury, Nebraska, 247 miles,.....	19
Hutchinson, Kansas, to Ft. Madison, Iowa,.....	23½
Chicago to Kansas City, Michigan, salt,.....	15
Michigan salt to Ft. Worth, Texas, 1887 miles, per hundred,.....	48½

4 INTER 8.

Kansas salt to Ft. Worth, Texas, 427 miles, per hundred,.....	35½
Michigan salt from Ft. Madison, Iowa, to Ft. Worth, Texas, 826 miles,...	35½
Hutchinson, Kansas, salt to Clio, Iowa, 372 miles, per hundred,....	23
Chicago to Clio, 378 miles, per hundred,.....	15

The distances are set forth as given in the complaint; while not in all cases exactly found from the records in this office, yet the differences do not materially affect the matter of complaint.

It is claimed that the defendants by charging the rates above set forth, and by making similar differences at other points, are violating the Act to Regulate Commerce, and a restraining order is sought. The defendants say substantially, while generally admitting the statements of the plaintiffs as to rates, that those lines which make the rates complained of are other and different than those named as defendant that defendants have no voice or part in making the rates from Chicago to the Mississippi and Missouri river points, nor from Bay City and the Michigan salt field to Chicago and St. Louis. That these rates were brought about by water competition, and other forces uncontrollable by any of the carrier lines and adjusted and agreed upon long before the Kansas

salt fields were discovered and developed, and that to make the charges sought by complainant would disturb the whole system of rates, and result in a compulsory rearrangement of all rates from Chicago and East St. Louis westward; that many independent lines extend from Chicago and St. Louis westward and southward, which do not reach the Kansas salt points, that the requirement of the law as to long and short haul, greater volume of business on the eastern portion of the lines and greater number of empty cars going westward and numerous other causes, beyond the control of the carriers, have operated to fix rates. Those rates that are complained of from Kansas to southeastern Nebraska and other points are said by defendants to be reasonable, the service being in a sparsely settled country and necessarily made by circuitous routes, and over branch lines and also controlled by circumstances and conditions which are altogether dissimilar to those controlling the fixing of the Michigan salt rates. That the rate on salt is everywhere very low, it being a commodity which will not bear any but very low rates. The defendants ask that the complaints be dismissed, or at least, that before any order is made, numerous carriers who will be affected by the order be made parties, and given an opportunity to be heard in reference to the nature and effect of the order prayed for.

By agreement of the several parties, these cases were heard together at Kansas City, Missouri, June 17, 18 and 19, 1891.

Upon the pleadings or written statements filed in these cases, the evidence introduced at the hearing, and the statistical and other information of record in this office, the following are found to be the facts:—

FINDING OF FACTS.

Salt is manufactured in great quantities in the northeastern part of the southern peninsula of Michigan. The principal points of that field are Bay City and Saginaw. Salt is also manufactured in large quantities in the southern and central parts of Kansas. Hutchinson, Texas, is an important point in the Kansas field, but Anthony, Kingman, Sterling, Nickerson and Wellington are also prominent points.

The productive capacity of each field is practically unmeasured, and probably equal to any demand that is likely to exist for the product in regions within reach of either.

The cost of producing the salt and putting it in the barrel ready for shipment, including the cost of the barrel, is estimated in the Kansas field at from 60 to 70 cents. The cost is probably about five cents per barrel less in the Michigan field. A salt barrel weighs about 20 pounds and contains about 280 pounds of salt.

The coeprage materials from which salt is

barrels are made for use in Kansas come from Michigan and from the vicinity of the Saginaw salt region, being brought by rail to Kansas. The fuel used at the Kansas salt fields is slack coal brought by rail from various points in southeastern Kansas and northwestern Arkansas. The Michigan salt manufacturers get their coeprage material from near the salt plants. In some instances they use as fuel the slabs and refuse from saw-mills. When they use coal, they get it principally from Cleveland and other lake points. This coal costs more than the slack used at the Kansas plants. The Kansas brine is much stronger than the Michigan, and the Kansas wells are not so deep. All things considered, it would seem, there is but little difference in the cost of getting salt ready for market at the two points, the advantage, if any, being with the Michigan salt.

The production and output of salt in Michigan, began in 1861; the amount that year was 125,000 barrels
In 1875 1,000,000 "
In 1890 4,000,000 "

—and Michigan now produces a very large portion of the salt supply in the United States.

Kansas salt production began in 1888, and for the year ending March 31, 1891, it reached 1,000,000 barrels. The area of territory embraced in the Kansas salt fields is large, being from east to west about 75 miles, and from north to south about 150 miles. The quality of it is good. Great quantities of salt are produced in other parts of the United States, namely, in New York, in the valley of the Ohio, in Louisiana, in Texas, and in Utah.

The United States annually consumes about 12,000,000 barrels of salt.

Salt from Michigan and New York reaches St. Louis and Chicago at very low rates. The St. Louis rate on Michigan salt exceeds the Chicago rate in the amount of 8½ cents per hundred, or 10 cents per barrel. On New York salt the rate varies during the year, the St. Louis rate being at all times from 3 to 4 cents per hundred more than to Chicago, according to the season of the year.

Great quantities of Michigan and New York salt are stored at all times at Chicago and St. Louis for distribution south to Texas points, and west to the country lying between the Mississippi river and the Rocky Mountains.

The average rate per ton per mile on salt from Michigan to points in Indiana, Ohio, and Illinois, and to East St. Louis, is .50 of a cent, and the rate to the same points from New York is .7½ of a cent.

A number of lines reach Texas points, and the western country east and west of the Missouri river, which do not reach the Kansas salt fields.

The Chicago, Rock Island & Pacific line

extends from Chicago in a southwesterly direction to the Kansas salt fields, crossing the Mississippi river at Rock Island and the Missouri river at St. Joseph and Kansas City. It also has a line from the Kansas salt region through southeastern Nebraska to Omaha, thence easterly through Des Moines, Iowa, to Chicago.

The Atchison, Topeka & Santa Fé road, runs from Chicago to the Kansas salt fields, and also reaches points in Texas, and on the Pacific coast and intermediate points, through its leased and operated lines.

The Missouri Pacific road extends westward from St. Louis to the Kansas salt fields, and by some of its lines reaches Omaha and Lincoln, Nebraska.

The St. Louis & San Francisco extends westward from St. Louis to the Kansas salt fields and also southward into Texas.

The Union Pacific does not reach the salt region, but by the Missouri Pacific receives Kansas salt at McPherson and Kanopolis, and carries to Omaha and other points west of the Missouri river.

In November, 1889, the question of rates on salt from Chicago and St. Louis, and from the Kansas region, was submitted to and settled by the award of an arbitrator as follows:

"On salt in carloads from Chicago to all Missouri river points, Kansas City to Sioux City, inclusive, per hundred pounds, 15 cents.

From St. Louis and other Mississippi river points to Missouri river points, (the rate from Mississippi river points to Sioux City applying only to points north of Clinton,) per one hundred pounds 11½ cts.

From Hutchinson and other salt producing points in Kansas to Kansas City, Leavenworth, Atchinson, and St. Joseph..... 11½ cts.
Nebraska City 16 cts.
Omaha 16½ cts.
Sioux City 18 cts.

Omaha and Sioux City not to have the rates, by routes, west of the Nebraska Division of the Missouri Pacific.

From Chicago and Mississippi river points to points in Kansas, and Kansas salt producing points to points in Missouri, through rates are to be made by adding to the above rates to Southwestern Missouri river points respectively the local rates from such points to destination.

To all points in Nebraska, west of the Missouri river, rates to be established from Chicago by the lines running from Chicago, and the same rates to be made from Hutchinson, subject to the condition that rates shall not be used which shall operate to reduce the Chicago rate."

The Missouri Pacific, and the St. Louis and San Francisco roads, connecting St. Louis with the Kansas salt fields, charge a rate in excess of the Missouri river rate to points as 4 INTER 8.

far as Sedalia and Lebanon respectively less than the sum of the locals, and to points further east the rates are made of the sum of the locals.

On account of conditions which have heretofore influenced the rates to the Mississippi and Missouri river points and points between, Kansas salt is excluded from all points in Missouri and Iowa between the Mississippi and Missouri rivers, except Kansas City and St. Joseph. The same is true as to other points, as to Michigan salt, which by the adjustment of rates, is practically excluded from St. Joseph and Kansas City.

The tonnage east bound on the defendant lines greatly exceeds the tonnage west bound.

The amount of freight passing over the Rock Island bridge for the year ending March 31, 1891, east bound was 28,000,000 pounds; west bound 1,300,000 pounds.

The tariff sheets of the St. Louis and San Francisco road reveal the use of the following rates:

Hutchinson east to Carl Junction, distance 225 miles, 11½ cents.

Oronogo, distance 231 miles, 18 cents.

Pierce City, distance 266 miles, 18 cents.

From St. Louis west to Hancock, distance 140 miles, the rate is 11½ cents.

Lebanon, 182 miles, the rate is 18½ cents.

Springfield, 237 miles, the rate is 15½ cents.

Pierce City, 287 miles, the rate is 15½ cents.

Oronogo, 322 miles, the rate is 15½ cents.

On the Atchison, Topeka & Santa Fé line rates are made to Texas points as follows:

Per ton per mile.

Hutchinson to Ft. Worth, a distance of 427 miles, rate 35½ 1.662

Ft. Madison to Ft. Worth, 826 miles, rate 35½859

Chicago to Ft. Worth, 1065 miles, rate 41½779

Bay City to Ft. Worth, 1388 miles, rate 48½625

At Austin, distance from Hutchinson 669 miles, the rate is 35½ cents, or 1.061 cents per ton per mile, while Michigan salt is given a rate from Ft. Madison to Austin 1069 miles of 35½ cents or .664 of a cent per ton per mile.

Relative differences of a kindred character are found in the charges for transporting the product manufactured at the two points, to Houston, Galveston, Laredo, San Antonio, Nacogdoches and San Angelo, the advantage in the rate per ton per mile being at all times in favor of the Michigan salt.

The question raised is one of relative rates and resulting discrimination which is claimed to be unjust, because it is said to bring about an undue preference of the Michigan region over the Kansas region both engaged in manufacturing salt, and to result in prejudice to the

Kansas locality. The giving of undue or unreasonable preference or advantage of any particular locality over another or subjecting any particular locality to any undue or unreasonable prejudice or disadvantage as to any other locality is declared in section three of the "Act to Regulate Commerce," to be unlawful. The facts are scarcely in dispute. It is practically conceded, that salt transported from Michigan, south and west, has more favorable rates than salt transported from Hutchinson and other points in Kansas, north, south and east, but defendants say that they are not responsible for the rates on Michigan salt. Its transportation, they allege, is forced to a very low mark by causes outside of any territory occupied by their lines, and where such forces are at work as to make a dominating necessity for the maintenance of present low rates, which have been established (for a long time acquiesced in), and regarded as absolute necessities for the work of transportation, in such manner as to secure the greatest good to the greatest number. That therefore, the rates complained of are, even if in violation of the law, not the acts of these defendants. They however insist, that the rates given the Michigan salt are reasonable, proper, and necessary; that the conditions and circumstances of controlling force and effect are dissimilar in reference to the two localities brought into question, namely, the Michigan and the Kansas salt fields, and finally, if there should be found a necessity for readjustment of rates, that it can only be done by making parties to the proceedings all lines interested by location and actual traffic operations in the business of either locality, with reference to the salt shipped therefrom, and carried to market over such carriers' lines.

A comparison of rates is invoked by these complaints, between rates on salt manufactured in Michigan and moving south and west, and rates on salt manufactured in Kansas and moving north and east. The commodities shipped, though similar in quality, are moving in a different, not the same direction.

From the fact that in the one case the product moves south and west to market, and in the other north and east, it follows that the lines serving in part the two localities run through differently situated countries, the one sparsely settled and not furnishing a very large local trade, the other more thickly settled, furnishing a larger local trade, and a greater volume of business. The lines leading from the Michigan salt region, besides the advantages just mentioned, have been forced, it is claimed, to make lower rates, than would probably have been acquiesced in, under other conditions, on account of water competition. And these rates were established before the Kansas salt fields were discovered, so that it is evident, that at

the time of their establishment there could have been no intention to unduly prefer the Michigan salt region, as compared with the Kansas salt region.

Not only is it claimed that water competition has lowered rates for the Michigan salt but that certain other established conditions have had the same tendency. These as set forth are, the great volume of business moving west and south from Chicago over the lines carrying Michigan salt, the heavy preponderance of east bound freight over west bound, principally caused by the large number of stock, or cattle and grain cars, used in transporting live stock and grain from western states and territories to Chicago and eastern points, thus throwing upon the lines terminating at Chicago large numbers of empty grain and cattle cars, which must return as empties to the west unless some product can be loaded into these cars, and transported west at a rate slightly remunerative. It is evident that these conditions have powerfully aided the Michigan salt in obtaining a low rate on its western and southern haul. These dissimilar circumstances and conditions are mentioned in section two of the Act to Regulate Commerce as matters to be considered. The proposition of the law seems to be that, where the circumstances and conditions of two localities are substantially similar, there shall be no advantage or preference given to one which is not also freely offered to the other. To give an advantage or preference, under such circumstances, to one place would be undue, or, in other words, would be giving to the favored locality an advantage, which did not of right belong to it, and producing an undue prejudice against the other locality.

It was urged with earnestness by the complainants, that the proof was that a great number of empty cars from Colorado and westward of Hutchinson and Kansas salt points were to be found in the region of these points, which could be conveniently and profitably loaded with salt and sent eastward, but, in our judgment, the force of this reasoning is broken by the fact that Hutchinson and the salt points of Kansas are within the grain belt, and the demand for grain cars, during a considerable part of the year, is greater than the supply; that loaded with grain these empties would yield a profit on the eastward haul which would be in excess of the profit on salt. To require carriers to take an unremunerative commodity, which demands a rate lower than the classes, in preference to another article which also takes a commodity rate, but will yield a greater profit to the carrier than the carriage of the former commodity, might be an unjustifiable requirement as revenues should not be arbitrarily reduced.

So far as the rate on Michigan salt from Bay

City to Chicago is concerned, it appears it was originally charged 83 cents per barrel, but this rate was reduced to 20 cents per barrel prior to the discovery and development of the Kansas salt, and has for a long time been the fixed rate.

The difference in charge for transportation of freight to St. Louis over the charge to Chicago is and seems to have been for a long time prior to the discovery of the Kansas salt fixed, as claimed by the railways, upon the following rule; that St. Louis should have a rate from the east as much greater than the Chicago rate as its rates westward, along distributing lines, were less than the Chicago rates, on its distributing lines, thus placing the two cities upon an equality as distributing centers. The Michigan salt reaches the Mississippi river at a rate apparently compulsory in its character on the entire line from the field of production either direct from Bay City or *via* Chicago. Forces beyond the control of the defendants have fixed this rate, and they must carry at this rate from Chicago to the Mississippi river or go out of the business. Other great advantages here concur in favor of the Michigan salt moving from Chicago. These are, great numbers of west bound empty cars, facilities for speedy loading of cars, and a minimum time of idleness for the unloaded cattle cars coming in from the west. Coal is cheaper in the region of supply for the eastern portions of the Rock Island and Atchison lines than the western portions.

It cannot be urged that the defendants are responsible for, or that they have arbitrarily fixed the rate on Michigan salt to either Chicago or St. Louis.

Nor can any comparison of rates from Hutchinson, Kansas, eastward to St. Louis with rates from Bay City to Chicago or St. Louis be of any advantage, for the conditions and circumstances are not substantially similar.

For these reasons, a comparison as to relative rates if of any value, should be as between St. Louis and Kansas City on the one hand, and Kansas City and Hutchinson, Kansas, and the several Kansas salt points on the other hand. The distance from St. Louis to Kansas City is 283 miles. The rate on salt 11½ cents.

The distance from Hutchinson and the salt points to Kansas City is 235 miles. The rate on salt is 11½ cents. The shortest rail line distances from St. Louis to Kansas City is *via* the Wabash Road being 277 miles. This road does not reach the Kansas salt regions nor is it a party defendant in this case.

The roads leading from Chicago to Kansas City cannot, as rates are now arranged, charge more than the rate from St. Louis to Kansas City plus the difference between Chicago and St. Louis, 11½ cents plus 8½ cents, or 15 cents

the rate charged. If these roads charged more than 15 cents, all the Michigan salt would go *via* St. Louis and they would carry none and would lose the profit of carrying salt.

It is claimed by the plaintiffs in this case, that the rate from Kansas salt points to St. Louis should be 15 cents, and that discrimination against Kansas salt consists in a rate of 28½ cents to that point, which was the rate at the time the complaint was made, it now being 18 cents.

It must be noted, however, that lines from Chicago reach Kansas City that do not reach the Kansas salt fields. For instance, the Chicago, Burlington & Quincy railroad reaches Kansas City, the distance being 499 miles, and by a route substantially the same it reaches St. Joseph, Mo., the distance being 471 miles, and carries salt to this point and others at a 15 cent rate, if it carries at all, that being the maximum rate it is able to charge.

The claim of the plaintiffs to be allowed a 15 cent rate to St. Louis, would, we think, disarrange and disturb relations of rates to places considered alone as to distance. If salt were carried from Kansas salt points to St. Louis for 15 cents, a distance of 512 miles, while Michigan salt pays 11½ cents for going from St. Louis to Kansas City, a distance of 283 miles, it seems apparent that the shorter distance over the same line would pay a greater rate relatively than the longer distance. From St. Louis to Kansas City being 283 miles, if it be conceded that 11½ cents is a proper rate for that distance, distance alone now being considered, then the additional 235 miles from Hutchinson to Kansas City should (distance alone now being considered), pay for the additional haul 11½ more, or a rate of 23½ cents, and this was the precise rate charged at the time of complaint, now being 18 cents. If the rate asked by plaintiffs were established and the rate on Michigan salt were continued as at present, namely, 11½ cents for the 283 miles from St. Louis to Kansas City, a continuance of which latter rate is contemplated by defendants, then at a 15 cent rate for Kansas salt from Hutchinson to St. Louis there would only be left to pay for the distance hauled to Kansas City, which is 235 miles, 3½ cents per hundred, or the rate would be less for hauling practically the same distance west of the Missouri river than charged for the same distance east of the Missouri river, and this low rate would be established, being low and unequal, on freight passing eastward on a line running through a sparsely settled country, which often suffers for want of a sufficient number of cars to carry its grain and other products eastward, and on a line which had a great number of empty cars moving westward. The effect of such a rate upon the lines which extend into the country west of the Missouri river from

Chicago, but which do not reach the Kansas salt field, could not be otherwise than disastrous and disturbing.

Being forced, either to abandon salt transportation, or to meet the lowered salt rate from Kansas, such lines would, if any appreciable margin of remuneration were left at the lower rate, undoubtedly choose the latter alternative. This would again destroy the equilibrium of rates, and Kansas salt would be in a position to demand another reduction which, if granted, would call for another lowering of rates from Chicago westward and so on indefinitely. Now while this would not be undesirable, when brought about by the removal of artificial and unnatural differences, yet when the difference is, as in this case, one resulting from dissimilar circumstances and conditions, and when made to operate on commodity rates, concerning which no one has in this case shown that they are unreasonable or high rates, it does not appear to be right to inaugurate such continuing disturbances, when the real difficulty seems to be a real and natural advantage which the one region has and enjoys over the other.

Again, it is urged that great discriminations are shown in the rates and they are so arranged as to exclude western or Kansas salt from a field which otherwise could be reached from Kansas; and instances are given, as follows: Hutchinson to Trenton, Mo., 335 miles, rate 20½; Chicago to Trenton, Mo., 416 miles, 15 cents; Chicago to Clio, Iowa, 375 miles, 15 cents; Hutchinson to Clio, Iowa, 378 miles, 23½ cents; and many other instances might be given, but the defendants reply that such apparent anomalies are forced by the requirements of the Act to Regulate Commerce as to the long and short haul.

The maximum rate to the Missouri river, as we have shown, is fixed by forces beyond the control of the defendants at 15 cents. Whenever a point is reached on the lines leading from Chicago westward where the rate made up of locals, or in any manner based on distance, equals the fixed rate of 15 cents, the additional miles hauled cannot be counted for the purpose of increasing the rate, for the law prohibits the greater rate for the shorter haul over the same line in the same direction. It is then apparent, that if any wrong is done by the differences complained of, it must be found in the rate from Hutchinson east. As we have already seen the rate in this direction, being uncontrolled by any such forces as act upon the westward movement from Chicago to the Missouri river, may be considered as the basis of an inquiry, whether the rate charged is reasonable and just under all the circumstances.

The following table shows the rate per ton
3 INTER 8.

per mile from Hutchinson to the several points named:—

To Trenton, Mo.....	.01233
To Marysville, Mo.....	.01853
To Clio, Iowa.....	.01234

Michigan salt reaches these points under circumstances, as we have before shown, advantageous to it, and compulsory upon the carriers.

We therefore feel compelled to conclude, that any advantages which would seem to inure to Michigan salt over Kansas salt, are advantages arising from situation, and not advantages unduly given by the defendant.

Complaint is made against the Union Pacific and Missouri Pacific with regard to rates on Kansas salt into Nebraska, as compared with Michigan salt rates. To understand this situation, it must be remembered that the difference in favor of St. Louis operates, in this field also, in favor of Michigan salt.

Those lines carrying directly west from Chicago, which do not reach the Kansas salt fields, are compelled either to carry salt at a very low rate to Nebraska, or go out of the business.

The Missouri Pacific reaches Omaha by a circuitous route through Beatrice and Lincoln, and the Omaha rate on Kansas salt is, as shown by the evidence, 15 cents.

But the Union Pacific and the Missouri Pacific carry to Fairbury, Neb., as follows:

By the Missouri Pacific.....	55 miles to Kanopolis.
By the Union Pacific.....	99 miles to Manhattan.
Branch of Union Pacific.....	56 miles to Marysville.
Branch of Union Pacific.....	40 miles to Fairbury, Neb.

Total distance.....250 miles.

The rate, by this route, on Kansas salt is 19 cents per hundred pounds. This is a special rate and groups both points of shipment and destination and is not made up of the sum of the locals. The rate to several points in Nebraska, with distance from Kansas salt field is given.

Rate on salt in barrels from Hutchinson, Kingman, and Anthony, Kansas.

To	Distance from Hutchinson		Rate per 100 pounds
	via Kanopolis	via McPherson	
Fairbury, Neb.	250	226	19
McCool Junction, Neb.	301	277	19
Hastings, Neb.	324	300	22
Grand Island, Neb.	349	325	22

Tobias, Fairmount, Osceola, David City, also have a 19 cent rate.

The mileage rate on the above combination route of

Missouri Pacific and Union Pacific would be Hutchinson to Kanopolis.....	11½
Kanopolis to Fairbury, Neb.....	24

35½

The rate given to Fairbury is 16½ cents below the sum of the locals, and is an evident concession to Kansas salt; and, in every specific instance called to our attention, the rate made

is the equal of the Chicago rate to the same point. But in every such case St. Louis has a rate $8\frac{1}{2}$ cents per hundred better. Complainants wish to have a rate to Nebraska points 5 cents less than Chicago and $1\frac{1}{2}$ cents less than St. Louis. If this were done, or a rate less than the Chicago rate given, those roads extending from Chicago into Missouri and Nebraska, but not reaching the Kansas salt fields, would be compelled either to go out of the business of carrying salt, or to lower the rate from Chicago, which would involve a complete readjustment of rates on salt, both east and west bound, after every such reduction.

But even such results might afford no reason why an unreasonably high rate should not be reduced. Yet upon consideration, we are not able to declare that the rates on Kansas salt to Nebraska points are unreasonably high. The evidence shows that the cost of the haul from Hutchinson to St. Louis is about 5.2 mills per ton, and that 15 cents to St. Louis would be the cost without any appreciable margin of profit, and that if east bound cars during the season of grain shipments were diverted from grain to salt transportation, it would bring about serious financial loss to the grain carrying roads. Salt is an article which requires and gets a commodity rate lower than class rates, and the general rule applicable thereto would seem properly to be that, if it has been placed at commodity or lower than class rates, the only limitation upon the roads should be that the commodity should not be carried at entirely unremunerative rates, so as to impose burdens upon other articles of transportation to recoup loss incurred in carrying the commodity.

When we come to a consideration of the evidence as to the rates on salt from Michigan to Texas, as compared with Kansas salt shipped to the same points, we find rates that we cannot approve. The Atchison, Topeka & Santa Fé road has a line running from Hutchinson in the Kansas salt fields to points in Texas. This line extends from Hutchinson in a general southerly direction.

The salt fields of Kansas lie nearer to some points in Texas than does St. Louis, the distributing point in question for Michigan salt going south. The limitations and conditions which are brought forward as tending to control the rates on salt moving westerly from Chicago, do not control the movement of Hutchinson salt southerly along the line to Texas points.

The Gulf, Colorado & Santa Fé Railroad Company is controlled by the Atchison road, through the ownership of a majority of capital stock. (See Statistics of Railways, 1889, page 55.)

The Chicago, Santa Fé & California Railway Company is operated with the Atchison

road as one property. (Statistics of Railways, 1889, page 53.)

The St. Louis & San Francisco Railway extends to the same southern and southwestern points, and is leased and operated by the Atchison road.

The Atchison has a direct line south from Hutchinson to Fort Worth, San Antonio, and other Texas points. It has another direct line to the same points from St. Louis *via* the St. Louis & San Francisco road. The latter road has a line from Hutchinson southeast toward Springfield, Mo., and at Monett Junction it intersects the line coming southwesterly from St. Louis. The exact situation may be more clearly understood by the accompanying diagram on opposite page.

By a reference to the diagram, it seems that the consumers of salt are hedged away from the Kansas salt, on the line of the St. Louis & San Francisco Railroad, at Oronogo, and Pierce City not far from 250 miles distant from the field of its production, the distance from Hutchinson to Monett Junction being about 271 miles, while the Michigan salt from St. Louis has a clear way from St. Louis to Ft. Worth *via* the Atchison line, and in turn the Kansas salt gets no relief from the direct line from Hutchinson to Ft. Worth, for the reason that the rate on salt from St. Louis to Ft. Worth is fixed at $85\frac{1}{4}$ cents while the rate from Hutchinson to Ft. Worth is $85\frac{1}{4}$ cents. Yet the distance from Hutchinson to Ft. Worth is 427 miles, while the distance from Bay City, Michigan, to Ft. Worth is 1898.

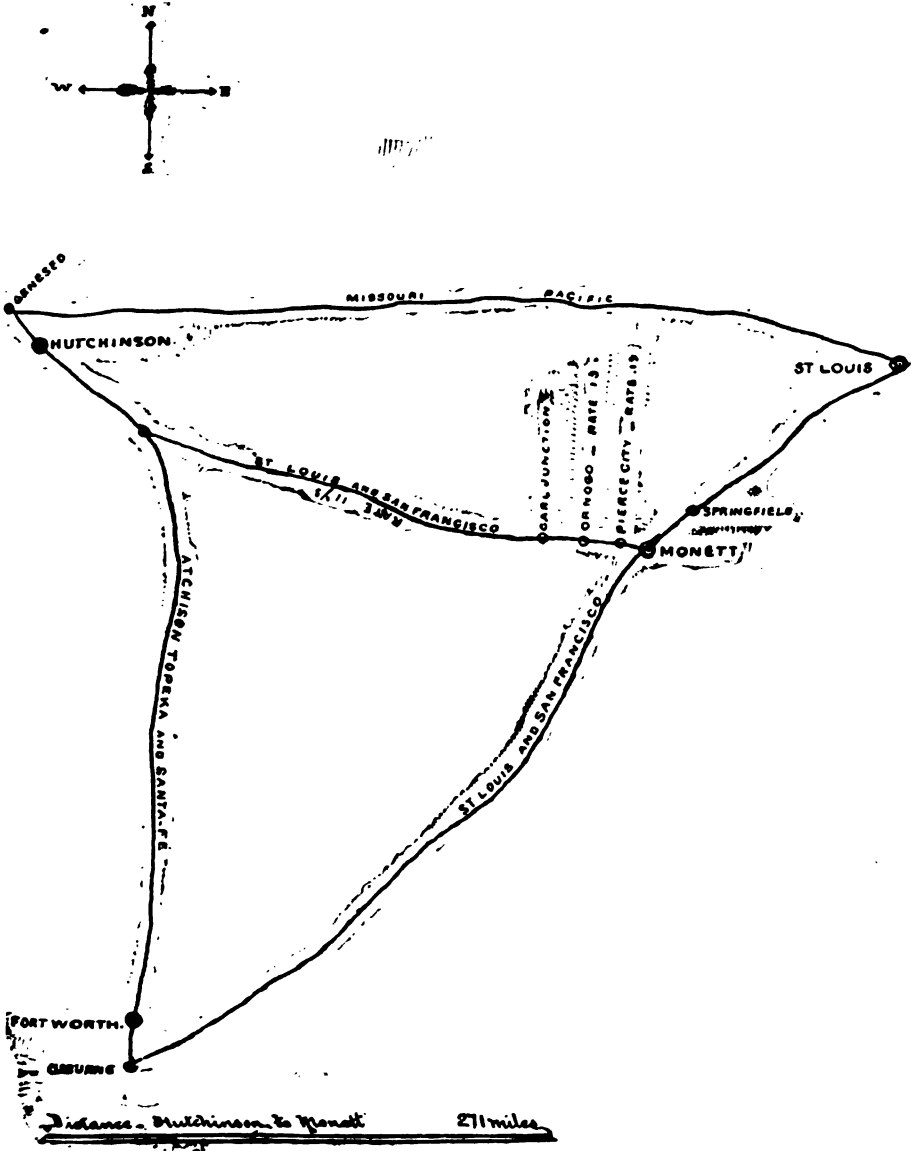
The rate from Bay City to Ft. Worth, 1388 miles, is $48\frac{1}{4}$ cents per hundred on salt, while from Hutchinson, Kansas, to Ft. Worth, 427 miles, the rate is $85\frac{1}{4}$. The excess in haul from Bay City only pays 8 cents per hundred, and the excess is twice as great as the total distance from Hutchinson to Ft. Worth.

As St. Louis is the distributing point for Michigan salt moving south and west, it would seem right to make the comparison between St. Louis and Hutchinson. St. Louis for the purpose of this inquiry may be treated as the point of origin of Michigan salt, the cost of getting it to the distributing point being perhaps an element of the original cost of the article in preparation for market. St. Louis is 748 miles from Ft. Worth, Texas; Hutchinson is 427 miles from the same point. If the common rate $85\frac{1}{4}$ cents per hundred is the proper rate for the 427 miles haul from Hutchinson to Ft. Worth, then the excess of haul from St. Louis to Ft. Worth which is 316 miles, without any reason shown in the record, is a carriage without charge. While many other considerations than distance may be considered in determining what shall constitute a proper rate, yet in this case nothing is shown to justify the apparent discrepancy of charge, and

it is believed to work an undue preference to Michigan salt over Kansas salt going to Texas and southerly points.

It can hardly be disputed that there is here a disadvantage brought about to the Kansas, and a preference given to the Michigan, salt, both undue and unreasonable. It seems that this arrangement is wholly under the control

We think that, in all this territory, where the Texas points are as near to Hutchinson as to St. Louis, the Kansas salt should by a rearrangement of rates be carried for an equal charge, and where Hutchinson is nearer than St. Louis, the Kansas salt should have the reasonable advantage of its proximity to the market, at all times, however, observing the re-



of the Atchison Railroad, and the lines leased and operated by it, and we see nothing in the situation, as proven, which can be given as a valid reason for not putting the Kansas salt fields in possession of all these natural advantages in the territory traversed by these lines.

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quirements of the law as to the long and short hauls.

We find and conclude, with reference to all the other defendants, except the Atchison, Topeka & Santa Fé, and its leased and operated lines, and with reference to that portion of its

line leading directly from Chicago west, that the advantages given to Michigan salt, by which it reaches Chicago and East St. Louis, are advantages it enjoys by reason of its natural situation. That the advantage, by which it reaches the Missouri river on a very low rate, is fixed by conditions beyond the control of the defendant roads, and that such conditions existed by reason of the situation before the Kansas salt was discovered.

With reference to the Atchison, Topeka & Santa Fé Railroad, and its lines, operated and leased, running from St. Louis and Hutchinson south and southwest, and connecting with such lines, the present adjustment of rates we think *does* operate so as to bring about an undue advantage to and undue preference of Michigan salt over Kansas salt, and said defendant, the Atchison, Topeka & Santa Fé Railroad, is now advised that said rates as now adjusted are in violation of the provisions of section three of the Act to Regulate Commerce, and it is hereby ordered to desist from the enforcement of the present rates, and at once to re-adjust rates on its last named lines, at all times observing the requirements of the law as to the long and short haul, so as to give the advantages of distance belonging to Kansas salt, in all the territories supplied by its lines, that lies as near or nearer to Hutchinson than to St. Louis, and the complaints against the Missouri Pacific Railroad Company, the Union Pacific Railroad Company and the Chicago, Rock Island & Pacific Railroad Company are dismissed without prejudice.

It is found upon examination that the rate of 23½ cents per hundred pounds on salt, from Hutchinson to St. Louis, a distance of five hundred and twelve miles, is equivalent to .91 of a cent per ton per mile.

The rate of 35½ cents per hundred pounds from Hutchinson to Galveston, a distance of seven hundred and seventy-two miles is equivalent to .92 of a cent per ton per mile.

We have found that recently the rate on salt from Hutchinson to St. Louis has been reduced from 23½ to 18 cents per hundred pounds or to .708 of a cent per ton per mile. On the same basis, the rate from Hutchinson to Galveston should be 27 cents per hundred pounds. Other Texas common points should receive the same rate. This would give the carriers from Hutchinson to Ft. Worth 1.26 of a cent per ton per mile to Galveston .703 of a cent per ton per mile.

Our belief that this rate is about the fair and reasonable rate is fortified by a consideration of the rates formerly and now in force upon salt from New Iberia, Louisiana, to common

Texas points. These rates are shown in the accompanying table:

Distance.	From Iberia, La. To	In cents per 100 lbs. in sacks or barrels.			Per ton per mile.
		In effect Dec. 15, 1890.	In effect Nov. 18, 1891.	In effect Jan. 7, 1892.	
	Austin, Tex.	30.50	23.9	23.9	
	Corriscanna, Tex.	30.50	24.7	23	
501	Dallas, Tex.	30.50	25	23	1.02
523	Ft. Worth, Tex.	30.50	24.5	23	.99
565	Sherman, Tex.	30.50	27.1	27.1	.97
	Terrel, Tex.	30.50	27.5	27.5	
422	Waco, Tex.	30.50	24.3	26	1.23

It is found that the rate from New Iberia, La., to Ft. Worth, Texas, was in December, 1890, 30.50 cents per hundred pounds and is now reduced to 26 cents per hundred pounds, and that the rate to Waco, distant from New Iberia 422 miles, is now 26 cents per 100 pounds, and the rate per ton per mile 1.23 of a cent. It would seem the rate named by us has reached the common basis of similar rates. We therefore order and direct that the maximum rate on salt from Hutchinson, Kansas to Galveston and common Texas points be fixed at 27 cents per hundred pounds so long as the rate on salt from St. Louis to Texas points is fixed at 35½ cents per hundred pounds, and that the relation and proportion be hereafter maintained between rates on salt from St. Louis and Hutchinson to Texas common points as hereby established.

Upon a distance basis alone the difference is still greater but undoubtedly there is greater volume of business from St. Louis and a more abundant supply of empty cars which would justify a somewhat lower rate from St. Louis than from Hutchinson which conditions although not measurable with mathematical exactness have been considered in fixing the above rate.

The cases seem to have been prepared with reference to the manufactured and barreled salt, and the necessary facts and conditions with regard to rock salt are not found in the record to enable an intelligent determination with reference to rates upon that product. Statements are made in a brief filed September 2, 1891, by the Lyons Rock Salt Company that the competition of the rock salt is not with the Michigan but with the New York salt, and it is asserted that the production of rock salt in Kansas might be greatly increased if rates were properly adjusted. It is also claimed that the rates from New York salt points to St. Louis and Chicago are relatively much less than the rates from Kansas rock salt points to Chicago and St. Louis. The

want of evidence upon the points claimed, the absence of any parties representing the New York salt interests, the fact that for aught that appears no railway line making the New York salt rates to Chicago and St. Louis is a party defendant, compel the conclusion that it would be unsafe for the Commission to attempt upon this record to consider the question raised by the brief. It may here also be noticed that the Lyons Rock Salt Company filing the brief is not a party plaintiff in any one of the cases under consideration.

It is therefore deemed right to say that nothing in this report and opinion is intended in any manner to apply to rates upon rock salt, or to any question of relative rates, upon comparison of rates of New York rock salt with rates on Kansas rock salt; the several parties interested in such products being left entirely free to whatever action they may deem wise, without being embarrassed by any action taken in these cases which have sole reference to questions of comparison between rates on manufactured salt made either in Michigan or Kansas and not to rock salt.

Some reference has been made in the briefs filed to a circular number 48 of the Western Traffic Association, dated Chicago, November 3, 1891, which shows an authorization by the Chairman of that Association to the lines embraced therein to make a through rate from Kansas salt points to Mississippi river points, Ft. Madison to St. Louis inclusive at some date to be fixed by the Chairman of the Association. It is contended that the circular is not properly in evidence, and, if it were, that it should have no weight in determining the merits of the controversy. It has not in fact been considered, but it is not the wish or purpose of the Commission in any manner to throw any obstacle in the way of any attempt on the part of the lines connected with the association to amicably adjust salt rates upon a better basis than the one now in use. In fact we find the present rate on salt from Anthony, Kansas, to St. Louis is 18 cents and we do not wish in the least to interfere with or disturb this rate. This rate now in force, was established December 16, 1891, and applies to St. Louis and other Mississippi river points and to intermediate points as far as Brant 145 miles west of St. Louis.

In conclusion, it is perhaps due to the complainants, that notice should be taken of their complaint that the Kansas salt rate to interior points in Iowa and Missouri is made by adding the local rate from the Missouri river points to destination to the rate from the salt points to the Missouri river points, while the rate from Chicago to central points in Iowa and Missouri is a single through rate.

We cannot regard the difference as of any

great importance, the question being directly as to the relative rates, and not the manner in which they are made.

If, as has been heretofore shown, a reduction of the salt rate from Kansas points to points between the Missouri and Mississippi rivers would be inexpedient, and unproductive of any relief to complainants, and no appreciable benefit to consumers, then it is immaterial how the rate is made, whether a single amount or by a combination of amounts. The conclusion reached after a comparison of two rates could hardly be changed, whether the rates under consideration were made as a single aggregate sum for the service or by combining certain sums, whether locals or arbitrary amounts. The real inquiry is whether the rates are in themselves high and unreasonable or wanting in proportion and relation to other rates, and whether any actual benefit would inure to complainants by reason of reducing them. We are convinced as already shown, that every reduction would bring about a corresponding reduction in the opposing rate, constant disturbance and fluctuation in rates, no benefit to complainants, probable reduction of revenue to carriers and no advantage to consumers.

Much has been said about grain rates and comparisons made therewith. The rates on grain are as shown by the records of this office as follows:

Hutchinson to St. Louis,	{ Wheat, 25 cts. per hund.
	{ Corn, 20 cts. per hund.
Hutchinson to Chicago,	{ Wheat, 30 cts. per hund.
	{ Corn, 25 cts. per hund.

There is no sufficient similarity between salt and grain to make a comparison in any degree instructive. Salt moves in quantities sufficient to supply the entire demand, from widely separated points of production to common intermediate points of consumption. Grain moves, as a rule, in one direction only to the general markets of the world and the demand is practically unlimited. The markets for grain will usually absorb the entire supply and the lowering of rates on grain inures largely to the producer of grain. A reduction in salt rates to the interior of Iowa and Missouri could not have such an effect. The market is necessarily limited. Disturbing rates would, as we have shown, lead to corresponding reductions as to the other competing field, so that a reduction will not give any profit, or any greater market in the end to the Kansas producers. Natural causes and forces ought to have full sway. The public mind has condemned what it has believed to be the attempt of railway managers to interfere with them. Commissions and other bodies in regulating transportation should, as far as possible, avoid the same error.

THE MINNEAPOLIS, MINNESOTA, CHAMBER OF COMMERCE,
v.

THE GREAT NORTHERN RAILWAY COMPANY;
The Chicago, Milwaukee & St. Paul R. Co.;
The Northern Pacific R. Co.; The Chicago
& Northwestern R. Co.; The Chicago, St.
Paul, Minneapolis & Omaha R. Co.; The
Minneapolis, St. Paul & Sault Ste. Marie R.
Co.; The St. Paul & Duluth R. Co.; The
Eastern Railway Company of Minnesota.

(No. 329.)

Complaint filed February 3, 1892.

THE complaint alleges that defendant's rates on wheat from points of origin to Minneapolis, Minnesota, are unreasonable and unjust and create an undue prejudice to Minneapolis in favor of Duluth and other Lake Superior points, taking the same rates as Minneapolis and that their rate on flour from Minneapolis to Lake Superior points is unjust and discriminating. That the rate on wheat to Minneapolis should not exceed 75 per cent of the rate to Lake Superior points, nor should said rate on wheat to Minneapolis, added to the flour rate to Lake Superior points, exceed the rate on wheat from the same point of origin to said Lake Superior points.

THE TECUMSEH CELERY COMPANY,
v.

THE CINCINNATI, JACKSON & MACKINAW RAILROAD COMPANY, and The Wabash R. Co.,

(No. 328.)

Complaint filed February 1, 1892.

THE complaint alleges that defendants are common carriers subject to the Act and that they charge an unreasonable and prejudicial rate on celery in carloads from Tecumseh, Michigan to Kansas City, Missouri, which is greater than carload rates on cauliflower and other similar vegetables, and also, that they refuse to transport mixed carloads of celery and other vegetables similar in bulk and value at a reasonable carload rate.

ALLEN RUTHERFORD,
v.

BALTIMORE & OHIO RAILROAD COMPANY, and Lehigh Valley R. Co.

(No. 327.)

Complaint filed January 29, 1892.

THE complaint alleges that defendants are common carriers subject to the Act to Regulate Commerce and under a common control, management or arrangement for the continuous carriage or shipment, are engaged in the transportation of passengers and property between points in the state of Pennsylvania

and points in the state of Maryland. That defendants charged to complainant an unreasonable rate of \$3.60 per hundred pounds on a carload of 36,800 pounds of coal shipped for Mauch Chunk, Pennsylvania to Gaithersburgh, Maryland, which was more, as complainant verily believes, than is or has been charged to other persons. Order commanding defendants to cease and desist from making such unlawful charges and to make reparation is prayed for.

PHELPS & COMPANY,
v.

TEXAS & PACIFIC RAILWAY COMPANY.

(No. 330.)

Complaint filed March 2, 1892.

COMPLAINT alleges that defendant demands payment of freight charges on cotton which are based on a constructive weight of 535 pounds per bale, and requires the filing of claim for overcharge if any is made. That on complainants refusal to accede to their demand defendant required complainant and cotton press companies interested with them to pay freight charges before delivery of cotton.

JOHN LYFORD
v.

MOBILE & OHIO RAILROAD COMPANY, and The Cleveland, Cincinnati, Chicago & St. Louis R. Co.

(No. 332.)

Complaint filed March 17, 1892.

COMPLAINT alleges that defendants under a common control, management or arrangement charge 25 cents per 100 pounds on lumber in carloads from Mobile, Alabama to Fernbank, Ohio, while at the same time they charge only 24 cents per 100 pounds on lumber in carloads for the longer distance over the same line to Cincinnati. Order correcting rates and awarding reparation prayed for.

Notice of correction of rates and settlement of complainant's claim filed.

SALT LAKE CHAMBER OF COMMERCE
v.

THE UNION PACIFIC RAILWAY Co.; The Denver & Rio Grande R. Co.; The Rio Grande Western R. Co.; The Southern Pacific Co.; The Burlington & Missouri River R. Co.; The Atchison, Topeka & Santa Fé R. Co.; and The Chicago, Rock Island & Pacific R. Co.

(No. 333.)

Complaint filed March 21, 1892.

COMPLAINT alleges unreasonable and prejudicial rates on freight articles from Missouri river points to Salt Lake City, and greater

charges for the shorter distance to that city than for the longer distance over the same line in the same direction to San Francisco, in violation of the Act to Regulate Commerce.

F. FEARNLEY

v.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; and Delaware, Lackawanna & Western R. Co.

(No. 335.)

Complaint filed March 24, 1892.

COMPLAINT alleges defendants charged an unreasonable and unpublished rate on six carloads of peaches from Lebanon, New Jersey, to Buffalo, New York, which was higher than their published rate for less than carload lots. Order forbidding such violations and awarding reparation prayed for.

J. K. FARRELL et al.

v.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(No. 331.)

Complaint filed March 9, 1892.

COMPLAINT alleges that defendants charge unreasonable and discriminating rates,

which are also in violation of the long and short haul provision of the Act to Regulate Commerce, on freight articles to and from Columbia, Tennessee, caused by the fact that rates to and from Columbia, Tennessee, caused by the fact that rates to and from Columbia are generally higher than Nashville rates to the extent of the prevailing local rate between Nashville and Columbia.

JAMES & ABBOTT

v.

THE CANADIAN PACIFIC RAILWAY COMPANY; The Maine Central R. Co.; and The Boston & Maine R. Co.

(No. 334.)

Complaint filed March 21, 1892.

COMPLAINT alleges that defendants charge unreasonable and discriminating rates on shingles in carloads of 31½ cents per hundred pounds from Fort Fairfield, Steven's Siding and Hurd's Siding in the state of Maine to Boston, Massachusetts, a distance of 484 miles, while from Fredericton, Tracey and Russiagornish, all in the province of New Brunswick, to Boston, a distance of about 438 miles, they charge on shingles only 16½ cents per hundred pounds. Order correcting rates and awarding reparation prayed for.

UNITED STATES SUPREME COURT.

J. TALMAN BUDD, *Piff. in Err.*,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel. EDWARD ANNAN, Piff. in Err.*,

v.

ANDREW WALSH, Police Justice of the City of Brooklyn, and CLARK D. RHINEHART, Sheriff of the County of Kings.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel. FRANCIS E. PINTO, Piff. in Err.*,

v.

ANDREW WALSH, Police Justice of the City of Brooklyn, and CLARK D. RHINEHART, Sheriff of the County of Kings.

(See S. C. 142 U. S. 517-552, 36 L. ed. 247-250.)

1. The New York law of 1888, regulating the fees for elevating and discharging grain by elevators is not contrary to the 14th Amendment to the Constitution of the United States, and does not deprive the citizen of his property without due process of law; and is not unconstitutional in fixing the maximum charges which it specifies, nor in limiting the charge for shoveling to the

actual cost thereof, and it is a proper exercise of the police power of the state.

2. The business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers, and may be controlled by public legislation for the common good.

3. The New York Act of 1888, as to elevators, is constitutional, as an exercise of the police power of the state; it is not a regulation of interstate commerce, and does not deprive the elevator owners of the equal protection of the laws.

4. The Legislature can fix a maximum beyond which any charge would be unreasonable, for the use of property in which the public has an interest, but cannot compel the doing of services without reward.

[Nos. 719, 644, 645.]

Argued and Submitted Nov. 17, 18, 1891. Decided Feb. 29, 1892.

THE first of the above named cases, *Budd v. The People of the State of New York*, is in error to the Superior Court of Buffalo, state of New York, to review a judgment of that court, adjudging that said Budd pay a fine and in default thereof be committed to jail for a violation of the New York law of 1888, regulating the fees and charges for elevating, etc., grain by means of a stationary elevator which judgment had been affirmed by the General Term of that court and by the Court of Appeals of New York.

The second and third of the above named cases, *People v. Walsh*, are in error to the Supreme Court of the state of New York, to review judgments of that court, in General Term, dismissing writs of habeas corpus and certiorari issued in order to discharge said Edward Annan and Francis E. Pinto, who were arrested and in custody for the violation of said New York law by exacting excessive charges for elevating, etc. grain and for trimming the cargo, which judgments had been affirmed by the New York Court of Appeals. *Judgments affirmed.*

See same cases 148 U. S. 517, 86 L. ed. 247, below, 5 L. R. A. 559, 117 N. Y. 1, 621, 50 Hun, 418.

The facts are stated in the opinion.

Mr. Spencer Clinton, for plaintiff in error, in *Budd v. State of New York*:

The police power of the states only extends to property or business which is by its owner devoted to the public by granting to the public the right to demand its use.

People v. Walsh, 117 N. Y. 621; *Rhode Island v. Massachusetts*, 37 U. S. 12 Pet. 657, 728 (9: 1288, 1260); *Ogden v. Saunders*, 25 U. S. 12 Wheat. 854 (6:654); *Cohens v. Virginia*, 19 U. S. 6 Wheat. 416 (5:294); *Craig v. Missouri*, 29 U. S. 4 Pet. 481, 482 (7:910, 911).

Messrs. Benjamin F. Tracy and William N. Dykman, for plaintiff in error, in *People, ex rel. Annan, v. Walsh* and in *People, ex rel. Pinto, v. Walsh*.

Floating elevators in the port of New York are private. They are not affected with any public interest, and they are not subject to regulation of rates.

Alexander v. Greene, 3 Hill, 9; *Caton v. Rumney*, 13 Wend. 387; *Wells v. Steam Nav. Co.* 2 N. Y. 204; *Wetmore v. Brooklyn Gas Light Co.* 42 N. Y. 384; *Woodruff v. Havemeyer*, 7 Cent. Rep. 776, 106 N. Y. 129.

The canal does not impress with a public character those who are engaged in carrying merchandise through it.

Fish v. Clark, 49 N. Y. 122; *Wells v. Steam Nav. Co.* 2 N. Y. 204; *Alexander v. Greene*, 3 Hill, 9.

This law is unconstitutional.

Chicago, M. & St. P. R. Co. v. Minnesota, 4 INTER S.

184 U. S. 466 (83:984); *Cooley, Const. Lim.* 222; 15 Vin. Abr. 398; *Cooley, Const. Lim.* (5th ed.) 786; *Hiz v. Gardiner*, 2 Hurlst. 195; *Re Eureka Basin W. H. & Mfg. Co.* 96 N. Y. 42; *New York v. Starin*, 8 Cent. Rep. 48, 106 N. Y. 1; *Mills v. St. Clair County Comrs.* 4 Ill. 53; *Trustees of Schools v. Tatman*, 13 Ill. 27.

In New York the Brooklyn wharves are private.

Wetmore v. Brooklyn Gas Light Co. 42 N. Y. 384; *Woodruff v. Havemeyer*, 7 Cent. Rep. 776, 106 N. Y. 129; *Allen v. Sackrider*, 87 N. Y. 341; *Fish v. Clark*, 49 N. Y. 122; *Re New York L. & W. R. Co.* 99 N. Y. 12.

A floating elevator in the port of New York is wholly private.

Munn v. People, 69 Ill. 80; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30:244).

This law is unconstitutional and void because it decides that Mr. Annan's elevator is not private, and therefore free from legislative control without due process of law.

People v. Marz, 99 N. Y. 377; *Morgan v. King*, 85 N. Y. 454; *Newland v. Marsh*, 19 Ill. 376; *Brown's App.* 16 Pa. 266; *Hurtado v. California*, 110 U. S. 516 (28:232).

Every principle which should govern legislation is violated by this law.

People v. Gillson, 12 Cent. Rep. 616, 109 N. Y. 399.

Mr. George T. Quinby, for defendant in error in *Budd v. State of New York*:

The courts of New York have been most conservative in their construction of acts of the Legislature affecting the rights of the citizen.

Re Jacobs, 98 N. Y. 96; *People v. Marz*, 99 N. Y. 377; *People v. Gillson*, 12 Cent. Rep. 616, 109 N. Y. 399; *Powell v. Pennsylvania*, 127 U. S. 678 (32:253).

The same subject has been repeatedly under the consideration of this court, and the police power of the legislatures of the different states sustained.

Mugler v. Kansas, 123 U. S. 623 (31:205); *Slaughter-House Cases*, 83 U. S. 16 Wall. 86 (21:394); *Munn v. Illinois*, 94 U. S. 113 (24:77).

When one devotes his property to a use in which the public have an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by public legislation for the common good, to the extent of the interest he has thus created.

The presumption is strongly in favor of the statute.

Sinking Fund Cases, 99 U. S. 718 (25:501); *People v. Comstock*, 78 N. Y. 356; *Re Gilbert Elec. R. Co. v. Handerson*, 70 N. Y. 387.

The business of elevating grain is of such a nature as fairly to be classed as a business charged with a public interest.

New Jersey Steam Nav. Co. v. Merchants

Bank of Boston, 47 U. S. 6 How. 844 (12:465); *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 381; *Chicago & N. W. R. Co. v. People*, 56 Ill. 877; *Munn v. Illinois*, 94 U. S. 180 (24:85); *Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co.* 66 Md. 899, 59 Am. Rep. 167.

Whenever a person pursues a public calling of such a nature that the people must of necessity deal with him, and are therefore under a moral duress to submit to his terms if unrestrained by law, then, in order to prevent extortion and an abuse of his position, the price he may charge for his services may be regulated by law.

Com. v. Duane, 98 Mass. 1; *State v. Perry*, 50 N. C. 252; *Murray v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272 (15:872); *Mills v. St. Clair County Comrs.* 4 Ill. 58; *Trustees of Schools v. Tatman*, 13 Ill. 87.

The highest courts of several states have followed the principles deemed to be settled in the *Munn* case.

Bertholf v. O'Reilly, 74 N. Y. 528; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 182; *Millet v. People*, 5 West. Rep. 155, 117 Ill. 294, 57 Am. Rep. 873; *Western U. Teleg. Co. v. Pendleton*, 95 Ind. 12; *Nash v. Page*, 80 Ky. 539; *Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co.* 66 Md. 899; *Sawyer v. Davis*, 186 Mass. 289; *Stone v. Yazoo & M. V. R. Co.* 62 Miss. 607; *State v. Nebraska Teleph. Co.* 17 Neb. 126; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140.

If it is a question of fact as to whether the business of elevating grain is a public or private business, then such question of fact is wholly within the province of the Legislature to determine.

Powell v. Pennsylvania, 127 U. S. 685 (32:256); *People v. Draper*, 15 N. Y. 545; *State v. Addington*, 77 Mo. 110; *Doyle v. Continental L. Ins. Co.* 94 U. S. 535, 541 (24: 148, 151); *People v. Orange County Suprs.* 17 N. Y. 285; *People v. Albertson*, 55 N. Y. 50.

The fact that the Act in question may impair the value of property does not render it unconstitutional.

Phelps v. Racey, 60 N. Y. 14; *Hill v. Thompson*, 16 Jones & S. 481; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140; *Slaughter-House Cases*, 83 U. S. 16 Wall. 86 (21:394).

Messrs. J. A. Hyland and Charles F. Tabor, for defendants in error, in *People, ex rel Annan, v. Walsh*, and in *People, ex rel Pinto, v. Walsh*.

The power of the Legislature to control and regulate charges for elevating grain, as embraced in the Act, rests upon the nature and extent of the business, which affects the business with a public interest.

Munn v. Illinois, 94 U. S. 124 (24: 88); *Coolley*, Const. Lim. (5th ed.) 739.

The Act is constitutional as an exercise of the police power of the state.

Broom, Leg. Max. (7th Am. ed) 1 *et seq.*, and 364 *et seq.*; *Entick v. Carrington*, 19 How. St. Tr. 1066; *Mobile v. Yulille*, 8 Ala. 139, 140, 36 Am. Dec. 441; *Bertholf v. O'Reilly*, 74 N. Y. 509; *Phelps v. Racey*, 60 N. Y. 10; *Hill v. Thompson*, 16 Jones & S. 481; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; *Barbier v. Connolly*, 118 U. S. 27 (28: 928); *Soon Hing v. Crowley*, 118 U. S. 703 (28: 1145); *State v. Burgoyne*, 7 Lea, 178, 40 Am. Rep. 60.

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The leading decisions of this court which touch the questions involved in the cases at bar sustain the constitutionality of this Act.

Munn v. Illinois, 94 U. S. 113 (24: 77); *Peik v. Chicago & N. W. R. Co.* 94 U. S. 176 (24: 98); *Dow v. Beidelman*, 125 U. S. 688 (31: 843); *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 455 (33: 979).

The law in question is valid as an Act regulating commerce on the waters of the state.

Munn v. Illinois, 94 U. S. 185 (24: 87); *Coolley v. Board of Wardens*, 58 U. S. 12 How. 299 (18: 996); *Ex parte McNeil*, 80 U. S. 18 Wall. 286 (20: 624); *Wilson v. McNamee*, 103 U. S. 573 (26: 234); *Fitch v. Livingston*, 4 Sandf. 492.

A statute to be held unconstitutional must be plainly at war with the fundamental law.

People v. Terry, 10 Cent. Rep. 460, 108 N. Y. 1. Every presumption is in favor of the validity of an enactment of the state Legislature.

People v. Comstock, 78 N. Y. 356; *Re Gilbert Elev. R. Co. v. Handerson*, 70 N. Y. 861, 867; *People v. Briggs*, 50 N. Y. 585; *Butchers U. Co. v. Crescent City Co.* 111 U. S. 746 (28: 585).

Mr. Justice Blatchford delivered the opinion of the court:

On the 9th of June, 1888, the governor of the state of New York approved an Act, chapter 581 of the laws of New York of 1888, which had been passed by the two houses of the Legislature, three fifths being present, entitled "An Act to Regulate the Fees and Charges for Elevating, Trimming, Receiving, Weighing and Discharging Grain by Means of Floating and Stationary Elevators and Warehouses in this State." The Act was in these words: "Section 1. The maximum charge for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses in this state shall not exceed the following rates, namely: For elevating, receiving, weighing and discharging grain, five eighths of one cent a bushel. In the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal boats, shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when unloading, and trimming cargo when loading. § 2. Any person or persons violating the provisions of this Act shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and be punished by a fine of not less than two hundred and fifty dollars and costs thereof. § 3. Any person injured by the violation of the provisions of this Act may sue for and recover any damages he may sustain against any person or persons violating said provisions. § 4. This Act shall not apply to any village, town or city having less than one hundred and thirty thousand population. § 5. This Act shall take effect immediately."

On the 26th of November, 1888, an indictment, which had been found by the grand jury of Erie county, New York, in the court of sessions of that county, against J. Talman Budd, for charging and receiving fees for elevating, receiving, weighing, and discharging grain into and from a stationary elevator and warehouse, contrary to the provisions of said

statute, came on for trial before a criminal term of the superior court of Buffalo, Erie county.

The charge in the indictment was, that Budd, at Buffalo, on the 19th of September, 1888, being manager of the Wells elevator, which was an elevator and warehouse for receiving and discharging grain in the city of Buffalo, that city being a municipal corporation duly organized in pursuance of the laws of the state of New York and having a population of upwards of 180,000 people, did receive, elevate and weigh from the propeller called the Oceanica, the property of the Lehigh Valley Transportation Company, a body corporate, 51,000 bushels of grain and corn, the property of said company, into the said Wells elevator, and unlawfully exacted from said company, for elevating, receiving, weighing and discharging said grain and corn, the sum of one cent a bushel, and also exacted from said company, for shoveling to the leg of the elevator, in the unloading of said 51,000 bushels of grain and corn, \$1.75 for every 1,000 bushels thereof, over and above the actual cost of such shoveling.

The facts set forth in the indictment were proved, and the defendant's counsel requested the court to instruct the jury to render a verdict of acquittal, on the ground that the prosecution was founded on a statute which was in conflict both with the Constitution of the United States and with that of the state of New York; that the services rendered by Budd, for which the statute assumed to fix a price, were not public in their nature; that neither the persons rendering them, nor the elevator in question had received any privilege from the Legislature; and that such elevator was not a public warehouse and received no license. The court declined to direct a verdict of acquittal, and the defendant excepted.

The court charged the jury that it was claimed by the prosecution that the defendant had violated the statute in charging more than five eighths of one cent a bushel for elevating, receiving, weighing and discharging the grain and in charging more than the actual cost of trimming or shoveling to the leg of the elevator, in unloading the propeller; that the statute was constitutional; and that the jury should find the defendant guilty as charged in the indictment, if they believed the facts which had been adduced. The defendant excepted to that part of the charge which instructed the jury that they might find the defendant guilty of exacting an excessive rate for shoveling to the leg of the elevator, and also to that part which instructed the jury that they might convict the defendant for having exacted an excessive rate for elevating, receiving, weighing and discharging the grain and corn.

The jury brought in a verdict of guilty as charged in the indictment, and the court sentenced the defendant to pay a fine of \$250, and, in default thereof, to stand committed to the common jail of Erie county for a period not exceeding one day for each dollar of said fine. The defendant appealed from that judgment to the general term of the superior court of Buffalo, which affirmed the judgment. He then appealed to the Court of Appeals of New York, which affirmed the judgment of the su-

perior court of Buffalo; and the latter court afterwards entered a judgment making the judgment of the Court of Appeals its judgment. The defendant then sued out from this court a writ of error directed to the superior court of Buffalo.

The opinion of the Court of Appeals is reported in 117 N. Y. 1, 5 L. R. A. 559. It was delivered by Judge Andrews, with whom Chief Judge Ruger and Judges Earl, Danforth, and Finch concurred. Judges Peckham and Gray dissented, Judge Gray giving a dissenting opinion, and Judge Peckham adhering to the dissenting opinion which he gave in the case of *People v. Walsh*, 117 N. Y. 84.

On the 22d of June, 1888, a complaint on oath was made before Andrew Walsh, a police justice of the city of Brooklyn, New York, that on the preceding day one Edward Annan, a resident of that city, had violated the provisions of chapter 581 of the laws of New York of 1888, by exacting from the complainant more than five eighths of one cent per bushel for elevating, weighing, receiving, and discharging a boat load of grain from a canal boat to an ocean steamer, and by exacting from the canal boat and its owner more than the actual cost of trimming or shoveling to the leg of the elevator, and by charging against the ocean steamer more than the actual cost of trimming the cargo, the services being rendered by a floating elevator of which Annan was part owner and one of the agents. On this complaint, Annan was arrested and brought before the police justice, who took testimony in the case and committed Annan to the custody of the sheriff of the county of Kings, to answer the charge before a court of special sessions in the city of Brooklyn. Thereupon, writs of habeas corpus and *certiorari* were granted by the Supreme Court of the state of New York, on the application of Annan, returnable before the general term of that court in the first instance; but on a hearing thereon, the writs were dismissed and Annan was remanded to the custody of the sheriff. The opinion of the general term is reported in 50 Hun, 413. Annan appealed to the Court of Appeals, which affirmed the order of the general term (117 N. Y. 621), for the reasons set forth in the opinion in the case of Budd (117 N. Y. 1, 5 L. R. A. 559) and the judgment of the Court of Appeals was afterwards made the judgment of the Supreme Court. Annan sued out a writ of error from this court, directed to the Supreme Court of the state of New York.

Like proceedings to the foregoing were had in the case of one Francis E. Pinto, the charge against him being that he had exacted from the complainant more than five eighths of one cent per bushel for receiving and weighing a cargo of grain from a boat into the Pinto stores, of which he was lessee and manager, the same being a stationary grain elevator on land in the city of Brooklyn, New York, and had exacted more than the actual cost of trimming or shoveling to the leg of the elevator. Pinto sued out from this court a writ of error to the Supreme Court of the state of New York.

The main question involved in these cases is whether this court will adhere to its decision in *Munn v. Illinois*, 94 U. S. 113 [24: 77].

The Court of Appeals of New York, in *Peo- ple v. Budd*, 117 N. Y. 1, 5 L. R. A. 559, held that chapter 581 of the laws of 1888 did not violate the constitutional guarantee protecting private property, but was a legitimate exercise of the police power of the state over a business affected with a public interest. In regard to the indictment against Budd, it held that the charge of exacting more than the statute rate for elevating was proved, and that as to the alleged overcharge for shoveling, it appeared that the carrier was compelled to pay \$4 for each 1,000 bushels of grain, which was the charge of the shovelers' union, by which the work was performed, and that the union paid the elevator, for the use of the latter's steam shovel, \$1.75 for each 1,000 bushels. The court held that there was no error in submitting to the jury the question as to the overcharge for shoveling; that the intention of the statute was to confine the charge to the "actual cost" of the outside labor required; and that a violation of the Act in that particular was proved; but that, as the verdict and sentence were justified by proof of the overcharge for elevating, even if the alleged overcharge for shoveling was not made out, the ruling of the superior court of Buffalo could not have prejudiced Budd. Of course, this court, in these cases, can consider only the Federal questions involved.

It is claimed, on behalf of Budd, that the statute of the state of New York is unconstitutional, because contrary to the provisions of section 1 of the 14th Amendment to the Constitution of the United States, in depriving the citizen of his property without due process of law; that it is unconstitutional in fixing the maximum charge for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses at five eighths of one cent a bushel, and in forbidding the citizen to make any profit upon the use of his property or labor; and that the police power of the state extends only to property or business which is devoted by its owner to the public, by a grant to the public of the right to demand its use. It is claimed on behalf of Annan and Pinto that floating and stationary elevators in the port of New York are private property, not affected with any public interest, and not subject to the regulation of rates.

"Trimming" in the canal boat, spoken of in the statute, is shoveling the grain from one place to another, and is done by longshoremen with scoops or shovels; and "trimming" the ship's cargo when loading is stowing it and securing it for the voyage. Floating elevators are primarily boats. Some are scows, and have to be towed from place to place by steam tugs; but the majority are propellers. When the floating elevator arrives at the ship and makes fast alongside of her, the canal boat carrying the grain is made fast on the other side of the elevator. A long wooden tube, called "the leg of the elevator," and spoken of in the statute, is lowered from the tower of the elevator so that its lower end enters the hold of the canal boat in the midst of the grain. The "spout" of the elevator is lowered into the ship's hold. The machinery of the elevator is then set in motion, the grain is elevated out of

the canal boat, received and weighed in the elevator, and discharged into the ship. The grain is lifted in "buckets" fastened to an endless belt which moves up and down in the leg of the elevator. The lower end of the leg is buried in the grain so that the buckets are submerged in it. As the belt moves, each bucket goes up full of grain, and at the upper end of the leg, in the elevator tower, empties its contents into the hopper which receives the grain. The operation would cease unless the grain was trimmed or shoveled to the leg as fast as it is carried up by the buckets. There is a gang of longshoremen who shovel the grain from all parts of the hold of the canal boat to "the leg of the elevator," so that the buckets may be always covered with grain at the lower end of the leg. This "trimming or shoveling to the leg of the elevator," when the canal-boat is unloading is that part of the work which the elevator owner is required to do at the "actual cost."

In the Budd and Pinto cases, the elevator was a stationary one on land; and in the Annan case, it was a floating elevator. In the Budd case, the Court of Appeals held that the words "actual cost," used in the statute, were intended to exclude any charge by the elevator beyond the sum specified, for the use of its machinery in shoveling, and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner were permitted to separate the services and charge for the use of the steam shovel any sum which might be agreed upon between him and the shovelers' union, and thereby, under color of charging for the use of his steam shovel, exact from the carrier a sum for elevating beyond the rate fixed therefor by the statute.

The Court of Appeals, in its opinion in the Budd case, considered fully the question as to whether the Legislature had power, under the constitution of the state of New York, to prescribe a maximum charge for elevating grain by stationary elevators, owned by individuals or corporations who had appropriated their property to that use and were engaged in that business; and it answered the inquiry in the affirmative. It also reviewed the case of *Munn v. Illinois*, 94 U. S. 118 [24: 77], and arrived at the conclusion that this court there held that the legislation in question in that case was a lawful exercise of legislative power, and did not infringe that clause of the 14th Amendment to the Constitution of the United States which provides that no state shall "deprive any person of life, liberty, or property without due process of law;" and that the legislation in question in that case was similar to, and not distinguishable in principle from, the Act of the state of New York.

In regard to *Munn v. Illinois*, the Court of Appeals said that the question in that case was raised by an individual owning an elevator and warehouse in Chicago, erected for, and in connection with which he had carried on, the business of elevating and storing grain, many years prior to the passage of the Act in question, and prior also to the adoption of the amendment to

the constitution of Illinois, in 1870, declaring all elevators and warehouses where grain or other property is stored for a compensation, to be public warehouses. The Court of Appeals then cited the cases of *People v. Boston & A. R. Co.* 70 N. Y. 569; *Bertholf v. O'Reilly*, 74 N. Y. 509; *Buffalo E. S. R. Co. v. Buffalo St. R. Co.* 111 N. Y. 132, 2 L. R. A. 384; and *People v. King*, 110 N. Y. 418, 1 L. R. A. 293, as cases in which *Munn v. Illinois* had been referred to by it, and said that it could not overrule and disregard *Munn v. Illinois* without subverting the principle of its own decision in *People v. King*, and certainly not without disregarding many of its deliberate expressions in approval of the principle of *Munn v. Illinois*.

The Court of Appeals further examined the question whether the power of the Legislature to regulate the charge for elevating grain, where the business was carried on by individuals upon their own premises, fell within the scope of the police power, and whether the statute in question was necessary for the public welfare. It affirmed that, while no general power resided in the Legislature to regulate private business, prescribe the conditions under which it should be conducted, fix the price of commodities or services, or interfere with freedom of contract, and while the merchant, manufacturer, artisan, and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty, yet there might be special conditions and circumstances which brought the business of elevating grain within principles which, by the common law and the practice of free governments, justified legislative control and regulation in the particular case, so that the statute would be constitutional; that the control which, by common law and by statute, was exercised over common carriers, was conclusive upon the point that the right of the Legislature to regulate the charges for services in connection with the use of property did not depend in every case upon the question whether there was a legal monopoly, or whether special governmental privileges or protection had been bestowed; that there were elements of public interest in the business of elevating grain which peculiarly affected it with a public interest; that those elements were found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it; that about 120,000,000 bushels of grain come annually to Buffalo from the west; that the business of elevating grain at Buffalo is connected mainly with lake and canal transportation; that the grain received at New York in 1887 by way of the Erie canal and Hudson river, during the season of canal navigation, exceeded 46,000,000 bushels, an amount very largely in excess of the grain received during the same period by rail and by river and coastwise vessels; that the elevation of that grain from lake vessels to canal boats takes place at Buffalo, where there are thirty or forty elevators, stationary and floating; that a large proportion of the surplus cereals of the country passes through the ele-

vators at Buffalo and finds its way through the Erie canal and Hudson river to the seaboard at New York, whence it is distributed to the markets of the world; that the business of elevating grain is an incident to the business of transportation, the elevators being indispensable instrumentalities in the business of the common carrier, and in a broad sense performing the work of carriers, being located upon or adjacent to the waters of the state, and transferring the cargoes of grain from the lake vessels to the canal boats, or from the canal boats to the ocean vessels, and thereby performing an essential service in transportation; that by their means the transportation of grain by water from the upper lakes to the seaboard is rendered possible; that the business of elevating grain thus has a vital relation to commerce in one of its most important aspects; that every excessive charge made in the course of the transportation of grain is a tax upon commerce; that the public has a deep interest that no exorbitant charges shall be exacted at any point, upon the business of transportation; and that whatever impaired the usefulness of the Erie canal as a highway of commerce involved the public interest.

The Court of Appeals said that, in view of the foregoing exceptional circumstances, the business of elevating grain was affected with a public interest, within the language of *Lord Chief Justice Hale*, in his treatise *De Portibus Maris* (Harg. Law Tracts, 78); that the case fell within the principle which permitted the Legislature to regulate the business of common carriers, ferrymen and hackmen, and interest on the use of money; that the underlying principle was, that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation; and that the court rested the power of the Legislature to control and regulate elevator charges upon the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the Erie canal's creating the business and making it possible, the interest to trade and commerce, the relation of the business to the property and welfare of the state, and the practice of legislation in analogous cases, collectively creating an exceptional case and justifying legislative regulation.

The opinion further said that the criticism to which the case of *Munn v. Illinois* had been subjected proceeded mainly upon a limited and strict construction and definition of the police power; that there was little reason, under our system of government, for placing a close and narrow interpretation on the police power, or restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society and the new circumstances as they arise calling for legislative intervention in the public interest; and that no serious invasion of constitutional guarantees by the Legislature could withstand for a long time the searching influence of public opinion, which was sure to come sooner or later to the side of law, order, and justice, however it might have been swayed for a time by passion or prejudice, or whatever aberrations might have marked its course.

We regard these views, which we have re-

ferred to as announced by the Court of Appeals of New York, so far as they support the validity of the statute in question, as sound and just.

In *Munn v. Illinois*, the Constitution of Illinois, adopted in 1870, provided in article 13, section 1, as follows: "All elevators or storehouses, where grain or other property is stored for a compensation, whether the property stored be kept separated or not, are declared to be public warehouses;" and the Act of the Legislature of Illinois approved April 25, 1871, (Public Laws of Illinois, of 1871-72, p. 762,) divided public warehouses into three classes, prescribed the taking of a license and the giving of a bond, and fixed a maximum charge, for warehouses belonging to class A, for storing and handling grain, including the cost of receiving and delivering, and imposed a fine on conviction for not taking the license or not giving the bond. Munn and Scott were indicted, convicted, and fined for not taking out the license and not giving the bond, and for charging rates for storing and handling grain higher than those established by the Act. Section 6 of the Act provided that it should be the duty of every warehouseman of class A to receive for storage any grain that might be tendered to him. Munn and Scott were the managers and lessees of a public warehouse, such as was named in the statute. The Supreme Court of Illinois having affirmed the judgment of conviction against them, on the ground that the statute of Illinois was a valid and constitutional enactment (*Munn v. People*, 69 Ill. 80,) they sued out a writ of error from this court, and contended that the provisions of the sections of the statute of Illinois which they were charged with having violated were repugnant to the third clause of § 8 of article 1, and the sixth clause of § 9 of article 1, of the Constitution of the United States, and to the 5th and 14th Amendments of that Constitution.

This court, in *Munn v. Illinois*, the opinion being delivered by Chief Justice Waite, and there being a published dissent by only two justices, considered carefully the question of the repugnancy of the Illinois statute to the 14th Amendment. It said, that under the powers of government inherent in every sovereignty, "the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good;" and that, "in their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold." It was added: "To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." It announced as its conclusions that, down to the time of the adoption of the 14th Amendment, it was not supposed that statutes regulating the use, or

even the price of the use, of private property necessarily deprived an owner of his property without due process of law; that, when private property was devoted to a public use, it was subject to public regulation; that Munn and Scott, in conducting the business of their warehouse, pursued a public employment and exercised a sort of public office, in the same sense as did a common carrier, miller, ferryman, inn-keeper, wharfinger, baker, cartman, or hackney coachman; that they stood in the very gateway of commerce and took toll from all who passed; that their business tended "to a common charge," and had become a thing of public interest and use; that the toll on the grain was a common charge; and that, according to Lord Chief Justice Hale, every such warehouseman, "ought to be under a public regulation, viz:" that he "take but reasonable toll."

This court further held, in *Munn v. Illinois*, that the business in question was one in which the whole public had a direct and positive interest; that the statute of Illinois simply extended the law so as to meet a new development of commercial progress; that there was no attempt to compel the owners of the warehouses to grant the public an interest in their property, but to declare their obligations if they used it in that particular manner; that it mattered not that Munn and Scott had built their warehouses and established their business before the regulations complained of were adopted; that the property being clothed with a public interest, what was a reasonable compensation for its use was not a judicial, but a legislative question; that, in countries where the common law prevailed, it had been customary from time immemorial for the Legislature to declare what should be a reasonable compensation under such circumstances, or to fix a maximum beyond which any charge made would be unreasonable; that the warehouses of Munn and Scott were situated in Illinois and their business was carried on exclusively in that state; that the warehouses were no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another; that their regulation was a thing of domestic concern; that, until Congress acted in reference to their interstate relations, the state might exercise all the powers of government over them, even though in so doing it might operate indirectly upon commerce outside its immediate jurisdiction; and that the provision of § 9 of article 1 of the Constitution of the United States operated only as a limitation of the powers of Congress, and did not affect the state in the regulation of their domestic affairs. The final conclusion of the court was, that the Act of Illinois was not repugnant to the Constitution of the United States; and the judgment was affirmed.

In *Sinking Fund Cases*, 99 U. S. 700, 747 [25: 496, 511], Mr. Justice Bradley, who was one of the justices who concurred in the opinion of the court in *Munn v. Illinois*, speaking of that case, said: "The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance

as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community,—it is subject to regulation by the legislative power." Although this was said in a dissenting opinion in *Sinking Fund Cases*, it shows what *Mr. Justice Bradley* regarded as the principle of the decision in *Munn v. Illinois*.

In *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 354 [28: 173, 176], this court said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn v. Illinois*, 94 U. S. 113 [24: 77]. As we said in that case, such regulations do not deprive a person of his property without due process of law."

In *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 569 [30: 244, 248], *Mr. Justice Miller*, who had concurred in the judgment in *Munn v. Illinois*, referred, in delivering the opinion of the court, to that case, and said: "That case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an Act of incorporation of any state whatever, and free from the question of continuous transportation through several states. And in that case the court was presented with the question, which it decided, whether anyone engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the Legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

In *Dow v. Beidelman*, 125 U. S. 680, 686 [31: 841, 842], it was said by *Mr. Justice Gray*, in delivering the opinion of the court, that in *Munn v. Illinois* the court, after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the Legislature "to declare what shall be a reasonable compensation for such services, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," said that to limit the rate of charges for services rendered in the public employment, or for the use of property in which the public has an interest, was only changing a regulation which existed before, and established no new principle in the law, but only gave a new effect to an old one.

In *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 461 [33: 970, 983], it was said by *Mr. Justice Bradley*, in his dissenting opinion, in which *Mr. Justice Gray* and *Mr. Justice Lamar* concurred, that the decision of the court in that case practically overruled *Munn v. Illinois*; but the opinion of the court did not say so, nor did it refer to *Munn v. Illinois*; and we are of opinion that the decision in the case in 134 U. S. is, as will be hereafter shown, quite distinguishable from the present cases.

4 INTER S.

It is thus apparent that this court has adhered to the decision in *Munn v. Illinois* and to the doctrines announced in the opinion of the court in that case; and those doctrines have since been repeatedly enforced in the decisions of the courts of the states.

In *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604, 616, in 1877, it was said, citing *Munn v. Illinois*: "When the owner of property devotes it to a public use, he, in effect, grants to the public an interest in such use, and must, to the extent of the use, submit to be controlled by the public, for the common good, as long as he maintains the use." That was a decision by the Supreme Court Commission of Ohio.

In *State v. Columbus Gas-Light & C. Co.*, 34 Ohio St. 572, 582, in 1878, *Munn v. Illinois* was cited with approval, as holding that where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, so long as he maintains the use; and the court added that in *Munn v. Illinois* the principle was applied to warehousemen engaged in received and storing grain; that it was held that their rates of charges were subject to legislative regulation; and that the principle applied with greater force to corporations when they were invested with franchises to be exercised to subserve the public interest.

The Supreme Court of Illinois, in *Ruggles v. People*, 91 Ill. 256, 262, in 1878, cited *Munn v. People*, 69 Ill. 80, which was affirmed in *Munn v. Illinois*, as holding that it was competent for the general assembly to fix the maximum charges by individuals keeping public warehouses for storing, handling, and shipping grain, and that, too, when such persons had derived no special privileges from the state, but were, as citizens of the state, exercising the business of storing and handling grain for individuals.

The Supreme Court of Alabama, in *Davis v. State*, 68 Ala. 58, in 1880, held that a statute declaring it unlawful, within certain counties, to transport or move, after sunset and before sunrise of the succeeding day, any cotton in the seed, but permitting the owner or purchaser to remove it from the field to a place of storage, was not unconstitutional. Against the argument that the statute was such a despotic interference with the rights of private property as to be tantamount, in its practical effect, to a deprivation of ownership "without due process of law," the court said that the statute sought only to regulate and control the transportation of cotton in one particular condition of it, and was a mere police regulation, to which there was no constitutional objection, citing *Munn v. Illinois*. It added, that the object of the statute was to regulate traffic in the staple agricultural product of the state, so as to prevent a prevalent evil, which, in the opinion of the law making power, might do much to demoralize agricultural labor and to destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory.

In *Baker v. State*, 54 Wis. 868, 873, in 1892, *Munn v. Illinois* was cited with approval by

the Supreme Court of Wisconsin, as holding that the Legislature of Illinois had power to regulate public warehouses, and the warehousing and inspection of grain within that state, and to enforce its regulations by penalties, and that such legislation was not in conflict with any provision of the Federal Constitution.

The Court of Appeals of Kentucky, in 1882, in *Nash v. Page*, 80 Ky. 539, 545, cited *Munn v. Illinois*, as applicable to the case of the proprietors of tobacco warehouses in the city of Louisville, and held that the character of the business of the tobacco warehousemen was that of a public employment, such as made them subject, in their charges and their mode of conducting business, to legislative regulation and control, as having a practical monopoly of the sales of tobacco at auction.

In 1884, the Supreme Court of Pennsylvania, in *Girard Pt. Storage Co. v. Southwark Foundry Co.* 105 Pa. 248, 252, cited *Munn v. Illinois* as involving the rights of a private person, and said that the principle involved in the ruling of this court was, that where the owner of such property as a warehouse devoted it to a use in which the public had an interest, he in effect granted to the public an interest in such use, and must, therefore, to the extent thereof, submit to be controlled by the public for the common good, as long as he maintained that use.

In *Sawyer v. Davis*, 136 Mass. 239, in 1884, the Supreme Judicial Court of Massachusetts said that nothing is better established than the power of the Legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed and business carried on, with a view to the good order and benefit of the community, even though they may interfere to some extent with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced; and *Munn v. Illinois* was cited as holding that the rules of the common law which had from time to time been established, declaring or limiting the right to use or enjoy property, might themselves be changed as occasion might require.

The Supreme Court of Indiana, in 1885, in *Brechbill v. Randall*, 103 Ind. 528, 2 West. Rep. 781, held that a statute was valid which required persons selling patent rights to file with the clerk of the county a copy of the patent, with an affidavit of genuineness and authority to sell, on the ground that the State had power to make police regulations for the protection of its citizens against fraud and imposition; and the court cited *Munn v. Illinois* as authority.

The Supreme Court of Nebraska, in 1885, in *Webster Telephone Case*, 17 Neb. 126, held that when a corporation or person assumed and undertook to supply a public demand, made necessary by the requirements of the commerce of the country, such as a public telephone, such demand must be supplied to all alike, without discrimination; and *Munn v. Illinois* was cited by the prevailing party and by the court. The defendant was a corporation, and had assumed to act in a capacity which was to a great extent public, and had undertaken to satisfy a public want or necessity, although it did not possess any special privileges by statute

or any monopoly of business in a given territory; yet it was held that, from the very nature and character of its business, it had a monopoly of the business which it transacted. The court said that no statute had been deemed necessary to aid the courts in holding that where a person or company undertook to supply a public demand, which was "affected with a public interest," it must supply all alike who occupied a like situation, and not discriminate in favor of or against any.

In *Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607, 639, the Supreme Court of Mississippi, in 1885, cited *Munn v. Illinois* as deciding that the regulation of warehouses for the storage of grain, owned by private individuals, and situated in Illinois, was a thing of domestic concern and pertained to the state, and as affirming the right of the state to regulate the business of one engaged in a public employment therein, although that business consisted in storing and transferring immense quantities of grain in its transit from the fields of production to the markets of the world.

In *Hockett v. State*, 105 Ind. 250, 258, 2 West. Rep. 764, in 1885, the Supreme Court of Indiana held that a statute of the state which prescribed the maximum price which a telephone company should charge for the use of its telephones was constitutional, and that in legal contemplation all the instruments and appliances used by a telephone company in the transaction of its business were devoted to a public use, and the property thus devoted became a legitimate subject of legislative regulation. It cited *Munn v. Illinois* as a leading case in support of that proposition, and said that although that case had been the subject of comment and criticism, its authority as a precedent remained unshaken. This doctrine was confirmed in *Central U. Teleph. Co. v. State*, 106 Ind. 1, 2 West. Rep. 778, in the same year, and in *Central U. Teleph. Co. v. State*, 118 Ind. 194, 207, in 1888, in which latter case *Munn v. Illinois* was cited by the court.

In *Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co.*, 66 Md. 399, 414, in 1886, it was held that the telegraph and the telephone were public vehicles of intelligence, and those who owned or controlled them could no more refuse to perform impartially the functions which they had assumed to discharge than a railway company, as a common carrier, could rightfully refuse to perform its duty to the public; and that the Legislature of the state had full power to regulate the services of telephone companies, as to the parties to whom facilities should be furnished. The court cited *Munn v. Illinois*, and said that it could no longer be controverted that the Legislature of a state had full power to regulate and control, at least within reasonable limits, public employments and property used in connection therewith; that the operation of the telegraph and the telephone in doing a general business was a public employment, and the instruments and appliances used were property devoted to a public use and in which the public had an interest; and that, such being the case, the owner of the property thus devoted to public use must submit to have that use and employment regulated by public authority for the common good.

In the Court of Chancery of New Jersey, in 1889, in *Delaware L. & W. R. R. Co. v. Central Stockyard & T. Co.*, 45 N. J. Eq. 50, 60, it was held that the Legislature had power to declare what services warehousemen should render to the public, and to fix the compensation that might be demanded for such services; and the court cited *Munn v. Illinois* as properly holding that warehouses for the storage of grain must be regarded as so far public in their nature as to be subject to legislative control, and that when a citizen devoted his property to a use in which the public had an interest, he in effect granted to the public an interest in that use, and rendered himself subject to control, in that use, by the body politic.

In *Zanesville v. Zanesville Gas Light Co.*, 47 Ohio St. 1, in 1889, it was said by the Supreme Court of Ohio that the principle was well established, that where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use; and that such was the point of the decision in *Munn v. Illinois*.

We must regard the principle maintained in *Munn v. Illinois* as firmly established; and we think it covers the present cases, in respect to the charge for elevating, receiving, weighing and discharging the grain, as well as in respect to the charge for trimming and shoveling to the leg of the elevator when loading, and trimming the cargo when loaded. If the shovelers or scoopers chose, they might do the shoveling by hand, or might use a steam-shovel. A steam shovel is owned by the elevator owner, and the power for operating it is furnished by the engine of the elevator; and if the scooper uses the steam shovel, he pays the elevator owner for the use of it.

The answer to the suggestion that by the statute the elevator owner is forbidden to make any profit from the business of shoveling to the leg of the elevator is that made by the Court of Appeals of New York in the case of *Budd*, that the words "actual cost," used in the statute, were intended to exclude any charge by the elevator owner, beyond the sum specified for the use of his machinery in shoveling and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner was permitted to separate the services, and to charge for the use of his steam shovel any sum which might be agreed upon between himself and the shovelers' union, and thereby, under color of charging for the use of his steam shovel, to exact of the carrier a sum for elevating beyond the rate fixed by the statute.

We are of opinion that the Act of the Legislature of New York is not contrary to the 14th Amendment to the Constitution of the United States, and does not deprive the citizen of his property without due process of law; that the Act, in fixing the maximum charges which it specifies, is not unconstitutional, nor is it so in limiting the charge for shoveling to the actual

cost thereof; and that it is a proper exercise of the police power of the state.

On the testimony in the cases before us the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers. The elevator owner, in fact, retains the grain in his custody for an appreciable period of time, because he receives it into his custody, weighs it, and then discharges it, and his employment is thus analogous to that of a warehouseman. In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would, without the use of elevators, be practically impossible. The elevator at Buffalo is a link in the chain of transportation to the seaboard, and the elevator in the harbor of New York is a like link in the transportation abroad by sea. The charges made by the elevator influence the price of grain at the point of destination on the seaboard, and that influence extends to the prices of grain at the places abroad to which it goes. The elevator is devoted by its owner, who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good.

It is contended in the briefs for the plaintiffs in error in the *Annan* and *Pinto* cases, that the business of the relators in handling grain was wholly private, and not subject to regulation by law; and that they had received from the state no charter, no privileges and no immunity, and stood before the law on a footing with the laborers they employed to shovel grain, and were no more subject to regulation than any other individual in the community. But these same facts existed in *Munn v. Illinois*. In that case, the parties offending were private individuals, doing a private business, without any privilege or monopoly granted to them by the state. Not only is the business of elevating grain affected with a public interest, but the records show that it is an actual monopoly, besides being incident to the business of transportation and to that of a common carrier, and thus of a quasi public character. The Act is also constitutional as an exercise of the police power of the state.

So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the state of New York. It operates only within the limits of that state, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in *Munn v. Illinois*. It is of the same character with navigation laws in respect to navigation within the state, and laws regulating wharfage rates within the state and other kindred laws.

It is further contended that, under the decision of this court in *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418 [33: 970], the fixing of elevator charges is a judicial question, as to whether they are reasonable or not; that the statute must permit and provide for a judicial settlement of the charges; and that, by the statute under consideration, an arbitrary rate is fixed and all inquiry is precluded as to whether that rate is reasonable or not.

But this is a misapprehension of the decision of this court in the case referred to. In that case, the Legislature of Minnesota had passed an Act which established a railroad and warehouse commission, and the Supreme Court of that State had interpreted the Act as providing that the rates of charges for the transportation of property by railroads, recommended and published by the commission, should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates. A railroad company, in answer to an application for a mandamus, contended that such rates in regard to it were unreasonable, and, as it was not allowed by the state court to put in testimony in support of its answer, on the question of the reasonableness of such rates, this court held that the statute was in conflict with the Constitution of the United States, as depriving the company of its property without due process of law, and depriving it of the equal protection of the laws. That was a very different case from one under the statute of New York in question here, for in this instance the rate of charges is fixed directly by the Legislature. See *Spencer v. Merchant*, 125 U. S. 845, 856 [81: 763, 767]. What was said in the opinion of the court in 134 U. S. had reference only to the case then before the court, and to charges fixed by a commission appointed under an Act of the Legislature, under a Constitution of the state which provided that all corporations, being common carriers, should be bound to carry "on equal and reasonable terms," and under a statute which provided that all charges made by a common carrier for the transportation of passengers or property should be "equal and reasonable."

What was said in the opinion in 134 U. S., as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the Legislature. Not only was that the case in the statute of Illinois in *Munn v. Illinois*, but the doctrine was laid down by this court in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 568 [30: 244, 248], that it was the right of a state to establish limitations upon the power of railroad companies to fix the price at which they would carry passengers and freight, and that the question was of the same character as that involved in fixing the charges to be made by persons engaged in the warehousing business. So, too, in *Dow v. Beidelman*, 125 U. S. 680, 686 [31: 841, 842], it was said that it was within the power of the Legislature to declare what should be a reasonable compensation for the services of persons exercising a public employment, or to fix a maximum beyond which any charge made would be unreasonable.

But in *Dow v. Beidelman*, after citing *Munn v. Illinois*, 94 U. S. 113 [24: 77]; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 161, 162 [24: 94, 95]; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 178 [24: 97, 99]; *Chicago M. & St. P. R. Co. v. Ackley*, 94 U. S. 179 [24: 99]; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180 [24: 99]; *Stone v. Wisconsin*, 94 U. S. 181 [24: 102]; *Ruggles v. Illinois*, 108 U. S. 526 [27: 812]; *Illinois Cent. R. Co. v. Illinois*, 4 INTER S.

108 U. S. 541 [27: 818]; *Stone v. Farmers L. & T. Co.* 116 U. S. 307 [29: 636]; *Stone v. Illinois Cent. R. Co.* 116 U. S. 847 [29: 650], and *Stone v. New Orleans & N. E. R. Co.* 116 U. S. 852 [29: 651], as recognizing the doctrine that the Legislature may itself fix a maximum beyond which any charge would be unreasonable, in respect to services rendered in a public employment, or for the use of property in which the public has an interest, subject to the proviso that such power of limitation or regulation is not without limit, and is not a power to destroy, or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law, the court said that it had no means, "if it would under any circumstances have the power," of determining that the rate fixed by the Legislature in that case was unreasonable, and that it did not appear that there had been any such confiscation of property as amounted to a taking of it without due process of law, or that there had been any denial of the equal protection of the laws.

In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws; even if under any circumstances we could determine that the maximum rate fixed by the Legislature was unreasonable.

In *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 179 [32: 877, 880], in the opinion of the court, delivered by Mr. Justice Field, it was said that this court had adjudged in numerous instances that the Legislature of a state had the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any contract to the contrary, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation, and that what is done does not amount to a regulation of foreign or interstate commerce.

It is further contended for the plaintiffs in error that the statute in question violates the 14th Amendment, because it takes from the elevator owners the equal protection of the laws, in that it applies only to places which have 180,000 population or more, and does not apply to places which have less than 180,000 population, and thus operates against elevator owners in the larger cities of the state. The law operates equally on all elevator owners in places having 180,000 population or more; and we do not perceive how they are deprived of the equal protection of the laws, within the meaning of the 14th Amendment.

Judgments affirmed.

Mr. Justice Brewer dissenting:

I dissent from the opinion and judgment in these cases. The main proposition upon which they rest is, in my judgment, radically unsound. It is the doctrine of *Munn v. Illinois*, 94 U. S. 113 [24: 77], reaffirmed. That is, as declared in the syllabus and stated in the opinion in that case: "When, therefore, one devotes his property to a use in which the public

has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." The elaborate discussions of the question in the dissenting opinions in that case, and the present cases when under consideration in the Court of Appeals of the state of New York, seem to forbid anything more than a general declaration of dissent. The vice of the doctrine is, that it places a public interest in the use of property upon the same basis as a public use of property. Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to wit, the state, has a right to create and maintain, and, therefore, one which all the public have a right to demand and share in. The use is public, because the public may create it, and the individual creating it is doing thereby and *pro tanto* the work of the state. The creation of all highways is a public duty. Railroads are highways. The state may build them. If an individual does that work, he is *pro tanto* doing the work of the state. He devotes his property to a public use. The state doing the work fixes the price for the use. It does not lose the right to fix the price, because an individual voluntarily undertakes to do the work. But this public use is very different from a public interest in the use. There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man's property is beyond the touch of another's welfare. Everything, the manner and extent of whose use affects the well-being of others, is property in whose use the public has an interest. Take, for instance, the only store in a little village. All the public of that village are interested in it; interested in the quantity and quality of the goods on its shelves, and their prices, in the time at which it opens and closes, and, generally, in the way in which it is managed; in short, interested in the use. Does it follow that that village public has a right to control these matters? That which is true of the single small store in the village, is also true of the largest mercantile establishment in the great city. The magnitude of the business does not change the principle. There may be more individuals interested, a larger public, but still the public. The country merchant who has a small warehouse in which the neighboring farmers are wont to store their potatoes and grain preparatory to shipment occupies the same position as the proprietor of the largest elevator in New York. The public has in each case an interest in the use, and the same interest, no more and no less. I cannot bring myself to believe that when the owner of property has by his industry, skill, and money made a certain piece of his property of large value to many he has thereby deprived himself of the full dominion over it which he had when it was of comparatively little value, nor can I believe that the control of the public over one's property or business is at all dependent upon the extent to which the public is benefited by it.

Surely the matters in which the public has the most interest, are the supplies of food and clothing; yet can it be that by reason of this

interest the state may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods? Men are endowed by their Creator with certain unalienable rights, "life, liberty, and the pursuit of happiness;" and to "secure," not grant or create, these rights governments are instituted. That property which a man has honestly acquired he retains full control of, subject to these limitations: First, that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit; second, that if he devotes it to a public use, he gives to the public a right to control that use; and, third, that whenever the public needs require, the public may take it upon payment of due compensation.

It is suggested that there is a monopoly, and that that justifies legislative interference. There are two kinds of monopoly; one of law, the other of fact. The one exists when exclusive privileges are granted. Such a monopoly, the law which creates alone can break; and being the creation of law, justifies legislative control. A monopoly of fact any one can break, and there is no necessity for legislative interference. It exists where anyone by his money and labor furnishes facilities for business which no one else has. A man puts up in a city the only building suitable for offices. He has therefore a monopoly of that business; but it is a monopoly of fact, which anyone can break who, with like business courage puts his means into a similar building. Because of the monopoly feature, subject thus easily to be broken, may the Legislature regulate the price at which he will lease his offices? So, here, there are no exclusive privileges given to these elevators. They are not upon public ground. If the business is profitable, anyone can build another; the field is open for all the elevators, and all the competition that may be desired. If there be a monopoly, it is one of fact and not of law, and one which any individual can break.

The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so, "Looking Backward" is nearer than a dream.

I dissent especially in these cases, because the statute in effect compels service without any compensation. It provides that the parties seeking the service of the elevator "shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when unloading, and trimming cargo when loading." This work of trimming or shoveling is fully explained in the briefs of counsel. It is work performed by longshoremen with hand scoops or shovels, on the vessel unloading or receiving the grain. They are not in the regular employ of the elevator; but engaged in an independent service, and yet one whose careful and skillful performance is es-

sential to the successful transfer of grain into and through the elevator. The full service required of the elevator compels its proprietor to employ and superintend the work of these longshoremen. For this work of employment, and superintendence, and for the responsibility for the proper performance of their work, the Act says that the proprietor of the elevator shall receive no compensation; he can charge only that which he pays out, the actual cost. I had supposed that no man could be required to render any service to another individual without some compensation.

Again, in the Pinto case, it appears that Mr. Pinto is the owner of a stationary elevator, built on private grounds. It is not on grounds devoted to a public use, like the right of way of a railroad company. There is nothing to indicate on his part a purpose to dedicate his property to public uses. So far as it is possible to make the business of an elevator a purely private business, he has done so. It will not do to say, that the transferring of grain through an elevator is one step in the process of transportation; and that, therefore, they are quasi common carriers, discharging a public duty, and subject to public control. They are not

carriers in any proper sense of the term. They may facilitate carriage; so does the boxing and packing of goods for transportation. The engineers, firemen, brakemen, and all the thousands of employes of a railroad company are helping the business of transportation; but are they all common carriers simply because their work tends to facilitate the business of transportation, and may the Legislature regulate their wages?

But, as I said, I do not care to enter into any extended discussion of the matter. I believe the time is not distant when the evils resulting from this assumption of a power on the part of government to determine the compensation a man may receive for the use of his property, or the performance of his personal services, will become so apparent that the courts will hasten to declare that government can prescribe compensation only when it grants a special privilege, as in the creation of a corporation, or when the service which is rendered is a public service, or the property is in fact devoted to a public use.

Mr. Justice Field and *Mr. Justice Brown* concur with me in this dissent.

THE HORN SILVER MINING COMPANY, *Plff. in Err.*,

The People of the STATE OF NEW YORK.

(See S. C. 143 U. S. 305-318, 86 L. ed. 164.)

- A corporation being the mere creature of the Legislature, its rights, privileges, and powers are dependent solely upon the terms of its charter.
2. According to the law of most states a franchise or privilege of being a corporation is personal property and is subject to taxation.
3. The granting of the rights and privileges which constitute the franchises of a corporation, may be accompanied with any such conditions as the Legislature may deem most suitable to the public interests and policy.
4. The Legislature may adopt any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence.
5. A foreign corporation cannot claim a right to do business in another state, except subject to the conditions imposed by its laws.
6. Having the absolute power of excluding the foreign corporation, the state may impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient, such as the payment of a specific license tax, or a sum proportioned to the amount of its capital.
7. The statute of New York does not require that the whole business of a foreign corporation shall be done within the state in order to subject it to the taxing power of the state.
8. The extent of a tax upon a foreign corporation is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court.
9. A tax levied only upon the franchise or business of a foreign corporation is not a tax on interstate commerce.

[No. 48.]

Argued and Submitted Dec. 11, 1891. Decided Feb. 29, 1892.

IN ERROR to the Supreme Court of the state of New York, to review a judgment of that court against the Horn Silver Mining Company, a corporation created under the laws of the territory of Utah, in favor of the people of the state of New York, for cer-

NOTE.—As to power of states to tax, see note to *Dobbins v. Erie County*, 10:1022.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations, see note to *Provident Bank v. Billings*, 7:989.

As to exemption from taxation; whether a contract

or not; not implied, see note to *Tucker v. Ferguson*, 22:806.

As to when an injunction to restrain the collection of a tax will be granted, see note to *Dows v. Chicago*, 20:65.

As to when taxes illegally assessed can be recovered back, see note to *Eskine v. Van Arsdale*, 21:63.

tain taxes on the corporate franchise or business of said corporation, and the penalty prescribed for delay in payment. *Affirmed.*

See same case below, 7 Cent. Rep. 220, 105 N. Y. 76.

The facts are stated in the opinion.

Messrs. Julien T. Davies and Edward Lyman Short, for plaintiff in error:

The taxes in question are not license taxes imposed upon a foreign corporation as a prerequisite of doing business in the state of New York.

The New York statutes impose a tax for revenue. They are not license laws, enacted under the police power of the state. They are to be judged therefore as tax laws.

People v. Davenport, 91 N. Y. 585; *People v. Home Ins. Co.* 92 N. Y. 389; *People v. Spring Valley H. G. Co.* 92 N. Y. 386; *People v. Gold & S. Teleg. Co.* 98 N. Y. 67.

A license fee is imposed as a condition of privilege granted. Such license fee must be accompanied by some grant of privilege, upon condition of its payment.

Cooley, Tax. 407; *Burroughs*, Tax. § 48; *Savannah v. Charlton*, 36 Ga. 462; *Philadelphia F. Assn. v. New York*, 119 U. S. 110 (30: 342); *Phoenix Ins. Co. v. Welsh*, 29 Kan. 672, 12 Ins. L. J. 502; *Com. v. Conglomerate Mtn. Co.* 13 W. N. C. 522.

There is a clear distinction between a license, granted or acquired as a condition precedent before a certain thing can be done, and a tax upon the business which that license may authorize one to engage in.

Home Ins. Co. v. Augusta, 50 Ga. 537; *Erie R. Co. v. State*, 31 N. J. L. 543.

The criterion of the amount imposed upon the corporations shows the law to be an exercise of the taxing power.

Van Hook v. Semla, 70 Ala. 361; *Railroad Tax Cases*, 13 Fed. Rep. 775, 777; *Santa Clara County v. Southern Pac. R. Co.* 18 Fed. Rep. 438; *San Francisco v. Liverpool & L. G. Ins. Co.* 74 Cal. 113.

This law, therefore, can obtain no support from any assumed principle or rule of law that any burden may be imposed upon a foreign corporation as a condition of doing business in any state.

Erie R. Co. v. State, 31 N. J. L. 543; *Cowell v. Colorado Springs Co.* 100 U. S. 55 (25: 547); *Christian Union v. Yount*, 101 U. S. 352 (25: 888); *Home Ins. Co. v. Morse*, 87 U. S. 20 Wall. 445 (22: 365); *Story*, Conf. L. § 38; *Merrick v. Van Santvoord*, 84 N. Y. 208; *State v. Western U. Teleg. Co.* 78 Me. 518; *New York v. Second Ave. R. Co.* 32 N. Y. 261.

The Legislature could not, because of its power to impose a burden upon foreign corporations as a condition of doing business, take money or property from a foreign corporation, already lawfully doing business here, by an absolute and unconditional demand.

Ducat v. Chicago, 77 U. S. 10 Wall. 410 (19: 972); *New York, L. E. & W. R. Co. v. Com.* 129 Pa. 463; *Doyle v. Continental Ins. Co.* 94 U. S. 535 (24: 148); *Home Ins. Co. v. Morse*, 87 U. S. 20 Wall. 445 (22: 366).

A corporation created by one state may do business in another by virtue of interstate comity unless prohibited by the law or established policy of the latter.

4 INTER S.

Cowell v. Colorado Springs Co. 100 U. S. 55 (25: 557); *Christian Union v. Yount*, 101 U. S. 352 (25: 888); *Merrick v. Van Santvoord*, 84 N. Y. 208; *People v. Fire Assn. of Philadelphia*, 92 N. Y. 325.

The taxes in dispute have not become binding by any assent upon the part of the plaintiff in error.

San Francisco v. Liverpool & L. & G. Ins. Co. 74 Cal. 113.

The business of bringing bars of silver from Chicago to New York and there selling them is interstate commerce.

Brown v. Maryland, 25 U. S. 12 Wheat. 419 (6: 678); *Paul v. Virginia*, 75 U. S. 8 Wall. 168 (19: 357); *The Daniel Ball v. United States*, 77 U. S. 10 Wall. 557 (19: 999); *Mobile County v. Kimball*, 102 U. S. 691 (26: 238); *Leisy v. Hardin*, 135 U. S. 100 (34: 128).

A foreign corporation is entitled to the same freedom in carrying on interstate commerce as citizens of the several states.

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727 (28: 1187); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29: 158); *Philadelphia & S. S. Co. v. Pennsylvania*, 122 U. S. 336 (30: 1200).

The statutes in question regulate interstate commerce in so far as they tax plaintiff in error for its business done in the state of New York during the years 1881 and 1882, and therefore are invalid to sustain the taxes for which judgment has been recovered.

Re Rahrer, 140 U. S. 545 (35: 572); *Hall v. DeCuir*, 95 U. S. 485 (24: 547); *Pembina Con. S. Mtn. & Mill. Co. v. Pennsylvania*, 125 U. S. 181 (31: 650); *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114 (34: 394); *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727 (28: 1187).

Under the statutes at bar a tax is imposed upon the plaintiff in error under such circumstances and with such effect as to constitute a regulation of interstate commerce, and it is therefore void.

Western U. Teleg. Co. v. Texas, 105 U. S. 460 (26: 1087); *Moran v. New Orleans*, 112 U. S. 69 (28: 653); *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 (6: 678); *Welton v. Missouri*, 9 U. S. 275 (23: 347); *Robbins v. Shelby Count. Tax. Dist.* 120 U. S. 489 (30: 694); *Corson v. Maryland*, 120 U. S. 502 (30: 699); *Fargo v. Michigan*, 121 U. S. 230 (30: 888); *Lyng v. Michigan*, 135 U. S. 161 (34: 150); *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114 (34: 394); *McCall v. California*, 136 U. S. 104 (34: 392); *Brown v. Houston*, 114 U. S. 622 (28: 257).

If the taxes in question are not laid upon the business of plaintiff in error in New York they are laid upon all its business or upon all its capital, and therefore either regulate commerce among the states or effect territorial taxation and are invalid *pro tanto*.

Bank of Commerce v. New York, 67 U. S. Black. 620 (17: 451); *Bank Tax Case*, 71 U. S. 2 Wall. 200 (17: 793); *People v. Commissione of Taxes*, 23 N. Y. 192; *People v. Badlam*, Cal. 594; *Chadwick v. Crapsey*, 35 N. Y. 19 202; *Burrall v. Bushwick R. Co.* 75 N. Y. 21 216; *People v. Coleman*, 12 L. R. A. 762, 1 N. Y. 483; *Pleasant Twp. v. Etina L. Ins. Co.* 138 U. S. 75 (34: 367); *Western U. Teleg. Co. v. Massachusetts*, 125 U. S. 530 (31: 790); *Fullme*

Palace Car Co. v. Pennsylvania, 141 U. S. 18 (35:613), 3 Inters. Com. Rep. 595; *Massachusetts v. Western U. Teleg. Co.* 141 U. S. 40 (35:628); *State Tax on Foreign-held Bonds*, 82 U. S. 15 Wall. 800 (21:179).

The statutes in question should be confined in their effect to the property of plaintiff within the jurisdiction of the state of New York.

Western U. Teleg. Co. v. Texas, 105 U. S. 460 (26:1067); *Western U. Teleg. Co. v. Massachusetts*, 125 U. S. 580 (31:790); *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411 (32:229); *Massachusetts v. Western U. Teleg. Co.* 141 U. S. 40 (35:628).

The affirmance of the judgment against plaintiff in error, would be a deprivation by the state of New York of the property of the plaintiff in error, without due process of law and a denial of the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States.

Bell's Gap. R. Co. v. Pennsylvania, 134 U. S. 232 (33:592); *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 209 (32:107); *Standard U. G. Cable Co. v. Atty-Gen.* 46 N. J. Eq. 278; *Soon Hing v. Crowley*, 118 U. S. 708 (28:1145); *Davidson v. New Orleans*, 96 U. S. 107 (24:620); *Caldwell v. Texas*, 137 U. S. 692 (34:816); *Leeper v. Texas*, 139 U. S. 462 (35:225); *Lent v. Tillson*, 140 U. S. 327 (35:425); *Atty-Gen. of Mass. v. Western Union Tel. Co.* 141 U. S. 49 (35:628).

The courts of New York concede the principles contended for, but deny their application to the tax in question.

Gordon v. Cornes, 47 N. Y. 608; *Stuart v. Palmer*, 74 N. Y. 183; *People v. Salem Twp. Board*, 20 Mich. 452; *People v. Commissioners of Taxes*, 76 N. Y. 71; *Cooley*, Const. Lim. (5th ed.) 603; *Cooley*, Taxn. (4th ed.) 60; *Burroughs*, Taxn. § 26; *Citizens Sav. & L. Assn. v. Tynka*, 87 U. S. 20 Wall. 655 (22:455).

Under the guise of taxation, New York has attempted to make an exaction purely arbitrary, founded upon no rule of equity, or justice, or economic principle, of an unusual character unknown to the practice of our government, and in effect an arbitrary spoliation of property.

People v. Equitable Trust Co. 96 N. Y. 393; *People v. Coleman*, 10 Cent. Rep. 268, 107 N. Y. 543; *Matson's Ford Bridge Co. v. Com.* 117 Pa. 265; *Fidelity Ins. T. & S. D. Co. v. Laughlin*, 139 Pa. 620; *Rothermel v. Meyerle*, 91 L. R. A. 366, 3 Inters. Com. Rep. 315, 186 Pa. 265; *Com. v. Provident Sav. Inst.* 12 Allen. 312; *Howe Mach. Co. v. Gage*, 100 U. S. 679 (25:755); *Hinson v. Lott*, 75 U. S. 8 Wall. 143 (19:387); *Gibson County v. Pullman S. O. Co.* 42 Fed. Rep. 572; *Mobile County v. Kimball*, 102 U. S. 691 (26:238); *Tappan v. Merchants Nat. Bank*, 86 U. S. 19 Wall. 490 (22:159); *Re Converse*, 137 U. S. 624 (34:796); *Guy v. Baltimore*, 100 U. S. 434 (25:748); *State Freight Tax*, 82 U. S. 15 Wall. 232 (21:146); *Sweten v. Wood*, 57 Mo. 880; *Skrainka v. Alva*, 76 Mo. 84; *Com. v. Hartnett*, 3 Gray, 451; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 209 (32:169); *Pembina Con. S. Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181 (31:650).

Mr. Charles F. Tabor, for defendant in error:

The right of a people of a state to prescribe

generally by its constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the state has been settled by this court.

Bank of Augusta v. Earle, 38 U. S. 18 Pet. 519 (10:274); *Paul v. Virginia*, 75 U. S. 8 Wall. 168 (19:357); *Ducat v. Chicago*, 77 U. S. 10 Wall. 410 (19:972); *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 732 (28:1138); *Sherlock v. Atling*, 98 U. S. 108 (23:820).

The state having the power to exclude entirely a foreign corporation has the power to change the conditions of admission at any time for the future, and to impose, as a condition, the payment of a new tax or a further tax, as a license fee.

Philadelphia Asso. v. New York, 119 U. S. 119 (30:346).

The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 12 (24:711); *Pembina Con. S. Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 190 (31:650); *McCall v. California*, 136 U. S. 104 (34:392); *Leisy v. Hardin*, 135 U. S. 100 (35:128); *Re Rahrer*, 140 U. S. 545 (35:575).

Mr. Justice Field delivered the opinion of the court:

The defendant below, the plaintiff in error here, the Horn Silver Mining Company, is a corporation created under the laws of the territory of Utah. The present action is brought by the people of the state of New York, upon the allegation that it was doing business within the state in 1881 and 1882, to recover certain taxes alleged to be chargeable on its "corporate franchise or business" for those years and the penalty prescribed for their non-payment in each year.

By the Act of the Legislature of New York, approved May 26, 1881, amending a previous Act providing for levying taxes for the use of the state upon certain corporations, joint-stock companies, and associations, it was declared that every corporation, joint-stock company, or association then or thereafter incorporated or organized under any law of the state, or of any other state or country, and doing business in the state, with certain specified exceptions not important in this case, should be subject to a tax "upon its corporate franchise or business," to be computed in a mode specified, which was by a certain percentage upon its capital stock measured by the dividend on the par value of that stock, or, where there were no dividends, or its dividends were less than a certain percentage upon the par value of the capital stock, then according to a certain percentage upon the actual value of the capital stock during the year.

The complaint in the action alleges the facts necessary to charge the corporation under this Act for both years; that the amount of tax due pursuant to its provisions for the year ending on the first day of November, 1881, was \$7,500, and the additional sum of \$1,500 as a penalty for the delay of the company in paying

the tax for two years after it became due, and that the amount of taxes due for the year ending on the first day of November, 1882, was \$30,000, with the further sum of \$3,000 as a penalty of ten per centum for the delay of the defendant in paying the same.

The defendant answered the various allegations of the complaint, denying them so far as they charge liability to the people of New York, and setting up that it had been at all times a manufacturing corporation organized and existing under the laws of Utah; that it had never exercised any franchises or powers under the laws of New York; that its capital stock of ten millions of dollars was issued in payment for real estate in Utah and Illinois, which consists entirely of mining property and improvements thereon, and a refinery; that during the years ending November 1st, 1881 and 1882, it carried on in the state of New York the business of manufacturing bars of silver from Utah and Illinois into standard bars; that said business constituted but a small portion of its entire business, and was the only business carried on in the State of New York, except its financial business and correspondence; that its capital stock was only partially employed in New York; and that it paid taxes both in Utah and in Illinois. It insisted that the statute, upon which the action was brought, was invalid and inoperative as to it because of the facts set forth, and because it established an unjust and unequal system of taxation, and fixed the amount of tax wholly without regard to the extent of the corporate franchises exercised by it in the state, and without regard to the amount of business done within the state, or the amount of capital employed or the amount of its capital stock held in the state, and the extent of the protection and benefits derived from its laws and agencies, and because it sought to tax property and persons not within the jurisdiction of the state or in any way subject to its authority, and violated the principles of equality and uniformity. It also insisted that the taxation attempted was, in effect, the taking of private property without just compensation, the denial to defendant of the equal protection of the laws, and a regulation of commerce among the several states, and taxing property and business without the jurisdiction of the state of New York. By consent of parties the case was referred to a referee to hear and determine all the issues of law and fact therein. The referee found that the defendant was a corporation created and organized under the laws of the territory of Utah, and was at all times mentioned in the complaint doing business in the state of New York, and liable to be taxed on its corporate business under the provisions of section 8 of the Act of New York above cited. He also found, in substance, that the stock and capital of the defendant were properly appraised and the amount of the tax was assessed in conformity with the provisions of that Act, and that, accordingly, the sums above mentioned, amounting to \$41,250, were due; and he directed a judgment to be entered therefor in favor of the plaintiff.

The referee also found that the defendant paid taxes, both in the territory of Utah and in the state of Illinois in the years 1881 and 4 INER8.

1882, and that the greater part of its business was out of the state of New York as well as the greater part of the capital used in its business.

Upon the findings of the referee judgment was entered in the supreme court of the state for the amount reported, and the case, being taken to the Court of Appeals was there affirmed. Being then remitted to the supreme court and entered there, the case was brought, on a writ of error, to this court.

A corporation being the mere creature of the Legislature, its rights, privileges and powers are dependent solely upon the terms of its charter. Its creation (except where the corporation is sole) is the investing of two or more persons with the capacity to act as a single individual, with a common name, and the privilege of succession in its members without dissolution, and with a limited individual liability. The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most states this franchise or privilege of being a corporation is deemed personal property and is subject to separate taxation. The right of the states to thus tax it has been recognized by this court and the state courts in instances without number. It was said in *Delaware Railroad Tax*, 85 U. S. 18 Wall. 206, 231 [21: 888, 896], that "the state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion;" except, we may add, as that discretion is controlled by the Organic Law of the state. And, as we there said also, "it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the Legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the Legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant as well as, also, if its continued exercise, the payment of a specific sum to the state each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the Legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations. Nor can there be any greater objection to a similar tax

upon a foreign corporation doing business by its permission within the state. As to a foreign corporation—and all corporations in states other than the state of its creation are deemed to be foreign corporations—it can claim a right to do business in another state to any extent, only subject to the conditions imposed by its laws.

As said in *Paul v. Virginia*, 75 U. S. 8 Wall. 162, 181 [19: 357, 360], "the recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states, a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest.

Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than a half century ago in *Bank of Augusta v. Earl*, 38 U. S. 13 Pet. 519 [10: 274]. One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Tel. Co. v. Western U. Tel. Co.* 96 U. S. 1, 12 [34: 706, 711]. The other limitation on the power of the state is, where the corporation is in the employ of the general government, an obvious exception, first stated, we think by the late *Mr. Justice Bradley* in *Stockton v. Baltimore & N. Y. R. Co.* 33 Fed. Rep. 9, 14. As that learned Justice said: "If Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the Union." And this court, in citing this passage, added, "without the permission and against the prohibition of the state." *Pembina Con. S. Min. & Mill Co. v. Pennsylvania*, 125 U. S. 181, 186 [31: 650, 652].

Having the absolute power of excluding the foreign corporation the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation or the corporation itself can call in question the validity of any taxation which the state may require for the grant of its privileges. It does not lie in any

foreign corporation to complain that it is subjected to the same law with the domestic corporation. The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the state. Conceding such to be the case we do not perceive how it in any respect affects the validity of the tax. However it may be regarded, it is the condition upon which a foreign corporation can do business in the state, and in doing such business it puts itself under the law of the state, however that may be characterized.

The only question therefore open to serious consideration in this case is one of fact: Did the Horn Silver Mining Company do business as a corporation within the State? The referee found such to be the fact, as a conclusion from many probative circumstances in the case. That finding was never set aside, but stands approved by the courts of New York. If the correctness of the conclusion could be questioned and held not justified by the facts in evidence—and they should be considered as showing only transactions of interstate commerce, and not business in the state independently of such commerce—it would be impossible to overcome the force of the answer of the defendant in which it alleges that in the years 1881 and 1882 it was a manufacturing company carrying on manufactures within the state of New York. The admission is conclusive that the corporation was engaged in business in the state in those years, though, we are clear, not in such a business as rendered it a manufacturing corporation exempt from the tax prescribed by the statute.

To dispose of the position that the plaintiff in error was a manufacturing corporation, and therefore excepted from taxation under the statutes cited, it is only necessary to refer to the articles of association of the company. By them it appears that it was organized to conduct the business of buying, selling, leasing and operating mines and mining claims in the territory of Utah, and smelting, reducing and refining works there and elsewhere; of conducting a general mining, milling and smelting business in all its branches, including buying and selling mineral ores and bullion; of carrying on a general mercantile business by buying and selling such goods, merchandise, stores and miners' supplies as are usually kept in and required by the wants of a mining camp or settlement; of building and operating all such roads, tramways and transportation routes as may be convenient in transporting the products of its business or procuring supplies; of purchasing, hiring and holding all such real and personal property, wherever situate, as may be required in carrying on any of its business, and when no longer required for business purposes, of leasing, selling or exchanging the same; and generally to do all acts and things incidental to a general mining business or to any of the aforesaid pursuits. They also declare that it was primarily formed for the immediate purpose of working and developing the estate, property and premises known as the Horn silver mine, and the treatment and reduction of the ores and metals therein contained. There is in the business thus detailed

nothing that would characterize the corporation as a manufacturing company, and in no proper sense was it engaged in a manufacturing business within the state. The bullion taken by the company from its mines was shipped to Chicago, and, after being refined and the silver separated from the lead, it was forwarded to the United States assay office in the city of New York, where it had an office, not for occasional business transactions, but where its transfer books were kept, its dividends declared and paid and other business done by it such as is usually performed by corporations where their principal office of business is situated. It is true the greater part of the business of the company was done out of the state, and the greater part of its capital was also without it, but the statute of New York does not require that the whole business of a foreign corporation shall be done within the state in order to subject it to the taxing power of the state. It makes, in that respect, no difference between home corporations and foreign corporations, as to the franchise or business of the corporation upon which the tax is levied, provided it does business within the state as such corporation.

There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the State, according to the amount of its business or capital without the state. That is a matter, however, resting entirely in the control of the state, and not a matter of Federal law, and with which,

of course, this court can in no way interfere.

Since this tax was levied the law of the state has been altered, and now the tax upon foreign corporations doing business in the state is estimated by the consideration only of the capital employed within the state. It is said that against nearly all other foreign corporations except this one the taxes upon their franchises have been computed upon the basis of the capital employed within the state: but as to that we can only repeat what was said in the Court of Appeals of the state, that if this be true, the defendant may have reason to complain of unjust discrimination and may properly appeal for relief to the Legislature of the state, but that it is not within the power of the court to grant any relief however great the hardship upon it.

The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the state and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company.

Judgment affirmed.

Mr. Justice Harlan dissented.

CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

THE INTERSTATE COMMERCE COMMISSION v. THE TEXAS & PACIFIC RAILWAY COMPANY.

The principal office, within the meaning of the Act of Congress authorizing a Circuit Court, where such office is situated, to enforce orders of the Interstate Commerce Commission, of a railroad corporation created by an Act of Congress which does not prescribe where such office shall be kept is the one where its principal officers have their

business domicil, the meetings of stockholders, directors and executive committee are held, the stock books kept and the dividends declared, rather than the place where the subordinate officers in charge of the operating, traffic and accounting departments of the business discharge their duties.

Decided April 4, 1892.

Wallace, J.:

The question in this case is whether the principal office of the defendant is at the city of New York within the meaning of section 16 of the Act of Congress, commonly known as the Interstate Commerce Act. That section confers jurisdiction upon the circuit courts of the United States to enforce any lawful order of the Interstate Commerce Commission, and in that behalf authorizes the Commission to apply in a summary way by petition to the Circuit Court "sitting in the judicial district in which the common carrier complained of has its principal office, or in which the viola-

tion or disobedience of such order or requirement may happen."

The defendant is a corporation created by an Act of Congress, and operates a railroad in the states of Louisiana and Texas. The Act of incorporation does not prescribe where the principal office shall be kept. If the office where the president, the first vice-president, and the secretary and treasurer have their business domicil, where the regular meetings of the stockholders, the board of directors, and the executive committee, are held, where certificates of stock are issued and registered upon the books, and where the profits, if any

are earned, are received and distributed to the stockholders, is the principal office of the corporation instead of that place where the subordinate officers and agents of the corporation who are in charge of the operating, traffic and accounting departments of its business, discharge their duties, the New York office is the principal office.

The principal office of the corporation is commonly understood to be its chief office or head office—the office at which its most important affairs are regulated and controlled, I conclude that the New York office is the principal office of the defendant within the meaning of the statute.

The statute intends to lodge the power of

enforcing any lawful order of the Commission with that particular Circuit Court which can most effectually compel obedience to its process in the particular case. Obedience to the order of the court is to be enforced by attachment of the directors, officers or agents of the corporation, or by any other process incident or applicable to writs of injunction. In cases of disobedience, process of attachment would ordinarily be most effectual against the chief executive officers of the corporation, and there would seem to be more propriety in directing such process to them than to the subordinate agents. These officers are ordinarily to be found at the head office of the corporation.

The plea is overruled.

IOWA SUPREME COURT.

John C. HOPKINS

v.

C. H. LEWIS, Judge of the District Court for the Fourth Judicial District.

(See S. C. 15 L. R. A. 397.)

A sale of the contents merely of the packages in which liquor was imported into the state, the purchaser being required to open them and empty the liquor into glasses furnished by the

seller, is not a sale by original packages, exempt as interstate commerce from the operations of state laws regulating the sale of intoxicating liquors.

Decided February 10, 1892.

CERTIORARI to the District Court for Woodbury County to review an order finding plaintiff guilty of contempt in violating an injunction restraining him from the unlawful sale of intoxicating liquors and imposing upon him a fine for \$500. *Affirmed.*

The facts are stated in the opinion.

Messrs. Lynn & Sullivan, for plaintiff:

Collins v. Hills, 8 L. R. A. 110, 77 Iowa, 181, shows that the bottles were original packages.

Sales in original packages could not be prohibited.

Leisy v. Hardin, 135 U. S. 100, 84 L. ed. 128; *Tuckman v. Welch*, 42 Fed. Rep. 548; *Wilkerson v. Rahrer*, 140 U. S. 545, 85 L. ed. 572.

Messrs. Carter & Brown, for defendant:

The liquors were delivered in boxes and barrels, securely fastened, containing from two to three dozen bottles of beer.

After receiving boxes and barrels plaintiff opened the same, taking the bottles from the boxes or barrels, and selling the same separately after so opened.

Whatever was said on the subject of what constituted the original package in *Collins v. Hills*, 8 L. R. A. 110, 77 Iowa, 181, was only dictum, and cannot be considered as authoritative or binding upon the court in that respect.

The box has been universally held to constitute the original package.

NOTE.—For note on interstate commerce as related to importations of intoxicating liquors, see *State v. Winters* (Kan.) 10 L. R. A. 616.

4 LITTEK B.

Keith v. State, 10 L. R. A. 480, 91 Ala. 2; *Smith v. State*, 54 Ark. 248, and citations; *State v. Chapman* (S. Dak.) 10 L. R. A. 432; *State v. Fraser*, 1 N. Dak. 425; *Re Beine*, 43 Fed. Rep. 546; *Re Harmon*, 43 Fed. Rep. 372.

Sales having been proved to have been made by plaintiff, and prohibition being the rule, and the right to sell the exception, the burden is upon plaintiff to show that sales made by him were made in a lawful manner.

State v. Cloughly, 78 Iowa, 626; *Keith v. State*, 10 L. R. A. 480, 91 Ala. 2.

Rothrock, J., delivered the opinion of the court:

The cause of John C. Hopkins was abstracted, argued, and submitted in this court with a stipulation that all of the other cases should be submitted upon the same record; the evidence being substantially the same in all the cases. The plaintiffs claim that they were not guilty of contempt, because they made no illegal sales. They insist that they were the keepers of what was known as "original package establishments;" that they sold intoxicating liquors in original packages, which packages were shipped into this state from other states. In other words the claim is made that the sales in question were authorized under the case of *Leisy v. Hardin*, 135 U. S. 100, 84 L. ed. 128. All of the sales were made before the recent Act of Congress known as the "Wilson Bill," relating to the laws of the several states pertaining to the traffic in intoxicating liquors. The plaintiffs rely upon the case of *Collins v.*

Hills, 77 Iowa, 181, 8 L. R. A. 110, in which an original package is defined by this court. Whatever may be thought of the correctness of that definition, it would be a hardship to now hold that it is wrong, because parties were authorized thereby to act in accordance therewith. It is a question of no importance now, in view of the Act of Congress above referred to. But the evidence in these cases shows that the sales in question were not made in accordance with the rule in the case of *Collins v. Hills*. They were not the keepers of original package houses. They kept saloons with bars and other saloon fixtures and appliances. The following is the testimony of one of the witnesses, taken on the trial: "I know a certain place situated upon the northwest corner of Fifth and Pearl streets, occupied by defendant Hopkins. I was there on the 10th day of June, and bought a bottle of beer. At the time I bought the beer Mr. Frank Roberts was with me, and we together drank this beer there at the time. The place where we got this beer was furnished up as an original package saloon. There was a bar and other saloon fixtures and appliances there. There was a shelf back of the bar, and sample bottles on it, and drinking glasses. The beer was cold. We paid for the beer after we drank it. We purchased also a package of whiskey. This beer we bought was lager beer and both the beer and whiskey were intoxicating. Mr. Frank Roberts and myself were there on the 28th of June, and bought a bottle of beer. We saw the defendant there on both occasions. Defendant Hopkins set up the bottle of beer we called for, and said we would have to put up for it before we drank it, as that was the law. Roberts asked him if he could have the bottle and he said 'Yes,' but would have to charge him a nickel for it. This was after drinking. We didn't buy the bottle and defendant took it and put it away. Cross-examination: The bottle of beer we purchased on the 10th of June was sealed. It had a tin-foil and wire over the top. So far as we could judge from its appearance, it had not been opened at all. We opened it. The whiskey had not been opened that we knew of. We didn't have possession of the bottle. We set it on the counter. We had to pull the cork out. We didn't try to carry it off. All the liquor that we ever bought there was in bottles, sealed; and to all appearances they had never been broken. Redirect exam-

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ination: There was no seal on the bottle of whiskey that we purchased there any more than an ordinary cork in the bottle. There was a paster on there which read: 'Bottled by William Darst, Omaha, Neb.'" It is agreed that the testimony of Frank Roberts is substantially the same as that above set out. This testimony is in no manner contradicted, except that plaintiff Hopkins testified as follows: "I heard the testimony of the last witness in regard to the bottles. After a customer comes in and buys a bottle he leaves it on the counter after he empties it and I take it, and set it on the back of the bar. I own the bottle. I have never prevented a customer from taking it if he desires to. I charge no more where the bottle is taken away than when it is left. Every bottle that we get we get labels on. Those bottles were shipped in original packages, and none have been received while we were in business that were not labeled." It thus appears that the plaintiffs did not sell the packages. They sold the contents. The device of requiring the purchaser to pull the corks from the bottles is of no consequence. The fact remains that it was the liquor, as emptied from the original packages into drinking glasses furnished by the plaintiffs, upon a counter in a saloon, which was sold. The cases of *Leisy v. Hardin* and *Collins v. Hills* were wholly unlike these cases. In those cases the sellers were not the keepers of dram shops. They sold original packages and not the mere contents of the packages. The evidence further shows that the beer which the plaintiffs sold was claimed to be imported from Covington, Neb.; to Sioux City, where the plaintiffs carried on the business. There is much in the evidence tending to show that the shipping of the beer across the Missouri river was a mere device, and that it was not interstate commerce, as understood in the way of trade. The parties owning the beer, and from whom the plaintiffs made their purchases, were in business in Sioux City, and the beer was ordered there, and it was brought over the river, as ordered, in the wagons of a transfer or transportation company, in which the wholesale dealers were interested as owners. We think that the plaintiffs did not show by a preponderance of the evidence that the sales were made by original packages.

The order of the District Court will be affirmed.

INTERSTATE COMMERCE COMMISSION.

THE EAU CLAIRE BOARD OF TRADE

v.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, CHICAGO & ALTON RAILROAD COMPANY, ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO & NORTHWESTERN RAILWAY COMPANY, CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY, MISSOURI PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, WABASH RAILROAD COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,

Defendants;

and

THE MUSSER LUMBER COMPANY, THE HERSHEY LUMBER COMPANY, THE LINDSAY & PHELPS COMPANY, CHRIST, MUELLER, THE DAVENPORT LUMBER COMPANY, THE CABLE LUMBER COMPANY, THE ROCK ISLAND LUMBER AND MANUFACTURING COMPANY, DIMOCK, GOULD & COMPANY, CURTIS BROS. & COMPANY, W. J. YOUNG & COMPANY, C. LAMB & SONS, THE CLINTON LUMBER COMPANY, GARDNER, BATCHELDER & WELLS, D. JOYCE, THE LYONS LUMBER COMPANY, AND THE LANGFORD & HALL LUMBER COMPANY, THE KEITHSBURG LUMBER COMPANY, THE GEM CITY SAW MILL COMPANY, THE RAND LUMBER COMPANY, THE BURLINGTON LUMBER COMPANY, GILBERT, HEDGE & COMPANY, NAIRN, GILLIES & COMPANY, S. & J. C. ATLEE, W. E. TABOR & COMPANY, THE CARSON & RAND LUMBER COMPANY, S. C. & S. CARTER, EVANS & SHEPARD, THE CANTON PLANING MILL COMPANY, THE CANTON SAW MILL COMPANY, THE BLUFF CITY LUMBER COMPANY, JOHN J. CRUIKSHANK, JR., THE EMPIRE LUMBER COMPANY, THE HARRIMAN & HURD LUMBER COMPANY, THE S. P. GIVEN LUMBER COMPANY, THE HANNIBAL SAW MILL COMPANY, THE HANNIBAL DOOR & SASH COMPANY, THE LA CROSSE LUMBER COMPANY, THE J. F. CRAWFORD LUMBER COMPANY, AND THE SCHULENBERG & BROCKLER LUMBER COMPANY, THE LA CROSSE LUMBER EXCHANGE,

Intervenor.

(No. 267.)

1. The doctrine that transportation charges should be proportioned to the distances between different points, *where those distances are greatly dissimilar*, has never been advocated by the railroads or recommended by the Commission. While distance is an ever-present element in the problem of rates and not unfrequently a controlling consideration, the general practice of rate making is opposed to the principle of exact proportion, and there is no opportunity for its application under present conditions. Where all the distances brought into comparison are considerable and the differences between them relatively small, there should be substantial similarity in the respective rates unless other modifying circumstances justify disparity.
2. That rates should be fixed in inverse proportion to the natural advantages of competing towns with the view of equalizing "commercial conditions," as they are sometimes described, is a proposition unsupported by law and quite at variance with every consideration of justice. Each community is entitled to the benefits arising from its location and natural conditions, and the exaction of charges unreasonable in themselves or relatively unjust, by which those benefits are neutralized or impaired, contravenes alike the provisions and the policy of the statute.
3. On complaint of a relatively unreasonable rate on lumber from Eau Claire to various points on the Missouri river as compared

with rates to the same points from La Crosse, Winona, and various other lumber shipping points: *Held*, That the case must mainly be determined by comparing the rate in question with the rates from neighboring towns, similar in size, situation and volume of competing traffic, and at approximately the same distance from common markets; that the rate complained of subjects Eau Claire to undue prejudice and disadvantage, and is unlawful; and that such rate should not exceed the rate from La Crosse and Winona by more than two cents per hundred pounds when, as at the time complaint was filed, the rate from those points is not over 11 cents per hundred, nor by more than two and one half cents per hundred pounds above the present rate of 16 cents per hundred from La Crosse and Winona.

4. A railroad cannot be said to discriminate against a town which it does not reach and in whose carrying trade it does not participate; therefore, no case is made out against the carriers which were made parties at the request of the original defendant, because none of them have lines extending to Eau Claire. Preference, prejudice and other like terms imply comparison, and the basis of comparison is wanting unless the rates compared are made by the same carrier. But these parties having defended and endeavored to justify the differential found excessive, while not technically subject to an order for its correction, have no more right to re-

der it ineffectual than to openly disregard a direction clearly within the scope of the Commission's authority. The intervening defendant, the Omaha road, though serving the complaining town, need not, for reasons

stated, be included in the order directing the reduced rate, but the case will be held open as against that company for such direction as may hereafter be required.

Complaint filed July 7, 1890.—Answer of original defendant, Chicago, Milwaukee & St. Paul Railway Company filed August 2, 1890.—Order entered bringing in other defendants September 17, 1890.—Order entered granting leave to Chicago, St. Paul, Minneapolis & Omaha Railway Company to intervene as a defendant, November 24, 1890.—Answers of new defendants filed October 13, 1890, to November 24, 1890; also on September 21, 1891.—Orders entered, allowing petitioning lumber dealers to intervene in behalf of the defense, November 21, December 17, 1890, and June 4, 1891.—Depositions filed April 3 to September 21, 1891.—Hearing had at Chicago, Illinois, September 21 and 22, 1891.—Briefs filed, September 21 to November 12, 1891.—Proposed findings of fact filed by complainant November 19, 1891. Decided June 17, 1892.

RELATIVE RATES on lumber from Eau Claire to points on the Missouri river. See Complaint and Answer, 3 Inters. Com. Rep. 174. Orders, 3 Inters. Com. Rep. 314.

*H. H. Hayden and Davis, Kellogg & Severance, for Eau Claire Board of Trade.
John W. Cary, for Chicago, Milwaukee & St. Paul Railway Company.
William Brown, for Chicago & Alton Railroad Company.
Britton & Gray, for Atchison, Topeka & Santa Fé Railroad Company.
Thomas F. Withrow and T. S. Wright, for Chicago, Rock Island & Pacific Railway Company.
J. W. Blythe, C. M. Dawes and Benton J. Hall, for Chicago, Burlington & Quincy Railroad Company.
W. C. Goudy, for Chicago & Northwestern Railway Company.
Lusk & Bunn, for Chicago, St. Paul & Kansas City Railway Company.
John S. Blair, for Missouri Pacific Railway Company.
W. H. Blodgett, for Wabash Railroad Company.
James H. Howe and S. L. Perrin, for Chicago, St. Paul, Minneapolis & Omaha Railroad Company.
Cummins & Wright, for Musser Lumber Company et al.
Thomas Hedge, for Kelthsburg Lumber Company et al.
Loeey & Woodward, for La Crosse Lumber Exchange.*

REPORT AND OPINION OF THE COMMISSION.

Knapp, Commissioner:

The substance of complainant's charge in this case is, that the rates maintained by the Chicago, Milwaukee & St. Paul Railway Company for the transportation of lumber, in car-load quantities, from various specified towns in the lumber producing districts of Wisconsin and Minnesota, to Kansas City, Omaha and other Missouri river points, discriminate unjustly against the city of Eau Claire, and operate to its serious prejudice and disadvantage. The formal complaint herein, which was directed against the above named carrier only, sets forth with considerable detail the history and situation of the lumber industry in that region, and contains numerous statements in reference to distances, tariffs, tonnage, population and the

like, all tending to establish the relative injustice asserted. The answer of this defendant substantially admits the specific facts alleged in the petition, but disputes some of its inferences and assertions, and indirectly denies that the rates in question are unreasonable or constitute any violation of legal duty. In further justification of the apparent disparity in charges on west bound lumber, as between Eau Claire and its immediate rivals, this railroad in effect pleads its inability to alter the rates complained of without the consent, hitherto withheld, of other carriers engaged in transporting lumber to western destinations from various places on their respective lines which are competitors of Eau Claire, because those carriers by lowering their rates at competing points, to correspond

with any reduction by this road at Eau Claire, could restore and maintain the existing *relation of rates* between these towns, which is the real grievance of complainant. It was therefore prayed that certain roads, which are enumerated in this answer, should be made parties to the proceeding, in order that the whole subject might be properly investigated and the various interested carriers bound by any ruling of the Commission. In compliance with this request an order was made bringing in the other railroad named in the title, except the Chicago, St. Paul, Minneapolis & Omaha Railway Company, which subsequently, on its own application, was permitted to intervene. Most of these corporations thereupon filed answers to the complaint; some of them setting forth the circumstances which led to the adoption of the present tariff on west bound lumber and alleging that serious disturbance and injury would result from any interference with the rate established at Eau Claire, and all of them denying any actual or intended discrimination against the shippers of that city. In addition to the carriers thus made defendants, a large number of persons, firms and corporations engaged in the lumber business in various places in the states of Iowa, Illinois and Missouri, together with the La Crosse Lumber Exchange of La Crosse, Wisconsin, all claiming a direct and important interest in the controversy, were also at one time or another allowed to intervene. These parties are named and described as intervenors in the title of the case; and so far as they answered, furnished evidence or otherwise participated in the hearing, (and to a great extent they assumed the burden of the defense,) they sought to sustain and defend the rates assailed in this proceeding. The introduction of these defendants, representing a large area of country and numerous transportation and commercial interests, greatly extended the range of investigation and opened up a broad field of inquiry.

In the voluminous testimony which has been placed upon the record there is little disagreement as to actual facts, but the claims of different parties and the elaborate arguments of counsel disclose many conflicting views and wide divergence of opinion. The nature of the controversy, with its diverse phases and relations, is so fully set forth in the formal findings, that no further analysis of the pleadings or other preliminary statement would seem to be required. In order that a complete summary of the proofs may be presented, and without special reference to their materiality or bearing, we find the following facts:

FINDINGS OF FACT.

1. The complainant, the Eau Claire Board of Trade, is an association of citizens and residents of the city of Eau Claire, Wisconsin,
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organized to promote the business interests of that city. The defendant railroad companies are severally common carriers engaged in the interstate transportation of lumber and other freight. The sources of supply of the west bound lumber shipped over these roads are the forests of northern Michigan, Wisconsin and Minnesota; and the main points from which such shipments are made are Minneapolis, Eau Claire, Winona, La Crosse, Oshkosh, Milwaukee and Chicago, and the following towns on the Mississippi river, south of La Crosse, to wit: Dubuque, Clinton, Lyons, Fulton, Moline, Rock Island, Davenport, Muscatine, Burlington, Keokuk, Hannibal and Louisiana. The market or distributing towns to which these shipments are made are for the most part the "Missouri river points," Sioux City, Omaha, Council Bluffs, St. Joseph and Kansas City.

2. No one of the defendant roads reaches all these points of production. From Eau Claire shipments of lumber are made to the Missouri river over the Chicago, Milwaukee & St. Paul, the Chicago, St. Paul, Minneapolis & Omaha, and the Wisconsin Central. The Chicago, Milwaukee & St. Paul road, (hereinafter designated the "Milwaukee,") has main lines as follows: from Chicago to Council Bluffs; from Marion, Iowa, on said former line, to Kansas City; from Oshkosh to Milwaukee; from Milwaukee to Sabula Junction; from Minneapolis *via* Wabasha to Sabula Junction, called the "river line;" from Minneapolis to Mason City, called the "Iowa & Minnesota line." Minneapolis, Winona and La Crosse are on the "river line," but Eau Claire is on a branch forty-eight miles in length connecting with that line at Wabasha. The Milwaukee road has an arrangement with the Iowa Central by which, in hauling from Eau Claire and Winona to Council Bluffs, it uses the latter road from Mason City to Pickering, a distance of 97 miles, and, in hauling to Kansas City, it uses the same road from Mason City to Hedric, a distance of 167 miles. The distances *via* the Iowa Central are considerably less than those over the Milwaukee line proper. The Chicago, St. Paul, Minneapolis & Omaha road (hereinafter styled the "Omaha") has a line extending from Eau Claire through St. Paul and Minneapolis to Sioux City, Omaha, and Council Bluffs. It also has lines from Worthington, Minn., to Mitchell in South Dakota; from St. Paul and Minneapolis through Hudson, Wis., to Elroy, Wis.; from Hudson to Ashland and Bayfield on Lake Superior in northern Wisconsin; and from Eau Claire to West Superior and Duluth, Minn. Winona and La Crosse are also both located on the Chicago & Northwestern, and the Chicago, Burlington & Northern. La Crosse is also reached by the Green Bay, Winona & St. Paul, and Winona by the last named road and the Winona & Southwestern,

but these roads apparently do not participate in the lumber traffic.

All the other defendant roads, except the Missouri Pacific and Great Northern, have main lines leading from Chicago, and, by their several connections, from Milwaukee, Oshkosh and other points across the Mississippi to Missouri river markets. The points at which these roads cross the Mississippi, and the Missouri river points reached by them, directly or through connections, are shown by the following table:

Roads.	Crossing points on the Mississippi.	Missouri river points reached.
Chicago & Alton R. R.	Louisiana, Mo.	Kansas City.
Atchison, Topeka & Santa Fé R. R.	Ft. Madison, Ia.	Kansas City, St. Joseph, Atchison and Leavenworth. Kansas City (in connection with the Hannibal & St. Joseph), Leavenworth, Atchison, St. Joseph, Council Bluffs and Omaha.
Chicago, Rock Island & Pacific R'y.	Rock Island, Ill.	Council Bluffs, Omaha, St. Joseph, Atchison, Leavenworth, Kansas City and Sioux City—the last in connection with the Chicago & Northwestern.
Chicago, Burlington & Quincy R. R.	Burlington, Ia. Quincy, Ill.	Council Bluffs, Omaha and Sioux City.
Chicago & North Western R'y.	Clinton, Ia., Winona, Minn. & St. Paul, Minn.	St. Joseph, Leavenworth, direct, and Atchison. Kansas City, Council Bluffs and Omaha, by connections.
Chicago, St. Paul & Kansas City R'y.	Dubuque, Ia.	Kansas City, direct, and St. Joseph, Atchison and Council Bluffs by connections.
Wabash R. R.	Hannibal and St. Louis.	

The Missouri Pacific Railway has lines running west from the Mississippi river to St. Louis and Belmont, Mo., and West Memphis and Helena, Ark., and reaching Kansas City, Leavenworth, Atchison, St. Joseph and Omaha; and the Great Northern line extends west from St. Paul and Minneapolis and reaches Sioux City in connection with Sioux City & Northern Railway.

The roads having lines from the river towns named below to lumber markets on the Missouri are as follows:

From Dubuque,—the Chicago, Milwaukee & St. Paul, Illinois Central and Chicago, St. Paul & Kansas City.

From Clinton,—the Chicago, Milwaukee & St. Paul, Chicago, Burlington & Quincy and Chicago & Northwestern.

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From Lyons,—the Chicago & Northwestern, and Chicago, Milwaukee & St. Paul.

From Fulton,—the Chicago & Northwestern, Chicago, Milwaukee & St. Paul, and Chicago, Burlington & Quincy.

From Moline,—the Chicago, Milwaukee & St. Paul, Chicago, Burlington & Quincy, and Chicago, Rock Island & Pacific.

From Rock Island,—the Chicago, Rock Island & Pacific, Chicago, Milwaukee & St. Paul, and Chicago, Burlington & Quincy.

From Davenport,—the Chicago, Rock Island & Pacific, and Chicago, Milwaukee & St. Paul.

From Muscatine,—the Chicago, Rock Island & Pacific.

From Burlington,—the Chicago, Burlington & Quincy, and Chicago, Burlington & Kansas City.

From Keokuk,—the Chicago, Burlington & Quincy, Chicago, Burlington & Kansas City, and Chicago, Rock Island & Pacific.

From Hannibal,—the Hannibal & St. Joseph, Chicago, Burlington & Quincy, and Wabash.

From Louisiana,—the Chicago & Alton.

From Quincy,—the Chicago, Burlington & Quincy, Hannibal & St. Joseph, and Quincy, Omaha & Kansas City.

From Winona,—Chicago, Milwaukee & St. Paul, Chicago & Northwestern, Chicago, Burlington & Northern, the last named being a party to the Chicago, Burlington & Quincy system which reaches the Missouri river.

From La Crosse,—Chicago, Milwaukee & St. Paul, Chicago and North Western, Chicago, Burlington & Northern, the last named being a party to the Chicago, Burlington & Quincy system, which reaches the Missouri river.

From Eau Claire,—Chicago, Milwaukee & St. Paul, Chicago, St. Paul, Minneapolis & Omaha; it is also located on the Wisconsin Central which connects with the above named roads.

The Milwaukee and Omaha are the only roads made defendants in this proceeding which reached Eau Claire. The Missouri Pacific, the Chicago, St. Paul & Kansas City, and the Chicago & Northwestern Railway Companies, admit that they are parties to joint rates on lumber from Eau Claire, and all the defendant roads appear to have joined in fixing the differentials complained of in this case. The Wisconsin Central, of which the Northern Pacific Railroad Company is lessee, is not made a party defendant, but its line now reaches Eau Claire and is carrying lumber to Missouri river points in connection with the Chicago, St. Paul & Kansas City, and also in connection with the Great Northern. The differentials, which are the ground of complaint in this proceeding, were fixed by what is known as the "Bogue Award," which is hereinafter

set forth. Since that award was made other lines of road have become engaged in carrying lumber to Missouri river points; among these are the Chicago & Kansas City, and the Atchison, Topeka & Santa Fé roads from Chicago.

3. As above stated, the sources of supply of the lumber carried by these roads are the forests of Northern Minnesota, Wisconsin and Michigan. The Minnesota timber is manufactured into lumber largely at Minneapolis, and thence transported to market; the Michigan timber is manufactured into lumber in that state and carried by water to Milwaukee, Chicago and other lake ports; the Wisconsin timber is manufactured extensively at Eau Claire, Winona, La Crosse and Oshkosh. Eau Claire and La Crosse are in western Wisconsin, the former about 75 miles by water from the Mississippi river, and the latter on its eastern bank; Winona is in Minnesota, on the western bank of the Mississippi, and Oshkosh is on Lake Winnebago in eastern Wisconsin. Minneapolis is about 100 miles from Eau Claire; Winona about 80 miles, and La Crosse about 106 miles. Eau Claire is situated at the junction of the Eau Claire and Chippewa rivers; the Eau Claire is a branch of the Chippewa, and the latter empties into the Mississippi. Logs are floated down the Eau Claire and Chippewa rivers to Eau Claire, and thence on the Chippewa and Mississippi rivers to Winona and La Crosse, and also to Mississippi river points below. Logs are also floated down the Black river to La Crosse and other Mississippi river towns. A large part of the timber on the Eau Claire and Black rivers can be floated with about equal facility down either stream and taken to Winona and La Crosse on the one hand or Eau Claire on the other. Eau Claire, Winona, La Crosse and Oshkosh are small cities, each having from 18,000 to 20,000 inhabitants, while Minneapolis has about 150,000. These cities are all natural lumber markets; they have large saw mills, and the man-

ufacture, sale and shipment of lumber are conducted on a large scale at Minneapolis, and constitute the principal business of the other places. Eau Claire and all the cities of Wisconsin, Minnesota and the northern peninsula of Michigan, and also Mississippi river points engaged in the manufacture and shipment of lumber to the Missouri river, may be said to be in competition in this business, but the most active competitors of Eau Claire are Winona and La Crosse. The principal distributing points for Eau Claire lumber are, and for 20 or 25 years have been, the Missouri river towns, which are also the principal markets for other shipping points both on the Mississippi river and in the interior. Eau Claire seems to be more rigidly confined than its competitors to the Missouri river market. Since 1864 when the Bogue award was made, southern yellow pine from the states of Georgia, the Carolinas, Southern Missouri, Arkansas and Texas, has come into competition with the white pine from Minnesota, Wisconsin and Michigan. This competition extends north to the southern line of Minnesota, and is strong in Missouri, Kansas, Nebraska and Iowa. The natural tendency of this competition is to reduce the price of the northern pine, and in that way affect transportation rates on the latter, but it does not appear to have an appreciable effect on the relation of rates on lumber between Eau Claire and its immediate competitors.

4. Eau Claire is situated in what is known as the "Chippewa District." In this district, and in the vicinity of Eau Claire, are Chippewa Falls, Badger's Mills and Porter's Mills, at which lumber is manufactured in large quantities. As appears from the "North Western Lumberman," copies of which were introduced in evidence, the aggregate cut of lumber at the points and in the districts named therein, from 1878 to 1890, both inclusive, is shown by the following table:

CUT OF LUMBER.

Year.	Chippewa District, including Eau Claire	Winona.	Black River Dist., including La Crosse.	Minneapolis.	Mississippi River.	Total west of Chicago District.
1878.	154,119,000			130,274,076	480,698,000	1,023,974,000
1879.	243,665,000			149,754,547	688,141,000	1,573,198,000
1880.	360,682,000			195,452,182	923,035,000	2,072,257,000
1881.	380,380,917			234,254,071	1,153,191,308	2,455,315,894
1882.	414,984,735			314,363,166	1,372,219,908	2,981,924,196
1883.	428,662,505	96,475,000	155,413,000	272,709,222	1,290,062,690	3,134,331,798
1884.	454,544,728	90,680,550	187,700,000	300,724,379	1,414,294,695	3,448,646,757
1885.	372,956,872	96,700,000	178,700,000	313,998,166	1,437,889,793	3,169,018,977
1886.	347,462,315				1,326,158,802	3,115,128,167
1887.	325,783,661				1,262,778,448	3,307,700,150
1888.	314,192,782	120,000,000	218,050,561	337,663,301	1,489,798,477	3,758,453,946
1889.	305,415,848	119,500,000	194,835,421	275,855,648	1,343,737,412	3,594,367,960
1890.	304,622,232	145,000,000	242,195,568	343,573,762	1,582,907,021	4,135,130,947
Percentage of increase from 1878 to 1890.	195 per cent.				194 per cent.	237 per cent.
Percentage of increase or decrease from 1884 to 1890.	13 per cent. Decrease.	60 per cent. Increase.	30 per cent. Increase.	14 per cent. Increase.	12 per cent. Increase.	20 per cent. Increase.

5. The Omaha road was built to Eau Claire in 1878 or 1879, and the Milwaukee road about 1882. Prior to the building of these roads, lumber produced at that place was rafted and then floated down the Chippewa and Mississippi to various towns on the latter river, from which it was distributed by rail to market destinations mainly in the west. These towns on the Mississippi have been engaged in this business since 1850 or 1853. After these roads were constructed, Eau Claire entered largely into the business of "piling, drying and manufacturing lumber" and shipping the same to market by rail. About half the cut at Eau Claire in 1890 was shipped in this way, and the other half was rafted to Mississippi river towns; and it is estimated that eighty per cent of the lumber rafted to points below Winona comes from the Chippewa river. Eau Claire appears to be well adapted by location and in other respects for the manufacture and sale of lumber; it has a natural booming ground or place for the safe storage of logs, cheap transportation from the stump to the mills, proximity to the timber and locations suitable for mills and yards. Being situated nearer the pine forests, the sources of timber supply, and at the confluence of two rivers which penetrate those forests, the Eau Claire and Chippewa, it appears to have natural advantages over its neighboring competitors. Logs for Eau Claire mills are subject to a boomage charge at that place for 50 cts. per thousand feet, and they also have to be separated from the mass of logs intended for Mississippi river towns. Chippewa river logs for those towns are driven at a nominal cost *via* Eau Claire to the Beef Slough Boom where that river empties into the Mississippi. These logs are subject to a boomage charge at Beef Slough of 50 cts. per thousand feet, but are not subject to such charge at Eau Claire. In order to float logs on the Mississippi to lumber points on the river, it is necessary to bind them together in rafts, but this expense is not incurred in floating logs to Eau Claire. These rafts have to be towed from Beef Slough to points below, and this occasions an additional expense. The weight of evidence is to the effect that it costs from 40 cts. to 75 cts. more per thousand feet to transport logs to Winona than to Eau Claire. The cost of towage from Beef Slough to Winona is about 12 cts. per thousand feet; to Rock Island, Davenport, Muscatine and Moline, about \$1.23; and to Hannibal, about \$1.95. There is no evidence as to the cost of towage to other lumber towns on the Mississippi. Besides the Chippewa and Black rivers, logs also come down the St. Croix river to the Mississippi. Rafting is not necessary in bringing logs down the Black river to La Crosse. Logs are not damaged in being transported by water in rafts, but sawed lumber is injured by the boring which is necessary in

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forming it into rafts and also by discoloration from water. After lumber is in the raft, the cost of its transportation by water down the Mississippi is less than for the same distance by rail; but, including the rafting and preceding expenses, the testimony is to the effect that lumber can be shipped from Eau Claire by rail direct to Missouri river markets at as little, if not less, cost than it can be floated to Mississippi river points and thence transported by rail to those markets. The railway companies whose lines run from Chicago across the Mississippi to the Missouri river territory naturally desire that lumber be carried by water down the Mississippi to shipping points on that river, and be thence shipped over their roads to the Missouri river markets. The Omaha road is also interested in maintaining high lumber rates at Eau Claire, because of an agreement between that road and the purchasers of its timber lands in northwestern Wisconsin, by which those purchasers bound themselves to ship over its line the timber from such lands, (which is further from the Missouri river markets than Eau Claire timber), on condition of receiving the same rates as might be charged by that road on such shipments from Eau Claire.

6. The rates from Eau Claire and the other shipping points to the Missouri river markets are based on the rate from Chicago, being certain differentials over or under that rate, and the same rate is made from any one of the shipping points to all the Missouri river markets, although the distances to the latter vary materially. The rate from Eau Claire seems to have been originally 2 cents per hundred pounds above the rate from Chicago, but there is no evidence of any considerable shipments at that figure, and it does not appear to have become a permanent and established rate. Prior to April, 1883, but little lumber was shipped by rail from La Crosse and Winona, and no regular lumber rate from those towns was in force until that date, when the rate from Chicago to Kansas City and Omaha appears to have been 15 cents, from La Crosse and Winona 15 cents, and from Eau Claire 17 cents. In March, 1884, there was a rate of 15 cents from La Crosse and Winona to Kansas City, and of 20 cents from Eau Claire to that point, but how long it continued does not clearly appear. The Eau Claire rate seems to have remained nominally at 2 cents above the Chicago rate until a period just prior to the Bogue award, when it was advanced to 4 cents above the Chicago rate. This 2 cent differential appears to have occasioned much dissatisfaction, for while it existed there were frequent fluctuations and general instability in the lumber rates. The situation at that time was described by some of the witnesses as a "rate war."

In the early history of the lumber industry

in this territory the principal points of competition were Chicago on the one hand, and St. Louis, Hannibal and Louisiana on the other. Chicago received its lumber from Michigan by way of the lake, and the other towns received theirs by way of the Mississippi. As railroads were built from time to time into the northern pineries, and numerous towns engaged in the manufacture of lumber, the conflict of rates increased and much uncertainty and demoralization resulted. After several unsuccessful attempts to adjust these differences, the railway companies finally submitted the matter to Mr. George M. Bogue, under an agreement between them to abide by his arbitration. The decision rendered by him, known as the "Bogue Award" was made May 26, 1884, and is as follows:

"Award of the Arbitrator as to the Differentials which shall govern on Lumber to Missouri River Points.

Chicago, May 10, 1884.

"J. W. Midgley, Esq.,

Chairman, etc., — Chicago.

"Dear Sir:—The question as to what difference shall govern in rates from the several shipping points on or east of the Mississippi river on lumber destined to Missouri river points, referred to me for arbitration, has had my careful consideration. All the lines in interest had opportunity to present arguments to me, and nearly all of them availed themselves of the privilege; but a few preferred, apparently, to leave the question in my hands. The arguments submitted are very full, covering, I think, every question that can possibly arise in the consideration of the subject; and it is not strange that arguments prepared from so many different standpoints present many conflicting statements. Nearly all the lines appear before me in the light of special pleadings, each representative seeming to think that the interest of his line is paramount to all others. I have, however, very carefully examined the different items of cost, as submitted in the different arguments; have visited the large manufacturing points on the Chippewa river; interviewed many of the lumber manufacturers; have visited several of the

Mississippi river points, and in fact, have taken every precaution to fully inform myself of the subject, so that I might be able to survey the situation from all sides, firmly believing that no decision which is not tolerably equitable will be strictly observed or long respected.

"I am impressed with the idea that, instead of this question being settled on the basis of the cost of lumber, the question at issue is, 'What rate will enable each line party to this arbitration to place its fair proportion of lumber in the territory under consideration?' for it is fair to assume that no road will see its principal lumber points dismantled and dried up till all efforts to retain their prominence have been exhausted; and, meantime, in the effort to do this, a great deal of money will be wasted. It is no doubt true that the roads reaching Chicago—which is the largest primary grain and stock receiving point in the world—can in their return make rates on lumber without loss, which would net a loss if applied to the roads reaching the pineries direct; and it is doubtless true, also, that the actual cost of the haul from Chicago does not greatly exceed the shorter haul from the Mississippi river; and so long as this is the case, it is natural to expect that the Chicago roads will support the Chicago market.

"This theory must not, however, be carried to the extreme, for if transportation costs anything, it certainly costs something for the haul from Chicago to the Mississippi river; and it is neither just nor politic for any road to claim that the rate from the Mississippi river should be as much or more than the Chicago rate, whatever may be the cost or the price at the two markets.

"While, therefore, it seems easily apparent that lumber can be sold at the Mississippi river at as low, or lower, prices than at Chicago, it cannot be safely argued that the same rate should be made for so much greater distance.

"After a most careful investigation of the subject in all its bearings, and with a keen appreciation of the delicate and difficult duty confided to me, I shall make the following award:

From St. Louis.....	6½	cts.	per cwt.	less than Chicago
" Louisiana, Hannibal and Quincy.....	5½	"	"	"
" Keokuk to Burlington inclusive.....	4½	"	"	"
" Rock Island, Moline, Davenport and Muscatine ..	3½	"	"	"
" Fulton, Clinton, Lyons, Sabula, Comanche and Dubuque.....	2	"	"	"
" McGregor and Prairie du Chien.....	1	"	"	"
" La Crosse and Winona.....	1	"	"	above
" Minneapolis and St. Paul.....	2	"	"	"
" Stillwater.....	4	"	"	"
" Menomonie, (Wis.) Eau Claire and Chippewa Falls.....	6½	"	"	"
" Wausau, Steven's Point, Centralia, Merrill, Grand Rapids and territory in that district, or Central Wisconsin.....	7	"	"	"
" Necedah.....	7	"	"	"

From Merillan	6½	cts. per cwt. above	Chicago
" Oshkosh	5½	" " " "	"
" Fond du Lac	5½	" " " "	"
" Menominee and Marinette, Mich.	7	" " " "	"
" Ft. Howard and Green Bay	6	" " " "	"
" Oconto	6½	" " " "	"
" Muskegon, Ferrysburg, Grand Haven, Grand Rapids and Allegan, Mich.	6½	" " " "	"

"All of which is respectfully submitted.

"George M. Bogue, Arbitrator."

7. To show the construction placed upon this award by railroad authorities and their understanding of the principle upon which it was based, we make the following extracts from the testimony: A. C. Bird, Traffic Manager of the "Milwaukee" road, stated that "the acknowledged principle of the award was that each company was entitled to all the lumber it could carry at reasonable rates—that is, rates that were *relatively fair as between the railroads*, and to put all the manufacturers on any one road on a fair equality with the manufacturers on another road, to the end that each road might thereby receive the benefit of its manufacturing industries;" and, again, that "primarily the object of the Bogue award was to place each line in a position to carry its fair share of the Missouri river lumber, and further to place each manufacturing locality upon an even footing with its competitors. . . . *If Eau Claire could produce lumber cheaper than Winona or La Crosse, then the latter points were to have a lower rate so as to enable them to compete.*"

This award appears to have been observed by the defendant roads since its date, May 26, 1884, except that from February 8 to June 20, 1888, the Milwaukee road had a 4 cent differential in force on shipments from Eau Claire. There have also been from time to time slight changes in the differentials at the lower Mississippi river points. As soon as the 4 cent differential was put in force at Eau Claire, rates were reduced in the same proportion at Chicago, Muscatine, Rock Island, Davenport, Louisiana, St. Louis and Minneapolis. Upon this action by the other roads, the Milwaukee road restored the 6½ cent differential. It is plain that if the rate from Eau Claire should be reduced, a corresponding reduction could be made by the roads leading from other lumber producing and shipping points which would restore the present relation of rates between Eau Claire and such other points.

8. At the time the complaint was filed, July 7, 1890, the Chicago rate to Missouri river points was 10 cents per hundred pounds. It has since been advanced to 15 cents.

The following table shows the rates from the towns named therein to Missouri river points, 4 INTER S.

with the "Bogue differentials" applied to the rates from Chicago of 10 and 15 cents, respectively; also the present rates as announced by the tariffs of the Western Freight Association:

	Rates under Bogue Differentials.		Present Rates as Per Tariffs of Western Frt. Assn.
	Cents.	Cents.	Cents.
Chicago	10	15	15
Milwaukee	10	15	15
Minneapolis	12	17	17
Eau Claire	16½	21½	21½
Winona	11	16	16
La Crosse	11	16	16
Oshkosh	15½	20½	20½
Clinton	8	13	14½
Fulton	8	13	14½
Lyons	8	13	14½
Moline	6½	11½	13
Rock Island	6½	11½	13
Davenport	6½	11½	13
Muscatine	6½	11½	13
Quincy	4½	9½	10½
Burlington	5½	10½	11½
Keokuk	5½	10½	11½
Hannibal	4½	9½	10½
Louisiana	4½	9½	10½
St. Louis	3½	8½	8½

While these rates are based on the Chicago rate, it appears that the building of large saw mills at other points, and the extension of railways into the timber regions of the north-west, have, to a large extent, withdrawn from Chicago the business of supplying lumber to western markets. Chicago, however, does as large a business as heretofore in supplying its local demand and in shipping east. Lumber from Oshkosh is also shipped extensively through Chicago to the east; and it appears that the western shipments from both Chicago and Oshkosh are mainly the surplus remaining after eastern markets have been supplied.

9. A carload of lumber is about 15,000 ft., the weight of which is about 85,000 lbs. The following table, showing the distances by short lines from Eau Claire and other shipping points therein named to Sioux City, Council Bluffs,

St. Joseph and Kansas City, is believed to be correct:

DISTANCES BY SHORT LINES.

To	Sioux City.	Council Bluffs.	St. Joseph.	Kansas City.
From	Miles.	Miles.	Miles.	Miles.
Chicago.....	517	488	479	458
Eau Claire.....	358	457	556	605
Winona.....	328	427	556	560
La Crosse.....	358	445	546	540
Minneapolis.....	268	322	481	581
Oshkosh.....	580	604	655	647
Clinton.....				
Fulton.....	382	355	399	380
Lyons.....				
Moline.....				
Rock Island.....	416	317	319	337
Davenport.....				
Muscatine.....	306	297	262	310
Quincy.....	416	317	207	226
Burlington.....	355	291	273	341
Keokuk.....	348	304	214	218
Hannibal.....	416	317	207	226
Louisiana.....	441	342	232	240
St. Louis.....	511	412	307	277

On the basis of these distances and estimating a carload at 35,000 lbs., the following are the rates per car per mile between said points:

RATE PER CAR PER MILE.

To	Sioux City.	Council Bluffs.	St. Joseph.	Kansas City.
From	Cents.	Cents.	Cents.	Cents.
Chicago.....	10.15	10.75	10.90	11.46
Eau Claire.....	21.01	16.46	12.84	12.47
Winona.....	17.07	13.11	10.07	10.00
La Crosse.....	15.73	12.64	10.25	10.37
Minneapolis.....	22.68	16.43	12.11	11.20
Oshkosh.....	12.37	11.87	10.95	11.08
Clinton.....				
Fulton.....	11.91	12.81	11.09	11.97
Lyons.....				
Moline.....				
Rock Island.....	9.67	12.70	12.61	11.94
Davenport.....				
Muscatine.....	10.16	12.55	12.78	12.98
Quincy.....	7.99	10.48	16.08	14.71
Burlington.....	10.25	12.62	13.45	10.77
Keokuk.....	10.56	12.09	17.25	14.71
Hannibal.....	7.99	10.48	16.08	14.71
Louisiana.....	7.53	9.72	14.33	13.85
St. Louis.....	5.82	7.22	9.69	10.74

The rate per ton per mile is shown by the following table:

RATE PER TON PER MILE.

To	Sioux City.	Council Bluffs.	St. Joseph.	Kansas City.
From	Cents.	Cents.	Cents.	Cents.
Chicago.....	0.58	0.61	0.62	0.65
Eau Claire.....	1.20	0.94	0.73	0.71
Winona.....	0.97	0.74	0.57	0.57
La Crosse.....	0.90	0.72	0.58	0.59
Minneapolis.....	1.29	0.68	0.69	0.64
Oshkosh.....	0.72	0.67	0.62	0.63
Clinton.....				
Fulton.....	0.66	0.73	0.67	0.69
Lyons.....				
Moline.....				
Rock Island.....	0.55	0.72	0.72	0.68
Davenport.....				
Muscatine.....	0.58	0.77	0.78	0.74
Quincy.....	0.45	0.60	0.91	0.84
Burlington.....	0.59	0.72	0.78	0.61
Keokuk.....	0.60	0.69	0.98	0.98
Hannibal.....	0.45	0.59	0.91	0.84
Louisiana.....	0.43	0.55	0.81	0.79
St. Louis.....	0.38	0.41	0.55	0.61

From these tables it appears that the rates per car per mile and per ton per mile are considerably greater from Eau Claire to the four Missouri river points named, than from any of its immediate competitors, except in the instance of the rates per car per mile and per ton per mile from Minneapolis to Sioux City, and that said rates are also greater from Eau Claire than from most of the Mississippi river points.

10. As before stated, Minneapolis, Winona and La Crosse are on the main line of the Milwaukee road from Chicago to Minneapolis, while Eau Claire is 48 miles distant from the main line on a branch road from Wabasha. On an average there is a train and a half each way per day on this branch road, which is about one tenth of the business of the main line. This branch road is comparatively level, with no difficult grades, and the cost of "physical movement" of a train over it is not greater than over the main line. It appears, however, that a full train cannot always be made up on this branch line, and hence engines employed there cannot always be utilized to their full capacity. As a general rule the operating expenses per ton per mile are greater on branch than on main lines. Eau Claire, is, however, on the main line of the Omaha road, and is reached by the Wisconsin Central and other roads hereinbefore named. Oshkosh is also on a branch of the Milwaukee road about 40 or 50 miles from the main line. It may be stated as in the nature of an admission that Mr. E. P. Ripley, Third Vice President of the Milwaukee road, testified that he knew of no "conditions that should make the rate higher from Eau Claire than from Oshkosh except that Eau Claire is nearer the lumber producing territory and perhaps may be said to be able to pay more," and that "there are no dissimilar conditions existing at Winona, La Crosse and Minneapolis as compared with Eau Claire which would justify the charge of a higher rate per car per mile on lumber from Eau Claire to the Missouri river points than from the points first named, except that they are farther from the supply and it costs more to get the logs there."

The general rule that the cost is less per ton per mile on long than on short hauls is subject to exceptions, and one of these is found where the business on the long haul goes over different divisions of a line, necessitating extra handling and switching. The evidence is to the effect that it costs less per ton per mile to haul freight from Burlington, Moline, Rock Island, Davenport, Lyons, Fulton and Clinton to Council Bluffs than from Eau Claire, notwithstanding the shorter distances from the former towns, but the extent of this difference in cost is not stated.

It is shown that more or less empty cars are

hailed to Eau Claire, Winona, La Crosse and other shipping points, but it does not appear that the difference between the number of such cars hauled to Eau Claire and to such other towns is sufficient to constitute an important factor in fixing their relative rates.

11. The average weight of a carload of lumber being about 35,000 lbs., the total freight per carload to Missouri river points, under the Bogue differentials, is about \$75.25 from Eau Claire; from Winona and La Crosse about \$56.00, from Minneapolis about \$59.50, from Chicago about \$52.50 and from Oshkosh about \$71.75, making the differences per carload against Eau Claire in favor of Winona and La Crosse about \$19.25, in favor of Chicago about \$22.75, in favor of Minneapolis about \$15.75 and in favor of Oshkosh about \$3.50. As is shown by the table of distances above given, the mileage from Eau Claire is somewhat greater than from Winona and La Crosse.

Eau Claire, Winona and La Crosse procure their lumber from practically the same region of country, but, as before stated, Eau Claire has natural advantages of location over the latter towns in being nearer the sources of supply. Under the system of differentials in force, timber can be and is hauled from points three or four miles west of Eau Claire across the Eau Claire river to Black river, a distance of seven miles, and carried by the latter to La Crosse. The differentials are important factors in making up the price lists on lumber from the several shipping points, and it is estimated that the difference in rates prevailing at Eau Claire, Winona and La Crosse has practically depreciated Eau Claire lumber, as compared with Winona and La Crosse lumber, about \$300,000.00 each year since the Bogue award went into effect. It further appears that since the system of rates established by that award has been in force many mills in and about Eau Claire have gone out of business or been moved to other points, its population has decreased from about 22,000 to 18,000, and, as shown by the table heretofore given, the cut of lumber in the district including Eau Claire has fallen off from 454,544,723 feet in 1884 to 394,622,292 feet in 1890. From 1878, about the time the first railroad (the Omaha) was built to Eau Claire, the cut of lumber in the Eau Claire district had annually increased up to and including 1884. On the other hand, the cut of lumber at Winona increased from 90,630,550 feet in 1884 to 145,000,000 feet in 1890, and in the district including La Crosse it increased from 187,700,000 feet in 1884 to 248,195,583 feet in 1890. There was also an increase at Minneapolis and several of the points on the Mississippi river. Under the 2 cent differential on shipments from Eau Claire, which prevailed more or less constantly from 4 INTER S.

about the time the Milwaukee road was built to Eau Claire until a short time prior to the Bogue award, the lumber companies at Eau Claire expended very considerable sums in changing their mode of business from rafting and floating their lumber down the Mississippi to piling, drying and remanufacturing it at Eau Claire, and shipping thence by rail. During this period Eau Claire rapidly increased in population and appears to have enjoyed a high degree of prosperity. After the Bogue award was put in effect, the shipment of lumber from Eau Claire over the Omaha road was substantially abandoned. The evidence is to the effect that, under the existing differential, Eau Claire cannot successfully compete with Winona and La Crosse in piling lumber and shipping it by rail to Missouri river markets.

12. About a year previous to the commencement of the present proceeding, a similar proceeding was begun in behalf of Eau Claire, but was subsequently discontinued at the request of the traffic manager of the Milwaukee road and the general freight agents of the Omaha and the Wisconsin Central. These railway officers substantially admitted that the 6½ cent differential was too high, and promised on the withdrawal of that proceeding to have the Eau Claire differential lowered if they could induce the other lumber roads to agree to it. At a meeting of railroad officials held for the consideration of this matter, the representatives of these roads voted for a reduction of the Eau Claire rate, but the proposition did not receive the support of the other roads, and was defeated. Furniture and perhaps some other articles take the same rate to Missouri river points from Eau Claire as from Chicago, but it was stated that this rate on furniture was made to encourage its manufacture at Eau Claire. The Milwaukee managers virtually say that they consider the Eau Claire rate on lumber too high, and that they are willing to reduce it, but allege that they are prevented from doing so by carriers from other lumber producing points interested in sustaining the Bogue differential. Most of the evidence was furnished by the intervenors, and no witness was called by the Milwaukee Company.

CONCLUSIONS.

The case presented by the complainant rests upon the general averment that rates on lumber from the city of Eau Claire to certain specified points on the Missouri river are unreasonable and oppressive in comparison with rates on the same article from Minneapolis, Oshkosh, La Crosse and Winona. The lower rates from Minneapolis and Oshkosh are not made the leading feature of this contention, the more distinct and special ground of complaint being the alleged disparity between Eau Claire and its immediate rivals, La Crosse and Winona. These three towns have considerable

similarity in location, industries, population and distance from western centers of distribution, and they are active competitors with each other in the various lumber markets which they seek to supply. So far as has been made to appear, the west bound rates on this commodity from La Crosse and Winona have at all times been the same; but since May, 1884, when the so-called "Bogue award" went into effect, the rate from Eau Claire has always been greater by five and one half cents per hundred pounds, except for a period of about four months in the spring of 1888 when this excess was only three cents a hundred.

The first circumstance to arrest attention is the attitude of the Chicago, Milwaukee & St. Paul road. This carrier is the only defendant named in the original complaint, and the only one against which relief is now distinctly demanded. The great system of railways operated by this company embraces in its mileage lines which connect each of these three towns with the principal lumber markets on the Missouri river, and its alleged discrimination against Eau Claire is the essential grievance sought to be redressed in this proceeding. In the answers filed by this defendant there is no denial that the lumber rate from Eau Claire is out of proportion to the rate from La Crosse to Winona, nor is there any disclosure of facts concerning the location and business of these rival places, and its own relation to them as a common carrier, which are claimed to justify this disparity. No witness was produced upon the trial at the direct instance of this company and the argument of its counsel at the final hearing was mainly confined to a statement of its position. If this position is correctly apprehended by us, the Milwaukee-road virtually concedes that the existing rates on west bound lumber discriminate against Eau Claire, and that it is entitled to lower charges on this article as compared with the competing towns of La Crosse and Winona. This admission is coupled with a professed willingness to make a substantial reduction in the Eau Claire rate, provided other defendant carriers engaged in transportation of lumber to Missouri river markets, from various producing points on their lines, will not make a corresponding reduction at those places to neutralize the effect of lower charges at Eau Claire. As evidence of its good faith in taking this position, the Milwaukee Company shows that the reduced rate which it conceded to Eau Claire in 1888 was followed by equivalent reductions granted at once to those other towns by rival carriers, which rendered its own action in aid of Eau Claire wholly ineffectual, and claims that it was compelled to restore the present differential rather than continue a contest injurious to itself and of no benefit to that community. In effect, therefore, this defendant acknowl-

edges that Eau Claire is unjustly treated, but alleged in extenuation that it is powerless to afford relief.

A brief examination of the findings discloses the reasons for this anomalous situation. At a number of places on the Mississippi south of La Crosse, the manufacture of lumber is extensively carried on, the timber from which it is produced being mainly obtained along the tributary streams north of that point. Each of these towns is connected with the Missouri river by one or more of the defendant railroads other than the Milwaukee. These towns compete in the same markets with the lumber manufacturing districts nearer the timber supply, and they naturally desire to retain and develop an industry in which they are so largely interested. The railroads extending westerly from those places are equally anxious for the traffic which this industry supplies, and they appear to have some advantage over their northern competitors in shorter distances and greater aggregate tonnage. Any reduction, therefore, in the rate established at Eau Claire, which would tend to increase the output of lumber in that locality at the expense of lumber towns more remote from the forest sources, is deemed by those towns and the carriers identified with them inimical to their common interests, and meets, almost as a matter of course, their combined opposition. Under these circumstances it is obvious that the lumber carrying roads which do not reach Eau Claire, and which are quite independent of the Milwaukee system, *have it in their power* to perpetuate the inequality of which that town complains by making a reduction in rates from other points equal to any reduction which the Milwaukee company may make at Eau Claire. This in substance is the excuse offered by the original defendant for maintaining rates on lumber shipments from Eau Claire which it admits to be relatively unjust, and its request that other carriers acting under the Bogue award be made parties to the proceeding was an indirect invitation to them to answer the accusation of the complainant.

So far as the defense interposed by these parties goes to the merits of the controversy, it rests ultimately upon two propositions. One is, that under the schedule of rates fixed by the Bogue arbitration Eau Claire is now paying less for the transportation in question than the lower Mississippi towns, *in proportion to their respective distances from the common markets*; the other is, that any interference with a system of charges which numerous carriers have so long enforced, and to which the lumber interests of so many towns have become adjusted, would result in a demoralizing "rate war" between these competing roads, and inflict injury upon other localities much greater than any advantage which might accrue to Eau Claire.

The first of these positions is readily seen to be untenable. The doctrine that transportation charges should be in proportion to the distances between different points, *where those distances are greatly dissimilar*, has never been advocated by the railroads or recommended by the Commission. It may be the rule to which tariff construction will sometime approximate, but there is no opportunity for its application under present conditions. To fix the rate for a thousand miles at twice the sum prescribed for half the distance would be most arbitrary and intolerable. It does not follow, therefore, that Eau Claire should pay 21½ cents for a haul of 608 miles to Kansas City, because Keokuk pays 11½ cents for a haul of 218 miles to the same place. The whole practice of rate-making is opposed to the principle of exact proportion, and even in theory there is little reason for its adoption. But distance, nevertheless, is an ever present element in the problem of rates and not unfrequently a controlling consideration. Where all the distances brought into comparison are considerable, and the differences between them relatively small, we should expect substantial similarity in the respective rates, unless other modifying circumstances justified a disparity. It is doubtless true that the present adjustment of charges gives Eau Claire a rate per ton per mile not greater than the rate per ton per mile from some of the shipping points on the lower Mississippi; but how does that fact excuse inequality between Eau Claire and places nearer by, whose competition is much more active and direct? The rates now in force may be relatively just as between Eau Claire and Davenport, and yet seriously unequal as between Eau Claire and Winona. Every locality in a producing region of such wide extent as the one in question is more or less interested in the rates on a common commodity from all other shipping places in that territory, but at the same time each of them is chiefly concerned with the rates from contiguous towns whose situation and facilities are not greatly unlike its own, and which are its actual and constant rivals in the same markets. It is, therefore, no sufficient answer to complainant's charge to show that the rate from Eau Claire is not proportionally higher than the rates from remote lumber towns in Missouri and southern Iowa which only indirectly and casually compete with Eau Claire; nor does any suggestion come from the intervenors in this case which seems to counteract the force of the admission made by Mr. E. P. Ripley, Third Vice President of the Milwaukee road, that "there are no dissimilar conditions existing at Winona, La Crosse and Minneapolis, as compared with Eau Claire, which would justify the charge of a higher rate per car per mile on lumber from Eau Claire to Missouri river points than from the points first named

except that they are farther from the supply, and it costs more to get the logs there." This statement seems to us a confession of injustice to the shippers of Eau Claire, which is neither explained nor excused by any facts bearing legitimately upon the rates in question. The discrimination is admitted, and stands without adequate defense.

If rates from different points of shipment to common terminals could properly be fixed on the basis of mileage, there would be great persuasiveness in the argument of the learned counsel for the Atchison road, who contends that the relief, to which he virtually concedes Eau Claire is entitled, can be effectively secured only by increasing the rates from La Crosse and Winona. But charges for distances greatly dissimilar cannot be adjusted on that principle, and it furnishes no practical rule for establishing rates from different places unequally remote from the same destination. It may be that the rates from these northerly towns are generally too high in comparison with the rates from lower Mississippi points, but that question is not before us and we have no occasion to consider it in this proceeding. The distinct issue now presented is the relative reasonableness of the Eau Claire rate, and that must mainly be determined by comparing it with the rates from neighboring towns, similar in size, situation and volume of competing traffic, and at approximately the same distance from common markets. Bearing in mind, also, that since this investigation was commenced all these rates have been advanced by an addition equal to fifty per cent of the rate upon which the others are based, viz, the ten cent rate from Chicago to the Missouri river, we deem it quite unsuitable to attempt the correction of the inequality complained of by ordering a further advance in the rates from competing points in the vicinity of Eau Claire. For this reason it is unnecessary to discuss the power of the Commission, in dealing with discriminations between different localities, to require an increase in rates deemed relatively preferential.

The further general argument against a reduction of the Eau Claire differential does not persuade us that the present rate should be continued. This impression involves some consideration of the Bogue award as it affects the town making this complaint, and the consequences to be apprehended from lowering the lumber rate at that point. The most noticeable fact in this connection is that the results apparently experienced do not accord with the principle upon which that award avowedly proceeds. Mr. Bogue expressly declares the question to be, "What rate will enable each line party to this arbitration to place its fair proportion of lumber in the territory under consideration?" This appears to

usequivalent to asking, "What rate will enable each town in this territory to place its fair proportion of lumber in the common markets?" for the arbitrator surely did not intend to imply that a "line" which, as compared with some rival road, gets its "fair proportion" of lumber tonnage, taking into account the aggregate shipments from all the towns which it serves, may so discriminate *between those towns* as to stimulate production at one and prevent it at the others. The Milwaukee road, for instance, may have a "fair proportion" of the lumber business under the present schedule, but that circumstance furnishes no reason for favoring La Crosse and Winona at the expense of Eau Claire. It could not have been the design of Mr. Bogue to equalize this traffic between the railroads without regard to the interests of competing localities, and his award does not appear to have been so interpreted by the carriers. What he evidently intended was that lumber should cost the producer approximately the same *when delivered at destination*, whether manufactured at one place or another. Increased charges for transportation were to offset advantages of location or other natural facilities for cheap production. In this way the tonnage was to be fairly divided between the roads, and the prosperity of all these towns secured by enabling them to compete on an even footing in the common markets. But the rate prescribed for Eau Claire hardly permitted a result consistent with this theory. As it seems to us, this town has been placed at a manifest disadvantage. So far from enjoying equal opportunity with its rivals, it appears to have been overweighted with a differential which has excluded it, to a great extent, from the field of competition. A number of its establishments have gone out of business, its industrial development has been checked and its population seriously diminished. While neighboring towns have been prosperous, Eau Claire has not held its own. These adverse consequences may not have been caused by the operation of the Bogue award, but no other explanation is suggested. Obviously, such an outcome was not designed, and the fact that it has occurred indicates an injustice to this locality which ought to be corrected.

We are not to be understood as indorsing the principle which governs that award. On the contrary we consider it radically unsound. That rates should be fixed in inverse proportion to the natural advantages of competing towns, with the view of equalizing "commercial conditions," as they are sometimes described, is a proposition unsupported by law and quite at variance with every consideration of justice. Each community is entitled to the benefits arising from its location and natural conditions, and any exaction of charges unreasonable in themselves or relatively unjust,

by which those benefits are neutralized or impaired, contravenes alike the provisions and the policy of the statute. There is no occasion for enlarging upon this point, as it is only incidentally involved in the discussion. Our chief object in commenting on the Bogue award in this connection is to draw attention to the fact that its declared purpose, so far as Eau Claire is concerned, has not been accomplished. Its effect upon that town has proved oppressive. Even if we could accept the theory upon which it is based, we should still be convinced that the rate fixed for Eau Claire was excessive, because its operation has prevented that town, as it seems to us, from retaining its "fair proportion" of the lumber business. As no such result was intended, the rate which produced it cannot be upheld by the rule adopted.

This criticism of the Eau Claire differential carries with it no general impeachment of Mr. Bogue's decision. On the contrary his award deserves great commendation. It was an intelligent and conscientious judgment, and shows a keen appreciation of the difficulties to be overcome. It is not surprising that a trial of eight years should disclose grounds for complaint on the part of one locality; the real surprise is that a schedule of rates was then devised which has since been observed by so many roads and proved fairly acceptable to so many communities. Its correction at this time in a single particular is no discredit to its general excellence.

We are unable to discover how other localities can reasonably object to a more equitable rate for Eau Claire, and our belief is that apprehensions based on a reduction at that point are not well founded. Relatively lower charges may enable Eau Claire to increase its lumber production, but that this will result in serious injury to competing towns is an unwarranted assumption. Remote places on the lower Mississippi can scarcely be affected by the removal of inequalities between Eau Claire and its neighboring rivals, and the latter can not justly complain because the former is accorded a rate fairly proportioned to their own. The relative volume of lumber shipments from La Crosse and Winona may be somewhat reduced by lower charges at Eau Claire, but any such effect will be attributable to natural advantages of which that town cannot justly be deprived. In short we see no reason why justice to Eau Claire should work injustice to any other community, much less result in the general disturbance of an established industry.

Nor will any such consequences follow a reduction of the Eau Claire differential as would justify other carriers in lowering their rates at competing points, for the purpose of preserving the co-relation of rates created by

the Bogue arbitration. Undoubtedly those roads have it in their power to continue the present disparity, but we do not anticipate, and certainly cannot assume, that they will resort to such inconsiderate and arbitrary action in order to nullify the lawful order of this Commission. Even if we believed otherwise, it would still be our duty to render a decision in accordance with our convictions, and thus place the responsibility upon them, if they should attempt to defeat our ruling.

A further position was taken in this proceeding which is apart from the merits of the principal issue. The roads which were made parties at the request of the original defendant insist that no case has been made against them, and that the Commission has no authority to include them in any order based upon the complaint of Eau Claire. We are disposed to agree with this contention. The sole complaint in this case is discrimination, and Eau Claire is the sole complainant. It is not easy to see how any carrier can "discriminate" against a town which it does not reach, and in whose carrying trade it does not participate. None of the roads so brought into the case run to Eau Claire or engage, even indirectly, in the transportation of lumber from that point. Of what offense *against that town* can they be legally guilty? It would be quite absurd to charge a railroad with giving preference or advantage to a community which it does not serve, and it is equally illogical to say that it can prejudice or discriminate against such a community. All these terms imply comparison, and the basis of comparison is wanting unless the rates compared are made by the same carrier. These views are so fully concurred in by counsel for the respective parties that further argument is unsuitable. They lead to the conclusion that no order can properly be made in this proceeding against the roads which do not run to Eau Claire. This determination must also include the intervening manufacturers and dealers, who have obviously no standing in the case independent of the lines which extend from their respective localities. It does not follow that these roads will be legally free to reduce their rates at other points to correspond with any lower rate which may be fixed for Eau Claire. They have responded to the demand that they should defend the differential complained of, and they have endeavored to justify it by evidence and argument. They have presented their case and will be formally notified of our decision. While they are not legally connected with the rate claimed to be excessive, and not technically subject to an order for its correction, they will have no better right to render it ineffectual than they would have to openly disregard a direction clearly within the scope of our authority.

3 INTER 8.

The attitude of the Omaha road is somewhat peculiar. It was not proceeded against originally, and the Milwaukee Company did not ask to have it made a defendant. It voluntarily sought an opportunity to oppose the complainant, and was made a party on its own application. After engaging in the litigation with considerable vigor, it now earnestly asks to be exempted from any order reducing the Eau Claire differential. These circumstances might well justify us in denying this request, but we incline to the opinion that it should be granted. Measured by the lumber rates which it maintains at other places on its line, the Omaha road cannot be said to discriminate against Eau Claire, nor is it charged with enforcing rates at different points which are relatively unequal. For this reason much embarrassment might result to that company from an order requiring it to reduce its rate at the place in question, and as such an order is not demanded by the complainant or deemed necessary for the relief which it seeks, we are disposed to leave that carrier the option of accepting the Eau Claire rate prescribed for the Milwaukee company or going out of the Eau Claire business. No order, therefore, will be made against the Omaha road at this time, but the case will be held as against that company for such directions as may hereafter seem to be required.

These are the general conclusions arrived at in this proceeding. The conflicting interests which we have investigated furnish material for more extended comment, and the discussion might be greatly prolonged. Minute analysis of the testimony has not been attempted in this opinion and many suggestions must remain unnoticed. In the view we take of the case much of the evidence is immaterial, and enough has been said to indicate the principal reasons which have influenced our decision. We hold that the lumber rates in question discriminate against the shippers of Eau Claire, and that such discrimination is unjust and unlawful. The undue prejudice and disadvantage to which Eau Claire is thus subjected consists generally in the lower relative rates accorded to competing towns, especially those granted to La Crosse and Winona, and the complainant is entitled to an order correcting the inequality between these rival places.

The extent to which the Eau Claire differential should be reduced has been the subject of much deliberation. We have not considered it as an abstract proposition, based on mileage and cost of service, but have endeavored to make proper allowance for other existing circumstances and actual conditions. It is our desire to prescribe a rate which will be reasonably just to Eau Claire, and which the Milwaukee road will be fairly satisfied to accept. No mathematical rule has been followed and

no particular theory applied, but that rate has been selected which, on the whole, best satisfies our judgment. To a certain extent our determination is arbitrary, but equally so is the fixing of a rate in the first instance. As the injustice which Eau Claire suffers arises mainly from the lower rates at La Crosse and Winona, the rate from the former should bear a fixed and permanent relation to the rates from the latter, independent of the Chicago rate upon which all the others are based under the Bogue arbitration. Taking everything into account, we think the rate from Eau Claire should not exceed the rate from La Crosse and Winona by more than 2 cents per hundred pounds, when the latter rate is not over 11 cents per hundred; and that such excess over the present rate of 16 cents from La Crosse and Winona should not be greater than $2\frac{1}{2}$ cents per hundred. Compared with the 16 cent rate now in force at these competing towns the rate thus fixed for Eau Claire will be higher by \$8.75 per car; and the rate per car per mile and per ton per mile to the several Missouri river markets will still be considerably greater from Eau Claire than from La Crosse or Winona. All things considered, however, we believe that an addition of $2\frac{1}{2}$ cents to the present rate from

those places will not be unjust to Eau Claire, and that a greater reduction in the differential now in force against that town should not at this time be required. If the operation of this rate fails to give equitable results, the complainant will not be debarred from making a further application for relief.

For the purposes of the formal order in this case, the sixteen cent rate from La Crosse and Winona will be assumed to continue; in case that rate is materially reduced, a proportionate reduction should be made in the difference or excess hereby allowed in the rate from Eau Claire.

The order of the Commission is that from and after the tenth day of July, 1892, the Chicago, Milwaukee & St. Paul Railway Company cease and desist from charging, collecting, or receiving for or on account of lumber transported by it, in carload quantities, from Eau Claire, Wisconsin, to the various Missouri river points mentioned in this report, any greater sum or amount than two and one half cents per hundred pounds more than shall or may from time to time be charged, collected or received by that company for the like transportation from the towns of La Crosse and Winona aforesaid.

UNITED STATES SUPREME COURT.

CHARLES L. FICKLEN, *Plff. in Err.*,

v.

THE TAXING DISTRICT OF SHELBY COUNTY, Tennessee, ET AL.

[No. 97.]

(See S. C. 145 U. S. 1-28, 36 L. ed. —.)

1. A state Legislature may tax trades, professions and occupations in the absence of inhibition in the state constitution in that regard, and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants of goods situated in another state does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution.
2. A state has power to tax all property having a *status* within its limits, whether employed in interstate commerce or not.
3. A citizen doing a general business at the place of his domicile cannot escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits.
4. Where complainants took out licenses under the Tennessee law of 1881 to do a general commission business, and gave bond to report their commissions during the year, and to pay the required percentage thereon, they cannot, when they apply for similar licenses for the ensuing year, resort to the courts because the municipal authorities refuse to issue such licenses without the payment of the stipulated tax.

Argued March 18, 21, 1892. Decided April 11, 1892.

IN ERROR to the Supreme Court of the state of Tennessee, to review a judgment of that court, reversing a decree of the Chancellor of that state which overruled a demurrer to a bill filed in the Chancery Court of Shelby county, Tennessee, by Ficklen and others against the Taxing District of Shelby county *et al.*, and decreed a perpetual injunction in behalf of Ficklen to restrain the collection of a tax on his business, and which as to Cooper

& Co., adjudged the payment by them of the tax on their business in Tennessee, and granted an injunction as to the remainder of the tax. The judgment of the Supreme Court also sustained the demurrer and dismissed the suit. *Affirmed.*

Statement by Mr. Chief Justice Fuller:

This bill was filed in the Chancery Court of Shelby County, Tennessee, by C. L. Ficklen and Cooper & Company, against the Taxing District of Shelby County and Andrew J. Harris, County Trustee.

The bill alleged that complainants were "commercial agents or merchandise brokers located within the taxing district of Shelby county, where their respective firms rent a room for the purpose of keeping and, at times, exhibiting their samples and carrying on their correspondence with their respective principals; that they use no capital in their business; that they handle or deal in no merchandise, and are neither buyers nor sellers; they only engage in negotiating sales for their respective principals; they do precisely the same business that commercial drummers do, the only difference being that they are stationary, while the commercial drummers are transitory, and go from place to place and secure a temporary room in each town or city in which to exhibit their samples. That each solicits orders for the sales of the merchandise of their respective principals and forwards the same to them, when such orders are filled by shipping the goods direct to the purchasers thereof in the county of Shelby."

It was then averred that all of the sales negotiated by complainant Ficklen were exclusively for non-resident firms, who resided and carried on business in other states than Tennessee, and all the merchandise so sold was in other states than Tennessee, where the sales were made, and was shipped into Tennessee, when the orders were forwarded and filled.

That at least nine tenths of the sales negotiated and effected by complainants Cooper & Company, and at least nine tenths of their gross commissions, were derived from merchandise of non-resident firms or persons, and which merchandise was shipped into Tennessee from other states, after the sales were effected.

That section 9, chapter 96, of the Acts of 1881, of Tennessee, made sub-section 17 of section 22 of the Taxing District Acts, Taxing District Digest, 50, provides:

"Every person or firm dealing in cotton, or any other article whatever, whether as factor, broker, buyer or seller, on commission or otherwise, (\$50) fifty dollars per annum, and in addition, every such person or firm shall be taxed *ad valorem* (10 cts.) ten cents on every one hundred dollars of amount of capital invested or used in such business; *Provided, however*, that if such person or firm carry on the cotton or other business in connection with the grocery or any other business, the capital invested in both shall only be taxed once; but such person or firm must pay the privilege tax for both occupations; *And provided, further*, that if the persons taxed in this subsection have no capital invested, they shall pay 2½ per cent on their gross yearly commissions, 4 INTER S.

charges or compensations for said business, and at the time of taking out their said license, they shall give bond to return said gross commissions, charges or compensation to the trustee at the end of the year, and at the end of the year they shall make return to said trustee accordingly, and pay to him the said 2½ per cent."

Complainants charged that, as they were neither dealers, buyers, nor sellers, but only engaged in negotiating sales for buyers, they were not embraced within the meaning of said section, and further stated that they had each heretofore paid the privilege tax and the income tax, except for the year 1887, and had tendered the privilege tax of \$50 and costs of issuing license for the year 1888 to the trustee, who refused to accept the same unless complainants would also pay the income tax for the year 1887.

From the bill and exhibits attached it appeared that complainants in January, 1887, each paid the sum of \$50 for the use of the taxing district, and executed bonds agreeably to the requirements of the law in that behalf, and received licenses as merchandise brokers within the limits of the district for the year 1887, and that in January, 1888, they tendered, as commercial brokers, to the trustee fifty dollars and twenty-five cents, each, as their privilege tax and charges for the year 1888, which he refused to accept because they refused to pay for the year 1887 two and one half per cent upon their gross commissions derived from their business for the year 1887, although they executed bonds in January, 1887, to report said gross commissions.

Complainants charged that the law in question was in violation of the commerce clause of the Constitution of the United States and also of the Constitution of Tennessee, and prayed as follows:

"That an injunction issue to restrain the defendants, or either of them from instituting any suit or proceeding against them or either of them for the collection of said 2½ per cent tax upon their respective gross commissions from their said business or from issuing any warrant for their arrest for their failure to pay the same for the year 1887, and that defendants, be also restrained from in any way interfering with them in the carrying on their said business for the year 1888; and upon final hearing they, the defendants, be restrained perpetually from collecting from them or either of them said 2½ per cent tax upon their said gross commissions from their said business, and from collecting said privilege tax of \$50, and they pray for general relief, and will ever pray, etc."

To this bill the defendants filed a demurrer, which was overruled by the chancellor, and, the defendants electing to stand by it, a final decree was entered, making the injunction perpetual in behalf of Ficklen as to the entire tax, including the \$50; and, as to Cooper & Company, adjudging that they were legally bound to pay the sum of \$50 and the tax of two and one half per cent on their commissions, to the extent that those commissions were upon sales of property owned by residents of Tennessee, and perpetuating the injunction in all other respects.

From this decree the defendants prayed an

appeal to the Supreme Court of the state, and that court decided that the Act of the Legislature in question was not in violation of the state constitution, and, further, that "inasmuch as it appears from the bill that the complainants at the beginning of the year 1887 applied for and received, respectively, license to carry on the business of commission brokers without qualification, and that they, the complainants, held said license throughout the year 1887, complainants were chargeable with the privilege tax, as fixed by the Act aforesaid, without regard to the amount or character of the business carried on under said licenses or the places of residence of their principals, and that complainants must have reported and paid 2½ per cent on the gross commissions received by them during the year 1887 before they could have become entitled to licenses for the year 1888."

That when at the beginning of the year 1888 the complainants applied for license as merchandise brokers they were rightfully required (1) to report and pay 2½ per cent on their commissions received during 1887, and (2) to pay the fixed charge of \$50 and give bond to report their gross commissions at the end of the year 1888. . . . That the said Act is not, as to these complainants, violative of art. 1, § 8, of the Constitution of the United States, by which the power to regulate commerce between the states is conferred upon the Congress of the United States; and . . . that complainants, having applied for, accepted, and held for and during the year 1887 unqualified license as commission brokers, and having applied for the same unqualified license for the year 1888, cannot question the validity of the said Act as being in conflict with said provisions of the Constitution of the United States, for that the said complainants were not entitled to the said license upon the facts stated in the bill, whether the business actually done and theretofore conducted by them was or was not exonerated from said privilege tax under the said provision of the Federal Constitution." The decree of the chancellor was accordingly reversed, the demurrer sustained, and the bill dismissed, whereupon a writ of error was taken out from this court.

Messrs. W. Hallett Phillips, McDowell and McGowan and Henry Craft, for plaintiffs in error:

An occupation cannot be taxed if, as has frequently been held, the tax is so specialized as to operate as a burden against the introduction and sale of the products of another state or against the citizens of other states. A tax to do business is a tax on the business, to be paid by and out of the business.

Here the operation of the tax is to exact a duty for permission to exercise interstate commerce within the state. It is for the privilege of making contracts within the county of Shelby to sell merchandise, the product of other states, for merchants of such states to residents of Tennessee. It is for the faculty of doing that business, that the license is required.

A law requiring a person to take out a license in order to confer upon him the faculty or privilege of conducting a business is a regulation of that business; and when the law requires the plaintiffs to take out a license in or-

der to acquire the privilege of conducting interstate commerce, that is a regulation of interstate commerce.

Here business between states is conducted by means of agents, called merchandise brokers, and that business cannot be prohibited unless a license is taken from the state in which the agent is located where the business is transacted.

It is the business really which is taxed, and the validity of the tax in nowise depends on the length of time in which the agent or broker was in the state or intended to remain, but upon the character of the business transacted. If the business was interstate it was not subject to any exaction by the state. If a person of the vocation of plaintiffs should come into the state of Tennessee for the sole purpose of getting orders for non-resident merchants for goods the products of other states, we do not suppose it would be claimed that a state would have a right to levy a tax on such person for the privilege. We repeat, does his liability to the tax depend on the length of his stay?

If it does not, then, it seems to us, it must follow that residence of the person doing the business cannot affect the question. It seems to us that the validity of the tax must be determined by the nature of the business taxed and not by the residence of the agent transacting it.

In *Walling v. Michigan*, the fact that the persons soliciting orders or selling, were located in the state, did not affect the question of the effect of the tax which was, as held by the court, a tax for selling goods brought into the state from other states.

116 U. S. 446 (29: 691).

It must be constantly kept in view that the tax is one on the faculty of conducting business. It will not do to say that the Act does not purport to make any regulation or prescribe any rule in the conduct of interstate business. The real inquiry must be, What is the necessary effect of the tax?

In the *State Freight Tax Case* this court says:

"It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid." 82 U. S. 15 Wall. 282 (21: 146).

That the entire business of Ficklen, and almost the entire business of Cooper & Company, constituted interstate commerce, can hardly be denied.

Commerce with foreign nations and among the several states can mean nothing more than intercourse with those nations and among the states for the purpose of trade, be the object of the trade what it may, and this intercourse must include all the means by which it can be carried on.

Corfield v. Coryell, 4 Wash. C. C. 379.

Nor is the tax any less objectionable—the nature of the exaction is not changed—because it does not discriminate in favor of domestic business.

State Freight Tax Case, 82 U. S. 15 Wall. 282 (21: 146.)

In *Leloup v. Port of Mobile* (opinion unanimous) it is said: "We fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exac-

tion of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business."

127 U. S. 645 (32: 813).

It was also observed in answer to the claim that the tax was partially levied on internal commerce: "That fact does not remove the difficulty. The tax affects the whole business without discrimination."

"No state has the right to levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation or on the occupation or business of carrying it on, and the reason is such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

To call the tax in question an occupation tax is only, as *Chief Justice* Marshall says, to vary the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing.

Brown v. Maryland, 25 U. S. 12 Wheat. 419 (6: 679).

The present case falls equally within the reasoning of *Pickard v. Pullman S. Car Co.*, where it was held that the privilege tax on the running and using of sleeping cars, was a tax on transportation, and hence a restriction on commerce.

Blatchford, J., 117 U. S. 49 (29: 790).

The imposition of taxes upon persons residing within the state or belonging to its population and upon avocations and employments pursued therein not directly connected with foreign or interstate commerce, or with some other employment or business, exercised under authority of the Constitution and laws of the United States, is within the power of the state.

The underlying principle in the *Robbins* case, is that it is not competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in such state before they are introduced therein.

Robbins v. Shelby County Tax. Dist. 120 U. S. 490 (30: 695).

The decision, by its terms and by necessity, covered all agencies, on the ground that the state had no right to make it a state privilege to carry on interstate commerce.

In the nature of things, it cannot be that when the business is conducted by one instrumentality the state cannot tax it; but when the same business is conducted by a different agency it is subject to state exaction.

That if the order is solicited by an agent called a drummer, who happens to be temporarily in the state, the state is prohibited to interfere, but that when the order is obtained by a person called a merchandise agent or broker located in the state, the state may interpose.

In both cases the levy of the tax or the requirement of a license is for making negotiations in the conduct of interstate commerce.

This the state cannot do, and for the reason that the negotiation of sales of goods for the purpose of introducing them into the state in

which the negotiation is made, is interstate commerce.

Fargo v. Michigan presented the case of a tax on the gross receipts of transportation which was held void.

The court (Miller, J.,) in that case says: "The proposition that the states can, by way of a tax on business transacted within their limits, regulate such business has often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But when the business so taxed is commerce itself, and is commerce among the states or with foreign nations, the constitutional provision cannot thereby be evaded."

121 U. S. 244 (30: 894).

Philadelphia & S. SS. Co. v. Pennsylvania, 122 U. S. 336 (30:1200), 1 Inters. Com. Rep. 308, a tax on gross receipts of the steamship company was pronounced void. The court said: "Their business as carriers in foreign or interstate commerce cannot be taxed by the state under the plea that they are exercising a franchise."

A similar general principle was announced by *Mr. Justice* Field in *Welton v. Missouri*, when he said: "The general power of the state to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be admitted in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

91 U. S. 279 (23: 349).

"Ordinary occupations," says the court in a later case, "are taxed in various ways, and in most cases legitimately taxed; but we fail to see how a state can tax a business occupation, when it cannot tax the business itself."

"The exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business tax is surely a tax on the business."

It was held that the state could not compel the company to take out a license for the transaction of business in the city, and that a general license tax on the telegraph company affected its entire business, interstate as well as internal.

Leloup v. Port of Mobile, 127 U. S. 640 (32: 811), 2 Inters. Com. Rep. 134.

And so it has been likewise held that a tax "on the gross receipts derived from business done in this state," when levied on a telegraph company, is invalid where the communication by messages is carried either into the state from without or from within the state to another state.

Western U. Teleg. Co. v. Alabama, 132 U. S. 477 (33: 410).

No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it which belongs solely to Congress.

Lyng v. Michigan, 135 U. S. 166 (34: 152), 3 Inters. Com. Rep. 143; *Asher v. Texas*, 128 U. S. 132 (32: 869), 2 Inters. Com. Rep. 241; *Stoutenburgh v. Hennick*, 129 U. S. 143 (32: 637), 2 Inters. Com. Rep. 409.

In *McCall v. California*, the license tax questioned was on railroad agencies.

McCall, the agent, was a resident in California. His business consisted in soliciting passenger traffic over the interstate railroad which he represented.

The court held that the soliciting agency was one of the means used by the company to increase its interstate traffic. "The tax upon it, therefore, was a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

136 U. S. 110 (34: 893), 3 Inters. Com. Rep. 181; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114 (34: 894), 3 Inters. Com. Rep. 178; *Crutcher v. Kentucky*, 141 U. S. 57 (35: 652); *Corson v. Maryland*, 120 U. S. 505 (30: 700); *Fargo v. Michigan*, 121 U. S. 247 (30: 895); *Ouchita Packet Co. v. Aiken*, 121 U. S. 447 (30: 976); *Philadelphia & S. S. Co. v. Pennsylvania*, 123 U. S. 336 (30: 1201); *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 356 (30: 1188); *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 496 (31: 710); *Leloup v. Port of Mobile*, 127 U. S. 646 (32: 313), 2 Inters. Com. Rep. 184; *Asher v. Texas*, 128 U. S. 130 (32: 869), 2 Inters. Com. Rep. 241; *Stoutenburgh v. Hennick*, 129 U. S. 143 (32: 639), 2 Inters. Com. Rep. 409; *Leisy v. Hardin*, 135 U. S. 108 (34: 132), 3 Inters. Com. Rep. 36; *McCall v. California*, 136 U. S. 108 (34: 892), 3 Inters. Com. Rep. 181; *Minnesota v. Barber*, 136 U. S. 827 (34: 460), 3 Inters. Com. Rep. 185; *Brimmer v. Reiman*, 133 U. S. 82 (34: 863), 3 Inters. Com. Rep. 485; *Re Rahrer*, 140 U. S. 554 (35: 574); *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 31 (35: 619), 3 Inters. Com. Rep. 595.

Mr. S. P. Walker, for defendants in error: This court, from the case of *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 (6: 678), to the very recent cases of *Robbins v. Shelby County Tax. Dist.*, 120 U. S. 489 (30: 694), *Leloup v. Port of Mobile*, 127 U. S. 640 (32: 311), 2 Inters. Com. Rep. 134; *Crutcher v. Kentucky*, 141 U. S. 47 (35: 649), has so frequently considered the question involved, that it is not our purpose to attempt an extended review or discussion of the authorities. We shall only, therefore, as briefly as possible, undertake to show that the tax in question is not a regulation of interstate commerce.

The case is not within the principles of the opinion in *Robbins v. Shelby County Tax. Dist.*, 120 U. S. 489 (30: 694).

Robbins was the representative of one non-resident firm, and the case was treated as if his principals had come into the state to make sales, and the state had undertaken to seize and tax them.

The tax was held to be in effect not a tax on
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Robbins but on his principals. Here the reverse is clearly true.

The case is distinguishable from that of *Cook v. Pennsylvania*, 97 U. S. 566 (24: 1015).

In that case the state of Pennsylvania exacted a certain percentage of the proceeds of foreign goods sold at auction, for the privilege of thus selling them; and the tax was held to be a duty on imports, and unconstitutional, under the principles of the leading case of *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 (6: 678).

In this case the state of Tennessee requires that every person pursuing the vocation of merchandise broker shall pay a vocation tax of two and one half per cent of the commissions earned. Can the tax be disputed, on the fact that the goods sold were, at the time of the sale, in another state, and that, as between the principals—buyer and seller—the transaction was one of interstate commerce.

We submit that it is not a tax upon the commerce between the states, but that it is what it purports to be—a tax upon the broker himself, graduated by the amount realized by him from the transaction.

"The property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to taxation, provided always it be within the jurisdiction of the state."

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 206 (29: 163).

"The cars of this company, within the state of Pennsylvania, are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction."

Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18 (35: 613), 3 Inters. Com. Rep. 595.

That case, as did that of *Pullman Palace Car Co. v. Twombly*, 29 Fed. Rep. 658, in its last analysis, turned upon the question of the property having a *situs* within the state seeking to tax it; and the question was determined upon the general principles of law applicable thereto.

The same proposition is announced in *Marye v. Baltimore & O. R. Co.*, 127 U. S. 117 (32: 94).

In the case of *Woodruff v. Parham*, 75 U. S. 8 Wall. 187 (19: 886), this court, Miller, J., delivering the opinion, said:

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York.

It is obvious that if articles brought from one state into another are exempt from taxation, even under the limited circumstances laid down in *Brown v. Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible.

Advancing from the question of the power to tax property to that of taxing vocations, business, franchises, we first notice the case of *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 865 (27: 419).

In that case the municipality imposed an

annual license fee of \$100 on the ferry company, whose boats plied between East St. Louis and St. Louis. The company was chartered by the state of Illinois and domiciled in East St. Louis, the case differing in that respect from the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29: 158). The court said: "The exaction of a license fee is an ordinary exercise of the police power by municipal corporations; and the Act by which this exaction is authorized will not be held to be a regulation of commerce."

The cases of *Asher v. Texas*, 128 U. S. 129 (32:368), 2 Inters. Com. Rep. 241, *Stoutenburgh v. Hennick*, 129 U. S. 148 (32: 637), 2 Inters. Com. Rep. 409, were identical, in all essential particulars, with that of *Robbins v. Shelby County Tax. Dist.*

In the case of *McCall v. California*, 136 U. S. 104 (34:391), 3 Inters. Com. Rep. 186, the tax was, "for every railroad agency, \$25 per quarter."

In commenting upon the case of *Smith v. Alabama*, 124 U. S. 465 (31: 508), the court said: "We (there) held, however, that the statute (there) in question (imposing a license tax on locomotive engineers) was not in its nature a regulation of commerce; that so far as it affected commercial transactions among the states its effect was so indirect, incidental and remote as not to burden or impede such commerce, and that it was not therefore in conflict with the Constitution of the United States or any law of Congress."

Perhaps the doctrine of the state's power to tax and its proper limits are found best stated in *Philadelphia & S. SS. Co. v. Pennsylvania*, 122 U. S. 342 (30: 1203). The court there said: "The tax in the present case is laid upon the gross receipts for transportation as such. They are taxed, not only because they are money, or its value, but because they were received for transportation."

A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything decided in *Brown v. Maryland*; but, on the contrary, that the reasoning in that case is decidedly against it.

The second ground on which the decision referred to was based was that the tax was upon the franchise of the corporation granted to it by the state. We do not think that this can be affirmed in the present case.

Interstate commerce, when carried on by corporations, is entitled to the same protection against state exactions which is given to such commerce when carried on by individuals.

Philadelphia & S. SS. Co. v. Pennsylvania, 122 U. S. 342 (30:1203).

And on page 345 (1204) it was said: "The corporate franchisees, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state."

In accord with the distinctions here laid down, this court, in the case of *Maine v. Grand Trunk R. Co.*, 142 U. S. 217 (35: 994), sustained a statute of the state of Maine as being a valid tax upon the corporate franchise—the law imposing a tax on the franchise according to the amount of the gross receipts in the state, such amount to be ascertained by divid-

ing the total gross receipts by the total number of miles operated, and multiplying that amount by the number of miles operated in the state.

We submit that the judgment of the state court should be affirmed on the principles of the last utterance of this court upon this subject, as contained in *Maine v. Grand Trunk R. Co.*

Mr. Chief Justice Fuller delivered the opinion of the court:

In *Robbins v. Shelby County Tax. Dist.*, 120 U. S. 489 [30: 694], it was held that section 16 of chap. 96 of the laws of Tennessee of 1881, enacting that: "All drummers and all persons not having a regular licensed house of business in the taxing district of 'Shelby county,' offering for sale, or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee, the sum of \$10 per week, or \$25 per month for such privilege, 'so far as it applied to persons soliciting the sale of goods on behalf of individuals or firms doing business in another state, was a regulation of commerce among the states and violated the provision of the Constitution of the United States which grants to Congress the power to make such regulations. The question involved was stated by *Mr. Justice Bradley*, who delivered the opinion of the court, to be: "Whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in said state before they are introduced therein;" and it was decided that it was not. At the same time it was conceded that commerce among the states might be legitimately incidentally affected by state laws, when they, among other things, provided for "the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States." And it was further stated: "To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because, the State is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other states, it acts of its own free will, and is itself the author of such discrimination. As before said, the state may tax its own internal commerce; but that does not give it any right to tax interstate commerce."

In the case at bar the complainants were established and did business in the taxing district as general merchandise brokers, and were taxed as such under section nine of chapter ninety-six of the Tennessee laws of 1881, which embraced a different subject-matter from section sixteen of that chapter. For the year 1887 they paid the \$50 tax charged, gave bond to report their gross commissions at the end of the year, and thereupon received, and throughout the entire year held, a general and unrestricted license to do business as such brokers. They were thereby authorized to do any and all kinds of commission business and became liable to pay the privilege tax in question

which was fixed in part and in part graduated according to the amount of capital invested in the business, or if no capital were invested, by the amount of commissions received. Although their principals happened during 1887, as to the one party, to be wholly non-resident, and as to the other, largely such, this fact might have been otherwise then and afterwards, as their business was not confined to transactions for non-residents.

In the case of Robbins the tax was held, in effect, not to be a tax on Robbins, but on his principals, while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom.

No doubt can be entertained of the right of a state Legislature to tax trades, professions, and occupations, in the absence of inhibition in the state constitution in that regard, and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants of goods situated in another state does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution.

The language of the court in *Lyng v. Michigan*, 135 U. S. 161, 166 [34: 150, 153], 3 Inters. Com. Rep. 143, was: "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether, by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." But here the tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business, and complainants voluntarily subjected themselves thereto in order to do a general business.

In *McCall v. California*, 136 U. S. 104 [34: 392], 3 Inters. Com. Rep. 181, it was held that: "An agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, is an agency engaged in interstate commerce; and a license tax imposed upon the agent for the privilege of doing business in San Francisco is a tax upon interstate commerce, and is unconstitutional." This was because the business of the agency was carried on with the purpose to assist in increasing the amount of passenger traffic over the road, and was therefore a part of the commerce of the road, and hence of interstate commerce.

In *Philadelphia S. S. Co. v. Pennsylvania*, 123 U. S. 326, 345 [80:1200, 1204], Mr. Justice Bradley, speaking for the court, said: "The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be,

taken not to interfere with or hamper directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government." And this of course is equally true of the property, the business, and the income of individual citizens of a state. It is well settled that a state has power to tax all property having a situs within its limits, whether employed in interstate commerce or not. It is not taxed because it is so employed, but because it is within the territory and jurisdiction of the state. *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18 [35: 613], 3 Inters. Com. Rep. 595; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 [29:158].

And it has been often laid down that the property of corporations holding their franchises from the government of the United States is not exempt from taxation by the state of its situs. *Union Pac. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5 [21:787]; *Thomson v. Union Pac. R. Co.* 76 U. S. 9 Wall. 579 [19:792]; *Western U. Teleg. Co. v. Massachusetts*, 125 U. S. 580 [31:790].

So in *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 865, 874 [27:419, 423], where an annual license fee was imposed on the ferry company by the city of East St. Louis, the company having been chartered by the State of Illinois and being domiciled in East St. Louis, its boats plying between that place and St. Louis, Missouri, the court said: "The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a state expressly grants to an incorporated city, as in this case, the power 'to license, tax, and regulate ferries,' the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different states, and the Act by which this exaction is authorized will not be held to be a regulation of commerce."

Again, in *Maine v. Grand Trunk R. Co.*, 142 U. S. 217 [35:994], we decided that a state statute which required every corporation, person, or association operating a railroad within the state to pay an annual tax for the privilege of exercising its franchise therein, to be determined by the amount of its gross transportation receipts, and further provided that when applied to a railroad lying partly within and partly without a state, or to one operated as a part of a line or system extending beyond the state, the tax should be equal to the proportion of the gross receipts in the state, to be ascertained in the manner provided by the statute, did not conflict with the Constitution of the United States. It was held that the reference by the statute to the transportation receipts and to a certain percentage of the same, in determining the amount of the excise tax, was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied. In this respect the tax was unlike that levied in *Philadelphia & S. S. Co. v. Pennsylvania*, where the specific gross receipts for transportation were taxed as such, taxed "not only because they are money, or its value, but because they were received for transportation."

Since a railroad company engaged in interstate commerce is liable to pay an excise tax

according to the value of the business done in the state, ascertained as above stated, it is difficult to see why a citizen doing a general business at the place of his domicile should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits. This tax is not on the goods or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce.

We presume it would not be doubted that if the complainants had been taxed on capital invested in the business, such taxation would not have been obnoxious to constitutional objection, but because they had no capital invested, the tax was ascertained by reference to the amount of their commissions, which when received were no less their property than their capital would have been. We agree with the Supreme Court of the state that the complainants having taken out licenses under the law in question to do a general commission business, and having given bond to report their commissions during the year, and to pay the required percentage thereon, could not, when they applied for similar licenses for the ensuing year, resort to the courts because the municipal authorities refused to issue such licenses without the payment of the stipulated tax. What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record.

The judgment of the Supreme Court is affirmed.

Mr. Justice Harlan dissenting:

It seems to me that the opinion and judgment in this case are not in harmony with numerous decisions of this court. I do not assume that the court intends to modify or overrule any of those cases, because no such purpose is expressed. And yet I feel sure that the present decision will be cited as having that effect.

In *Robbins v. Shelby County Tax. Dist.*, 120 U. S. 489, 496, 497 [30: 694, 697], it was held that Tennessee could not require, even from its own people, a drummer's license for soliciting the sale of goods there on behalf of individuals or firms doing business in another state. This rule, the court said, "will only prevent the levy of a tax, or the requirement of a license, for making negotiations for the conduct of interstate commerce, and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the state Legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country

are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them." Again: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of *The State Freight Tax*, 82 U. S. 15 Wall. 282 [21: 146]. The negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate, commerce, both of which are subject to regulation by Congress alone."

In *Philadelphia & S. S. Co. v. Pennsylvania*, 122 U. S. 836 [30: 1200], a tax, imposed in Pennsylvania, upon the gross receipts of a steamship company, incorporated under the laws of that state, such gross receipts being derived from the transportation of persons and property by sea, between different states, and to and from foreign countries, was held to be a regulation of interstate and foreign commerce, and, therefore, unconstitutional.

In *Leloup v. Port of Mobile*, 127 U. S. 640, 648 [32:311, 314], 2 Inters. Com. Rep. 184, an ordinance of that port requiring a license tax from telegraph companies was held to be invalid in its application to a company, having a place of business in Mobile, and being engaged there in the occupation of transmitting messages from and to points in Alabama to and from points in other states. This court, overruling *Osborne v. Mobile*, 83 U. S. 16 Wall. 479 [21: 470], said that "no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In *Asher v. Texas*, 128 U. S. 129 [32: 368], 2 Inters. Com. Rep. 241, a state law exacting a license tax to enable a person, within the state, to solicit orders and make sales there for a person residing in another state, was held to be repugnant to the commerce clause of the Constitution.

In *Stoutenburgh v. Hennick*, 129 U. S. 141, 147 [32:637, 639], 2 Inters. Com. Rep. 409, the question was whether an Act passed, in 1871, by the legislative assembly of the District of Columbia, requiring commercial agents, engaged in offering merchandise by sample, to take out and pay for a license, was invalid when applied to persons soliciting in the district the sale of goods on behalf of individuals or firms doing business outside of the district. Referring to the particular clause of the Act, upon which it was attempted to sustain the case, this court said:

"This provision was manifestly regarded as a regulation of a purely municipal character, as is perfectly obvious, upon the principle of *noctitur a sociis*, if the clause be taken as it should be, in connection with the other clauses and parts of that Act. But it is indistinguishable from that held void in *Robbins v. Shelby County Tax. Dist.*, and *Asher v. Texas*, 128 U. S. 129 [32:368], 2 Inters. Com. Rep. 241, as being a regulation of interstate commerce, so far as applicable to persons soliciting, as Hennick was, the sale of goods on behalf of individuals or firms doing business outside of the District."

In *McCall v. California*, 136 U. S. 104 [34:392], 3 Inters. Com. Rep. 181, it was held that a license tax imposed by an ordinance enacted by the board of supervisors of the city and county of San Francisco, upon an agent engaged at that city, in the business of soliciting travel for a line of railroad between Chicago and New York, was invalid under the commerce clause of the Constitution.

In *Norfolk W. R. Co. v. Pennsylvania*, 136 U. S. 114 [34:394], 3 Inters. Com. Rep. 178, a tax imposed by Pennsylvania upon a railroad company, incorporated in another state, and whose line extended from Philadelphia into other states, for the privilege of keeping an office in Pennsylvania, to be used by its officers, stockholders, agents, and employes, was a tax upon commerce among the states, and therefore void.

In *Crutcher v. Kentucky*, 141 U. S. 47 [35:649], the court adjudged to be void an Act of the Legislature of Kentucky, so far as it forbade foreign express companies from carrying on business between points in that state and points in other states, without first obtaining a license from the state.

The principles announced in these cases, if fairly applied to the present case, ought, in my judgment, to have led to a conclusion different from that reached by the court. Ficklen took out a license as merchandise broker and gave bond to made a return of the gross commissions earned by him. His commissions in 1887 were wholly derived from interstate business, that is, from mere orders taken in Tennessee for goods in other states, to be shipped into that state, when the orders were forwarded and filled. He was denied a license for 1888 unless he first paid two and a half per cent on

his gross commissions. And the court holds that it was consistent with the Constitution of the United States for the local authorities of the taxing district of Shelby county to make it a condition precedent to Ficklen's right to a license for 1888 that he should pay the required per cent of the gross commissions earned by him in 1887 in interstate business. This is a very clever device to enable the taxing district of Shelby county to sustain its government by taxation upon interstate commerce. If the ordinance in question had, in express terms, made the granting of a license as merchandise broker depend upon the payment by the applicant of a given per cent upon his earnings in the previous year, in interstate business, the court, I apprehend, would not have hesitated to pronounce it unconstitutional. But, it seems, that if the local authorities are discreet enough not to indicate in the ordinances under which they act their purpose to tax interstate business, they may successfully evade a constitutional provision designed to relieve commerce among the states from direct local burdens. The bond which Ficklen gave should not, in my opinion, be construed as embracing his commissions earned in business upon which no tax can be constitutionally imposed by a state.

The result of the present decision is, that while under *Robbins v. Shelby County Tax. Dist.*, a license tax may not be imposed in Tennessee upon drummers for soliciting there the sale of goods to be brought from other states; while under *Leloup v. Port of Mobile*, a local license tax cannot be imposed in respect to telegrams between points in different states; and while under *Stoutenburgh v. Hennick*, commercial agents cannot be taxed in the District of Columbia for soliciting there the sale of goods to be brought into the District from one of the states; the taxing district of Shelby County may require, as a condition of granting a license as merchandise broker, that the applicant shall pay a license fee, and, in addition, 2½ per cent upon the gross commissions received, not only in the business transacted by him that is wholly domestic, but in that which is wholly interstate.

For these reasons I am constrained to dissent from the opinion and judgment of the court in this case.

THE LEHIGH VALLEY RAILROAD COMPANY, *Plff. in Err.*,

v.

THE COMMONWEALTH OF PENNSYLVANIA.

[No. 275.]

(See S. C. 145 U. S. 192, 36 L. ed. 672.)

1. A railroad corporation of a state is liable to taxation by such state upon its receipts, for the mileage within the state, from transportation by

continuous carriage from a point in the state to another point in the state, but over a line which, in its course between those points passes out of

NOTE.—As to power of Congress to regulate commerce, see notes to *Gibbons v. Ogden*, U. S. Bk. 6 L. ed. 22; and *Brown v. Maryland*, U. S. Bk. 6 L. ed. 678. As to tonnage tax, see note to *Inman SS. Co. v. Tinker*, U. S. Bk. 24 L. ed. 118.

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As to interstate commerce; regulation of; power of Congress; how far exclusive, see note to *Gloucester Ferry Co. v. Pennsylvania*, U. S. Bk. 29 L. ed. 158.

- the state into another state and back again into the State.
2. The grant to Congress of the power to regulate commerce among the states does not embrace that commerce which is completely internal or between different parts of the same state.

3. In the carriage of freight and passengers between two points in one state, the mere passage over soil of another state, does not render that business foreign, which is otherwise domestic.

Argued April 5, 1892. Decided May 2, 1892.

IN ERROR to the Supreme Court of the state of Pennsylvania, to review a judgment in favor of the Commonwealth of Pennsylvania, against the Lehigh Valley Railroad Company for the recovery of taxes upon amounts received by said Company for transportation in that state. *Affirmed.*

Statement by *Mr. Chief Justice Fuller*:

April 28, 1887, the auditor-general of Pennsylvania settled an account with the Lehigh Valley Railroad Company, in accordance with the Act of June 7, 1879, of that Commonwealth, for its taxes on gross receipts for the six months ending December 31, 1886, as follows:

Gross receipts.....	\$4,798,938 54
Proportion taxable in Pennsylvania, $\frac{1}{10}$	8,835,926 60
Tax at rate of eight tenths of one per cent.....	30,642 88

Due Commonwealth..... \$30,642 88"

This settlement was approved by the state treasurer June 3, 1887. The Lehigh Company thereupon prayed an appeal to the Court of Common Pleas of Dauphin county, Pennsylvania, where a declaration and copy of account were filed and the case tried under stipulation by the court without a jury. Upon the trial it appeared from the affidavit of the treasurer of the Lehigh Company, given November 10, 1887, that he had made to the auditor-general for the six months ending December 31, 1886, the report of gross receipts upon which the account for taxes had been settled, and further that "the main line of railroad operated by the Lehigh Valley Railroad Company extends from Perth Amboy, in the state of New Jersey, to Wilkesbarre, in the state of Pennsylvania, with numerous branches in Pennsylvania and New Jersey. The company has also running arrangements with other companies whereby it runs its own trains, both passenger and freight, on a through line from Jersey City, New Jersey, to Buffalo, New York. A very large portion of its business consists of the transportation of freight, passengers, etc., from points in Pennsylvania, to points in other states or from points in other states to points in Pennsylvania, or from points in other states to points in other states, passing through the state of Pennsylvania, about one half of its entire receipts being derived from the transportation of anthracite coal from Pennsylvania into other states."

The affidavit gave a detailed statement showing the several classes of transportation from which the receipts returned were derived, being from transportation of coal; freight other than coal; passengers, express, and mail; distributed as in a summary, with which the

statement concluded, and which was as follows:

1. Total receipts from transportation from points in Pennsylvania to other points in Pennsylvania without passing out of the state.....	\$1,853,441 50
2. Total receipts from transportation by continuous carriage from points in Pennsylvania to other points in Pennsylvania, but over lines partly in Pennsylvania—that is to say, passing out of Pennsylvania into other states and back again into Pennsylvania in course of transportation.....	207,660 42
3. Total receipts from transportation by continuous carriage from points in a foreign state to other points in the same state passing through the state of Pennsylvania.....	50,494 25
4. Total receipts from transportation by continuous carriage from points in other states to points in Pennsylvania.....	292,422 00
5. Total receipts from transportation by continuous carriage from points in Pennsylvania to points in other states.....	2,569,514 58
6. Total receipts from transportation by continuous carriage from points in a foreign state, passing through Pennsylvania, and ending in a third state.....	267,868 59
7. Total receipts from transportation from points in foreign states to other points in foreign states not touching Pennsylvania.....	57,532 19
Total receipts.....	\$4,798,938 58"

In another affidavit, under date January 20, 1888, the same official stated: "Wherever in the said statement of November tenth, 1887, I used the term 'continuous transportation' or 'continuous carriage,' the freight or passengers from the transportation of which the receipts were derived were carried between the points mentioned for a single sum or charge and upon a single way-bill or ticket, and were, when taken upon the cars of this company, destined

to be carried and were actually carried from point to point as in said statement set forth. The Lehigh Valley Railroad Company has no railroad of its own reaching the city of Philadelphia, but transports coal and other merchandise, and sometimes passengers, from Mauch Chunk and other points in Pennsylvania over its own line to Phillipsburg, in the state of New Jersey, from which point it is carried upon the Belvidere & Delaware railroad to Trenton, and thence by the Pennsylvania Railroad lines to the city of Philadelphia. So far as the Lehigh Valley Railroad line is concerned the transportation is from Mauch Chunk, or the other points in Pennsylvania, to Phillipsburg, in New Jersey; but by arrangements between this company and the corporations owning the other roads the transportation is continuous from Mauch Chunk and the other points in Pennsylvania to Philadelphia. The receipts mentioned in my statement of November tenth in the second paragraph in each instance under the respective heads of 'coal,' 'freight other than coal,' and 'passenger, express, and mail,' and also in the second item in the summary, were derived in the manner above explained. Some of the trains, and in many instances the same cars, which carried the freight and passengers indicated between the points in Pennsylvania and the city of Philadelphia carried also freight and passengers destined and carried from points in Pennsylvania to points in New Jersey and New York, and *vice versa*. The various items of receipts shown in my statement of November tenth and classified in the third paragraph of the summary as 'receipts from transportation by continuous carriage from points in a foreign state to other points in the same state, passing through the state of Pennsylvania,' were derived from transportation of freight and passengers billed or ticketed from the city of New York to other points in the state of New York, and *vice versa*. The same trains and the same cars which carried the said freight and passengers carried also freight and passengers destined and carried from points in Pennsylvania to points in other states and from points in other states to points in Pennsylvania."

It was admitted that the Lehigh Company was originally incorporated by the State of Pennsylvania, and that it owned and operated as part of its main line about sixty-six miles of railroad in New Jersey.

The fraction of the entire gross receipts given in the settlement represented the Lehigh Company's mileage within the state.

The Court of Common Pleas found the facts, and held, for the reasons given in *Com. v. Delaware & H. Canal Co.*, (Pa.) 21 W. N. C. 406, and *Com. v. New York, L. R. & W. R. Co.*, (Pa.) 21 W. N. C. 410, that the Commonwealth could only recover taxes upon the two items of \$1,358,441.50, and \$207,660.42 (classes one and two), being the amount received for transportation between points both of which were in the state; and directed judgment accordingly, which, exceptions thereto having been overruled, was thereupon entered. The case was carried by writ of error to the Supreme Court of Pennsylvania, and the judgment affirmed upon the opinion of the court

below. A writ of error was then sued out from this court.

The company, conceding its liability to taxation in respect of the receipts contained in class one, questions by its assignment of errors the validity of the tax as to the receipts in class two.

Mr. M. E. Olmsted, for plaintiff in error:

The seventh section of the Pennsylvania revenue statute of June 7, 1879, which has since been repealed, was three times before this court, and, in each instance, condemned as unconstitutional in so far as it imposed a tax upon receipts derived from interstate commerce.

Philadelphia & S. M. S. Co. v. Pennsylvania, 122 U. S. 326 (80: 1200); *Western U. Tele. Co. v. Pennsylvania*, 128 U. S. 89 (32: 846), 2 Inters. Com. Rep. 241; *Western U. Tele. Co. v. Texas*, 105 U. S. 460 (26: 1067); *Ratterman v. Western U. Tele. Co.* 127 U. S. 411 (32: 229), 2 Inters. Com. Rep. 59.

In *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (35: 618), 8 Inters. Com. Rep. 565, the unconstitutionality of this tax as applied to receipts derived from the transportation of passengers interstate, by rail, in Pullman cars was conceded.

Following upon these decisions, the Legislature of Pennsylvania passed a new Revenue Act, approved June 1, 1889 (Laws of Pennsylvania, 420), repealing the seventh section of the Act of June 7, 1879, under which the tax in controversy is claimed; and, in its twenty-third section re-enacting the tax and confining it specifically to receipts "received from passengers and freight traffic transported wholly within this state." In repealing the former Act, however, there was reserved to the Commonwealth the right to collect any taxes accrued under the Act of 1879. The decision of this court will, therefore, not affect the present revenue system of the Commonwealth, but only the taxes of this one company upon its receipts from a single source prior to the passage of the Act of June 1, 1889.

So far as the Lehigh Valley Railroad Company was concerned, the transportation began in Pennsylvania and ended in New Jersey.

So far as the Pennsylvania Railroad Company was concerned, the transportation began in New Jersey and by it was conducted for more than fifty miles in that state, and finally ended in Pennsylvania.

This transportation was interstate commerce; transportation is itself commerce.

Passenger Cases, 48 U. S. 7 How. 283 (12: 702); *State Freight Tax Cases*, 82 U. S. 15 Wall. 232 (21: 146); *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284 (21: 164); *Fargo v. Michigan*, 121 U. S. 230 (30: 888); *Philadelphia & S. M. S. Co. v. Pennsylvania*, 122 U. S. 326 (80: 1200); *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (80: 244).

This court has always and invariably proceeded upon the theory that transportation is commerce; and, wherever the transportation involved has been of an interstate or international character, its regulation by the states has been invariably prohibited.

Ex parte Koehler (Or.) 30 Am. & Eng. R.

Cas. 71; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 (6: 23); *State Tonnage Tax Cases*, 79 U. S. 12 Wall. 204 (20: 370); *Hall v. DeCuir*, 95 U. S. 485 (24: 547); *Fargo v. Michigan*, 121 U. S. 230 (30: 888); *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30: 244); *Coe v. Errol*, 116 U. S. 517 (29: 715).

The only commerce which a state has any authority to regulate is that which is wholly within her own borders.

Lord v. Goodall N. & P. SS. Co. 102 U. S. 541 (26: 224); *Veazie v. Moor*, 55 U. S. 14 How. 568 (14: 546); *Pacific Coast SS. Co. v. Railroad Comrs.* 18 Fed. Rep. 10.

The regulation here attempted, by means of taxation, is just as much prohibited as any other.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (29: 158); *Sternberger v. Cape Fear & Y. R. Co.* 29 S. C. 510, 35 Am. & Eng. R. Cas. 693; *New Orleans Cotton Exchange v. Cincinnati, N. O. & T. P. R. Co.* 2 Inters. Com. Rep. 289.

Commerce between points in the same state, but which, in being carried from one place the other, passes through another state, is interstate commerce.

State v. Chicago, St. P. M. & O. R. Co. 40 Minn. 267; *Lord v. Goodall N. & P. SS. Co.* 102 U. S. 541 (26: 224).

Messrs. James A. Stranahan, Deputy Atty-Gen., of Pennsylvania, and W. U. Hensel, Atty-Gen., of same state, for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

The Lehigh Valley Railroad Company is a Pennsylvania corporation, which owns and operates an extensive system of railroads in that state, but has no line of its own to Philadelphia. For the traffic from Mauch Chunk to Philadelphia, it makes use of two routes, one by the way of the Philadelphia & Reading road, being wholly within the State, and the other by its own line connecting with the lines of the Pennsylvania Railroad at Phillipsburg, New Jersey, and thence *via* Trenton, in that state, to Philadelphia. Detailed reports of its receipts show that the passenger traffic of the Lehigh Company to Philadelphia from Mauch Chunk is almost wholly taken over the Philadelphia & Reading, while its coal and general freight traffic reaches Philadelphia by the other road. Phillipsburg, New Jersey, lies across the Delaware river, opposite Easton, Pennsylvania. By the running arrangements between the Lehigh and Pennsylvania companies, the transportation of through freight and passengers is continuous from Mauch Chunk to Philadelphia.

The receipts named in class two are confined to that part of the transportation from Mauch Chunk to Phillipsburg, and the taxation to the mileage wholly within the state of Pennsylvania; and the question is whether this taxation in respect of such receipts from freight and passengers carried by continuous transportation to Philadelphia from Mauch Chunk by way of Trenton, New Jersey, amounts to a regulation of interstate commerce.

The conflict between the commercial regulations of the several states was destructive to

their harmony and fatal to their commercial interests abroad, and this was the mischief intended to be obviated by the grant to the Congress of the power to regulate commerce with foreign nations and among the states. But, as was said by *Chief Justice Marshall*, the words of the grant do not embrace that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to nor affect other states. "Commerce," observed the Chief Justice, "undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." 22 U. S. 9 Wheat. 189 [6: 68]. This is no more than an expansion of its simplest signification, that of an exchange of goods, the bringing of them from the seller to the buyer, however vast the range now comprehended by the term in the progress of society.

Taxation is undoubtedly one of the forms of regulation, but the power of each state to tax its own internal commerce, and the franchisees, property, or business of its own corporations engaged in such commerce, has always been recognized, and the particular mode of taxation in this instance is conceded to be in itself not open to objection. And while interstate commerce cannot be regulated by a state by the laying of taxes thereon, in any form, yet whenever the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising upon commerce solely within its own territory. *Ratterman v. Western U. Tel. Co.*, 127 U. S. 411, 424 [32: 229, 232], 2 Inters. Com. Rep. 59.

The tax under consideration here was determined in respect of receipts for the proportion of the transportation within the state, but the contention is that this could not be done because the transportation was an entire thing, and in its course passed through another state than that of the origin and destination of the particular freight and passengers. There was no breaking of bulk or transfer of passengers in New Jersey. The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same state, made interstate because in its accomplishment some portion of another state may be traversed? Is the transmission of freight or messages between two places in the same state made interstate business by the deviation of the railroad or telegraph line on to the soil of another state?

If it has happened that through engineering difficulties, as the interposition of a mountain or a river, the line is deflected so as to cross the boundary and run for the time being in another state than that of its principal location, does such detour in itself impress an external character on internal intercourse? For example, the Nashville, Chattanooga & St. Louis Railway Company is a corporation cre-

ated under the laws of Tennessee and through freight and passengers transported from Nashville to Chattanooga pass over a few miles in Alabama and perhaps two miles in Georgia, but we had not supposed that that circumstance would render the taxation of that company, in respect of such business, by the State of Tennessee invalid.

So as to the traffic of the Erie railway between the cities of New York and Buffalo, we do not understand that that company escapes taxation in respect of that part of its business because some miles of its road are in Pennsylvania, while the New York Central is taxed as to its business between the same places, because its rails are wholly within the state of New York.

It should be remembered that the question does not arise as to the power of any other state than the state of the termini, nor as to taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere, but it is simply whether, in the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state renders that business foreign, which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk.

Nor is the contrary conclusion supported by *Coe v. Errol*, 116 U. S. 517 [29: 715], and *Lord v. Goodall, N. & P. SS. Co.*, 102 U. S. 541 [26: 224], much relied on by plaintiff in error.

In *Coe v. Errol*, logs cut in Maine and detained at Errol, New Hampshire, on their way down the Androscoggin river to Lewiston, Maine, were held by the Supreme Court of New Hampshire not taxable at Errol, while logs cut in New Hampshire and hauled down to that town for similar transportation were held taxable, and this court sustained the judgment of the state court in reference to the New Hampshire logs, upon the ground that they were still part of the general mass of property of the state, and had not commenced "their final movement for transportation from the state of their origin to that of their destination." The Maine logs had never been part of the property of New Hampshire, and had no *situs* there. They were therefore not taxable, though whether they were or not was not drawn into decision. These logs were also in course of transportation from the place of cutting to another place likewise in Maine, and as that transportation required them to arrive and remain for a time in New Hampshire, the predicament in that regard was referred to in the opinion by way of argument, as being such that New Hampshire could not impose a burden on that transportation. But the right of Maine to tax them was not disputed.

The single question in *Lord v. Goodall, N. & P. SS. Co.*, was, as stated by Mr. Chief Justice Waite, delivering the opinion of the court, whether Congress had power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and

places in the same state, it being conceded that the voyages of the steamship in respect of whose loss the question arose were always ocean voyages. The argument was that "while on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the state of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such, she and the business in which she was engaged was subject to the regulating power of Congress."

But it was unnecessary to invoke the power to regulate commerce in order to find authority for the law in question. As stated by Mr. Justice Bradley in *Re Garnett*, 141 U. S. 1, 12 [35: 631, 633]: "The Act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is co-extensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends." In that case the Limited Liability Act was applied to a steamer engaged in commerce on the Savannah river.

In *Ex parte Boyer*, 109 U. S. 629 [27: 1056], it was decided that the admiralty jurisdiction extended to a steam canal boat, in case of collision between her and another canal boat, whilst the two boats were navigating the Illinois & Lake Michigan Canal, although the libellant's boat was bound from one place in Illinois to another place in the same state.

The principle is well settled, and the cases are largely referred to in *Re Garnett*.

In *Pacific Coast SS. Co. v. Board of Railroad Comrs.*, 9 Sawyer, 253, the Circuit Court for the District of California held, Mr. Justice Field delivering the opinion, that the California State Board of Railroad Commissioners had no power to regulate or interfere with the transportation of persons or merchandise by a steamship company between ports within the state, if they were in transit to or from other states, or if the transportation consisted of voyages upon the ocean, bringing the steamships under the exclusive control of Congress.

But that case involved the direct regulation by a state of transportation which had passed beyond the jurisdiction of the state, and did not decide the question of the power of a state to tax its own corporations in respect of transactions within it in the course of a continuous carriage from one point to another in the state, in accomplishing which a part of another state was incidentally traversed.

This Pennsylvania Company was not taxed in respect of its receipts from transportation

from points in foreign states to other points in foreign states not touching Pennsylvania; nor from transportation by continuous carriage from points in a foreign state passing through Pennsylvania and ending into a third state; nor from transportation by continuous carriage from points in Pennsylvania to points in other states; nor from transportation by continuous carriage from points in other states to points in Pennsylvania; nor from transportation by continuous carriage from points in another state to other points in the same state passing through Pennsylvania; but only in respect of

receipts from transportation from points in Pennsylvania to other points in Pennsylvania without passing out of the state, and from transportation by continuous carriage from points in Pennsylvania to other points therein, but passing out of Pennsylvania into another state and back again in the course of transportation.

We do not deem it necessary to continue the discussion. We concur with the state court in sustaining the validity of the tax herein involved, and the judgment is affirmed.

THE INTERSTATE COMMERCE COMMISSION, *Appt.*,
v.
THE BALTIMORE & OHIO RAILROAD COMPANY.

[No. 889.]

(See S. C. 145 U. S.. 263, 36 L. ed. 699.)

1. The Interstate Commerce Act was not designed to prevent competition between different roads, nor to interfere with the customary arrangement made by railway companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination against other persons traveling over the road.
2. In order to constitute an unjust discrimination under section 2, of the Interstate Commerce Act, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but, in either case, it must be for a

like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.

3. A party rate ticket, which is a single ticket covering the transportation of ten or more persons from one place to another on a railroad is not in violation of the Interstate Commerce Act, although sold at a reduction from the regular passenger rates.
4. Railway companies are only bound under the Interstate Commerce Act to give the same terms to all persons alike under the same conditions and circumstances, and any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge.

Argued March 17, 18, 1892. Decided May 16, 1892.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Ohio, dismissing a suit brought by the Interstate Commerce Commission against the Baltimore & Ohio Railroad Company, for a writ of injunction to restrain the defendant from continuing its violation of the order of the Commission that the Railroad Company cease and desist from selling party rate tickets at reduced rates. *Affirmed.*

See same case below, 48 Fed. Rep. 37; see also 2 Inters. Com. Rep. 572, 729.

Statement by *Mr. Justice Brown*:

This proceeding was originally instituted
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by the filing of a petition before the Interstate Commerce Commission by the Pittsburgh, Cincinnati & St. Louis Railway Company against the Baltimore & Ohio Railroad Company, to compel the latter to withdraw from its lines of road, upon which business competitive with that of the petitioner was transacted, the so-called "party rates," and to decline to give such rates in future upon such lines of road; also for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate, unless such rates were posted in its offices as required by law. The petition set forth that the two roads were

competitors from Pittsburg westward; that the Baltimore & Ohio road had in operation upon its competing lines of road so-called "party rates," whereby "parties of ten or more persons traveling together on one ticket will be transported over said lines of road between stations located thereon, at two cents per mile per capita, which is less than the rate for a single person; said rate for a single person being about three cents per mile."

There was another charge that the defendant was in the habit of selling excursion tickets without posting its rates for the same in its offices; but this charge was subsequently abandoned.

The answer of the Baltimore & Ohio Railroad Company admitted that it had at one time in effect the so-called "party rates," but prior to the filing of the complaint had withdrawn said rates, not that it believed that they were illegal, but because it was claimed by other companies that said rates were put into effect in violation of an agreement between companies belonging to a certain association of which defendant was a member. It further averred that said rates were in no way a violation of the Act to Regulate Commerce, and were an accommodation to the public, necessary to the business of theatrical and other amusement companies, and that when the legality of such rates was properly raised for decision, it was prepared to defend the legality of the same. The answer further denied the right of the complainant to institute the proceeding, and prayed that the complaint might be dismissed.

The cause was heard before the Commission, which found "that so-called party rate tickets, sold at reduced rates, and entitling a number of persons to travel together on a single ticket or otherwise, are not commutation tickets within the meaning of section 22 of the Act to Regulate Commerce, and that when the rate at which such tickets for parties are sold are lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points, they constitute unjust discrimination, and are therefore illegal." It was ordered and adjudged "that the defendant, the Baltimore & Ohio Railroad Company, do forthwith wholly and immediately cease and desist from charging rates for the transportation over its lines of a number of persons traveling together in one party, which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points."

The defendant road having refused to obey this mandate, the Commission, on May 1, 1890, pursuant to section 16 of the Interstate Commerce Act, filed this bill in the Circuit Court of the United States for the Southern District of Ohio for a writ of injunction to restrain the defendant from continuing in its violation of the order of the Commission. The bill set up the proceedings which had theretofore been taken before the Commission,

and set forth as its gravamen that the defendant had wholly disregarded and set at naught the authority and order of the Commission in that regard, and had willfully and knowingly disobeyed said order, and had not ceased and desisted from allowing party rates as it had been ordered to do; and had upon divers occasions since the service of said order charged rates for the transportation over its lines of a number of persons traveling together in one party, which were less for each person than rates contemporaneously charged under schedules lawfully in effect between the same points for the transportation of persons, citing a number of instances of such disobedience.

The answer admitted the proceedings set forth in the bill, but denied that it had been made to appear to the Commission that defendant had violated the provisions of the Act to Regulate Commerce, or that the Commission had duly and legally determined the matters and things in controversy and at issue between the parties; and averred that several of the conclusions of fact stated in the report of the Commission were not true, or justified by the evidence produced at the hearing; and that the conclusions of law contained in the report, and the interpretation therein given to the Act, were not correct. It admitted that it had not wholly ceased charging rates for transportation over its lines for a number of passengers traveling together in one party upon one ticket, which are less for each person than rates contemporaneously charged by it for the transportation of single passengers between the same points, and admitted a violation of the order of the Commission.

The seventh and eight paragraphs of the answer are the material ones, and are here given in full:

"7. That for many years prior to the passage of the said 'Act to Regulate Commerce,' all the railroad carriers in the United States had habitually made a rate of charge for passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charged between the same points, and such lower rates were universally made at the date of the passage of said Act. To carry on this universal practice many forms of tickets were employed to enable different classes of passengers to enjoy these lower rates, and so stimulate travel. To meet the needs of the commercial traveler the thousand mile ticket was used: to meet the needs of the suburban resident or frequent traveler, several forms of tickets were used, *e. g.*, monthly or quarterly tickets, good for any number of trips within the specified time, and ten, twenty-five, or fifty-trip tickets, good for the specified number of trips by one person, or for one trip by the specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for the purpose; to accommodate excursionists traveling in numbers too large to use a single ticket special individual tickets were issued

to each person. Tickets good for a specified number of trips were issued also between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for reduction of the charge per capita, then such reduction was reasonable and just in the interests both of the carrier and of the public. Long experience has proved the soundness of the principle. Under its application grew up the business of commercial travelers, the enormous suburban business, the constant travel between large cities, and the excursion business. Under its application has grown up also the business of traveling companies or parties, which has reached an aggregate of many hundreds of thousands of dollars, and which depends for its existence upon a continuance of the transportation rates under which it has grown up.

"8. That since the passage of the said 'Act to Regulate Commerce,' this respondent has continued as theretofore the practice above stated, of making a lower charge on passenger travel, in consideration of the amount and frequency of the travel, and with that purpose and to accommodate the various class of passengers, it has continued in use all the forms of ticket described in the next preceding section. That the charge fixed by it for the transportation of parties of ten or more, on a single ticket, has been two cents per mile, per capita, which is the same rate charged on thousand mile tickets, and is a higher rate than it charges on long distance passenger travel, and excursion travel, and higher than its general rate for suburban travel on time or other suburban tickets. That the said charge for the transportation of parties on a single ticket is just and reasonable, affording a fair compensation to the carrier, and for the best interests both of the carrier and of the public, because any higher rate would destroy the business. That the business reasons, circumstances, and conditions which induced this respondent to make such lower charge for the transportation of parties as aforesaid, and that make it the interest of this respondent as a carrier to make such lower charge, are precisely the same reasons, circumstances, and conditions that induce it and make it its interest to fix a lower charge for the transportation of passengers buying mileage tickets, time or trip tickets, and excursionists. That while so-called party rate tickets are used principally by traveling amusement companies, because no other form of ticket meets the requirement of such companies, yet this respondent has avoided confining such tickets to any class of business, by offering them on the same terms to the public at large. That this respondent has obviated the danger that such lower charge for parties might be taken advantage of by speculators or ticket brokers, by issuing only one ticket for the whole party. And respondent avers that, as such tickets are now issued by it they are not and cannot be used for speculative purposes, and afford no opportunity for evading the law in the hands of ticket brokers. This

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respondent further avers that it may rightly and legally make a charge per capita for persons traveling on said party rate tickets, lower than its charge for a single passenger making one trip between the same points, the character, circumstances, and conditions of the service being substantially different, and that the making of such lower charge per capita to the member of the party makes or gives no undue or unreasonable preference or advantage to him, and subjects no person, company, firm, corporation, or locality, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The answer further averred the illegality of the order of the Commission, and averred "that by the true construction of the Act the second section thereof requires the same charge for transportation service only in cases where the commercial circumstances and conditions are substantially similar, and the third section requires the same charge to be made only when a difference in charge would work a prejudice or disadvantage to some one without reason therefor. That the twenty-second section, so far from making exceptions to an otherwise absolute rule, was inserted merely as additional precaution to insure the giving to the second and third sections of the Act the construction which Congress intended. That the twenty-second section is a legislative declaration; that under the provisions of the second section of the Act circumstances and conditions of a commercial nature are to be considered, and among such circumstances and conditions, in the case of passenger traffic, the amount of service purchased or contracted for, and the interest of the carrier in stimulating travel are to be considered."

Upon the hearing before the Circuit Court upon pleadings and proofs the bill was dismissed, separate opinions being delivered by *Judges Jackson and Sage*. 43 Fed. Rep. 37. From this decree the Interstate Commerce Commission appealed to this court. The provisions of the Interstate Commerce Act, so far as the same are material to this case, are set forth in the margin.*

*AN ACT TO REGULATE COMMERCE.

"SEC. 1. That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement, for a continuous carriage of shipment.

"All charges made for any service rendered, or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

"SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the trans-

Messrs. Samuel Shellabarger, Alfred G. Safford, Mr. Attorney-General W. H. H. Miller and J. M. Wilson, for appellant.

Railroad companies are subject to legislative control as to their rates of fare and freight, unless protected by their charters.

Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 161 (24: 95); *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 (24: 97); *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179 (24: 99); *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180 (24: 99); *Stone v. Wisconsin*, 94 U. S. 181 (24: 102); *Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co.* 25 W. Va. 324.

The determination of the question whether two kinds of traffic are conducted under similar circumstances and conditions is a question of fact; and the question of reasonableness of a rate and the fact of its being discriminating or otherwise is a question of fact.

Colliery Co. v. Manchester, 8 Nev. & McNam, 441; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* 11 App. Cas. 97; *Samuels v. Louisville & N. R. Co.* 21 Fed. Rep. 58; *United States v. Tozer*, 2 Inters. Com. Rep. 540, 39 Fed. Rep. 369; Harper, Law Inters. Com. 66-68.

Inequality of charge for contemporaneous and like service under substantially similar conditions taken by itself is created an offense by section 2 of the Act, although such unequal charges may be no more than fairly compensatory considered by themselves.

Messenger v. Pennsylvania R. Co. 37 N. J. L. 531.

A common carrier owes an equal duty to all, and it cannot be discharged if he is allowed to make unequal preferences, and thereby prevent or impair the enjoyment of the common right.

Audenried v. Philadelphia & R. R. Co. 68 Pa. 370; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 196; *Bazendale v. Eastern Counties R. Co.* 4 C. B. N. S. 63; *McDuffie v. Portland & R. R. Co.* 53 N. H. 430; *Sanford v. Catawissa, W. & E. R. Co.* 24 Pa. 378, 1 Am. Railway Rep. 530; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Coggs v. Bernard*, 3 Ld. Raym. 909; *Great Western R. Co. v. Sutton*, L. R. 4 Eng. & Ir. App. 226; *Parker v. Great Western R. Co.* 7 Man. & G. 253; *Parker v. Great Western Co.* 11 C. B. 545, 588; *Crouch v. Great Northern R. Co.* 9 Exch. 556, 11 Exch. 742;

Piddington v. South Eastern R. Co. 5 C. B. N. S. 111; *Garton v. Bristol & E. R. Co.* 1 Best & S. 112; *Branley v. South Eastern R. Co.* 13 C. B. N. S. 63; *Bazendale v. Great Western R. Co.* 14 C. B. N. S. 1.

A railway company acting as common carriers, and bound by statute to deal equally with all persons, cannot make a regulation for the conveyance of goods which, in practice, affects one individual only.

Scofield v. Lake Shore & M. S. R. Co. 1 West. Rep. 812, 43 Ohio St. 571.

Exceptions made by the statute itself exclude all other exceptions.

Brockett v. Ohio & P. R. Co. 14 Pa. 241; *Miller v. Kirkpatrick*, 29 Pa. 226; *Oliver Cemetery Co. v. Philadelphia*, 93 Pa. 129; *Koch v. Bridges*, 45 Miss. 247; *McRoberts v. Washburne*, 10 Minn. 23; *Perkins v. Thornburgh*, 10 Cal. 189; *Watkins v. Wassell*, 20 Ark. 410; *State v. Jaeger*, 63 Mo. 408; *Niemeyer v. Wright*, 75 Va. 239; *Jenkins v. Ewin*, 8 Heisk. 456; *State v. T aylor*, 15 Ohio St. 137; *Cherokee Nation v. Georgia*, 30 U. S. 5 Pet. 1 (8: 25); *Schofield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 812, 43 Ohio St. 571.

Where a lower rate is given by a railroad company to a favored shipper, which is intended to give, and necessarily gives, an exclusive monopoly to the favored shipper, affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances.

Railroad Comrs. v. Portland & O. Cent. R. Co. 63 Me. 269-278; *Rex v. Barker*, 3 Burr. 1267; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Com. v. Eastern R. Co.* 103 Mass. 258; *Sanford v. Catawissa, W. & E. R. Co.* 24 Pa. 378; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407; *Talcott v. Pine Grove Twp.* 1 Flap. 120; *McDuffie v. Portland & R. R. Co.* 52 N. H. 430; *Erie & N. E. R. Co. v. Casey*, 26 Pa. 287; *Pickford v. Grand Junction R. Co.* 10 Mees. & W. 399; *Bazendale v. London & S. W. R. Co.* L. R. 1 Exch. 187; *London & N. W. R. Co. v. Evershed*, 26 Week. Rep. 863.

Common law here requires substantially the same degree of equality of charge for freights and fares as is required under the statutes and the decisions in England.

Chicago & A. R. Co. v. People, 67 Ill. 11; *Messenger v. Pennsylvania R. Co.* 36 N. J. L.

portation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"Sec. 2. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

"Sec. 22 (As amended by § 9 of Act of March 2, 1893, chap. 232, 25 Stat. at L. 855, 856). That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons

transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law, or by statute, but the provisions of this Act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this Act."

407; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378; *Shipper v. Pennsylvania R. Co.* 47 Pa. 398; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188; *Dinsmore v. St. Louis, C. & L. R. Co.* 2 Fed. Rep. 465; *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309; *Crawford v. Wick*, 18 Ohio St. 190; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666.

Messrs. John J. Cowen and Hugh L. Bond, Jr., for appellee:

Under pretence of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418 (33: 970).

As to railroad companies, the general law forbids unjust discrimination.

New England Exp. Co. v. Maine Cent. R. Co. 57 Me. 188; *McDuffee v. Portland R. R. Co.* 52 N. H. 480; *Hersh v. Northern Cent. R. Co.* 74 Pa. 181; *Scotfield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 812, 43 Ohio St. 571; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Ex parte Benson*, 18 S. C. 38; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623; *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309; *Texas Exp. Co. v. Texas & P. R. Co.* 6 Fed. Rep. 426; *Southern Exp. Co. v. Memphis, etc. R. Co.* 8 Fed. Rep. 799; *Southern Exp. Co. v. St. Louis, I. M. & S. R. Co.* 10 Fed. Rep. 210, 869.

The Act prohibits unjust discrimination.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 684-685 (23: 297, 298).

The first section requires that all charges be reasonable and just. All the railroad companies of the country have, by the practice of years, recognized the justice and reasonableness of a lower charge per ride to the passenger buying a time ticket, a ticket for ten trips, or a mileage ticket, and to a passenger riding with nine or more others on a single ticket.

To interpret the second section as requiring the company to charge these passengers the full single trip fare is to interpret the second section as requiring a violation of the prohibition in the first section.

Concord & P. R. Co. v. Forsaith, 59 N. H. 122.

It is only when the discrimination inures to the undue advantage of one man in consequence of some injustice inflicted on another that the law intervenes for the protection of the latter.

Hays v. Pennsylvania R. Co. 12 Fed. Rep. 309; *Hoxier v. Caledonian R. R. Co.* 1 Nev. & McN. 27, 1 Ry. & Canal Cas. 31.

The value of the services is the true test of reasonableness.

Canada S. R. Co. v. International Bridge Co. L. R. 8 App. Cas. 723.

Mr. Justice Brown delivered the opinion of the court:

Prior to the enactment of the Act of February 4, 1887, (24 Stat. at. L. 879), to Regulate Commerce, commonly known as the Interstate Commerce Act, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons

who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; (*Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Buzendale v. Eastern Counties R. Co.* 4 C. B. N. S. 63; *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226, 237; *Ex parte Benson*, 18 S. C. 38; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623); though the weight of authority in this country was in favor of an equality of charge to all persons for similar services. In several of the states acts had been passed with the design of securing the public against unreasonable and unjust discriminations; but the inefficacy of these laws beyond the lines of the state, the impossibility of securing concerted action between the legislatures toward the regulation of traffic between the several states, and the evils which grew up under a policy of unrestricted competition, suggested the necessity of legislation by Congress under its constitutional power to regulate commerce among the several states. These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburg; but if A agrees not only to go but to return by the same route, it is no injustice to B to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination. Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring

what shall be deemed unjust. We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice Blackburn in *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

The question involved in this case is, whether the principle above stated as applicable to two individuals applies to the purchase of a single ticket covering the transportation of ten or more persons from one place to another. These are technically known as party rate tickets, and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation ticket" seem to have no definite meaning. They are defined by Webster (edition of 1891) as "a ticket, as for transportation, which is the evidence of a contract for service at a reduced rate." If this definition be applicable here, then it is clear that it would include a party rate ticket. In the language of the railway, however, they are principally, if not wholly, used to designate tickets for transportation during a limited time between neighboring towns, or cities and suburban towns. The party rate ticket upon the defendant's road is a single ticket issued to a party of ten or more, at a fixed rate of two cents per mile, or a discount of one third from the regular passenger rate. The reduction is not made by way of a secret rebate or drawback, but the rates are scheduled, posted, and open to the public at large.

But assuming the weight of evidence in this case to be that the party rate ticket is not a "commutation ticket," as that word was commonly understood at the time of the passage of the Act, but is a distinct class by itself, it does not necessarily follow that such tickets are unlawful. The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative

than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, state or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes, etc., and ministers of religion, in favor of whom a reduction of rates had been made for many years before the passage of the Act. It may even admit of serious doubt whether, if the mileage, excursion, or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3. In other words, whether the allowance of a reduced rate to persons agreeing to travel one thousand miles or to go and return by the same road is a "like and contemporaneous service under substantially similar conditions and circumstances" as is rendered to a person who travels upon an ordinary single trip ticket. If it be so, then, under state laws forbidding unjust discriminations, every such ticket issued between points within the same state must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, state or Federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public, it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them.

But, whether these party rate tickets are commutation tickets proper, as known to railway officials or not, they are obviously within the commuting principle. As stated in the opinion of Judge Sage in the court below: "The difference between commutation and party rate tickets is, that commutation tickets are issued to induce people to travel more frequently, and party rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured."

The testimony indicates that for many years before the passage of the Act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the Act. As stated in the answer, to meet the needs of the commercial traveler the thousand mile ticket was issued; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were issued. For example, monthly or quarterly tickets,

good for any number of trips within the specified time; and ten, twenty-five or fifty-trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionist traveling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an established principle of the business, that whenever the amount of travel more than made up to the carrier for the reduction of the charge per capita, then such reduction was reasonable and just in the interest both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets, would be by no means conclusive evidence that they were legal, since the main purpose of the Act was to put an end to certain abuses which had crept into the management of railroads, yet Congress may be presumed to have had those practices in view, and not to have designed to interfere with them, except so far as they were unreasonable in themselves or unjust to others. These tickets then being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is, whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public generally a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business and enable the larger ones to drive them out of the market.

The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously toward anyone it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the Act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. If it be lawful to issue these tickets, then the Pittsburg, Chicago & St. Louis Railway Company has the same right to issue them that the defendant has, and may compete with it for the same traffic; but it is unsound

to argue that it is unlawful to issue them because it has not seen fit to do so. Certainly its construction of the law is not binding upon this court. The evidence shows that the amount of business done by means of these party rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing. If a case were presented where a railroad refused an application for a party rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage.

In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

In this connection we quote with approval from the opinion of *Judge Jackson* in the court below: "To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

The English Traffic Act of 1854 contains a clause similar to section 3 of the Interstate Commerce Act, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In *Hosier v. Caledonian R. Co.*, 17 Sess. Cas. 302, 1 Nev. & McN. R. Cas. 27, complaint was made by one who had frequent occasion to travel, that passengers from an intermediate station between Glasgow and Edinburgh were charged much greater rates to those places than were charged to other through passengers between these termini; but the Scotch Court of Session held that the petitioner had not shown any title or interest to maintain the proceeding; his only complaint being that he did not choose that parties traveling from Edinburgh to Glasgow should enjoy the benefit of a cheaper rate of travel than he himself could enjoy. "It provides," said the court, "for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain."

This is in substance holding that the allowance of a reduced through rate worked no injustice to passengers living on the line of the road, who were obliged to pay at a greater rate. So, in *Jones v. Eastern Counties R. Co.*, 3 C. B. N. S. 718, the court refused an injunction to compel a railway company to issue season tickets between Colchester and London upon the same terms as they issued them between Harwich and London, upon the mere suggestion that the granting the latter, the distance being considerably greater, at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. Upon the other hand, in *Ransome v. Eastern Counties R. Co.*, 1 C. B. N. S. 437, where it was manifest that a railway company charged Ipswich merchants, who sent from thence coal which had come thither by sea, a higher rate for the carriage of their coal than they charged Peterboro merchants, who had made arrangements with them to carry large quantities over their lines, and that the sums charged the Peterboro merchants were fixed so as to enable them to compete with the Ipswich merchant, the court granted an injunction upon the ground of an undue preference to the Peterboro merchants, the object of the discrimination being to benefit the one dealer at the expense of the other, by depriving the latter of the natural advantages of his position. In *Ozlake v. North-Eastern R. Co.*, 1 C. B. N. S. 454, a railway company was held justified in carrying goods for one person for a less rate than that at which they carried the same description of goods for another, if there be circumstances which render the cost of carrying the goods

for the former less than the cost of carrying them for the latter, but that a desire to introduce northern coke into a certain district was not a legitimate ground for making special agreements with difference merchants for the carriage of coal and coke at a rate lower than the ordinary charge, there being nothing to show that the pecuniary interests of the company were affected; and that this was an undue preference.

In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the Act, or would be open to the charge of unjust discrimination. But so far as relates to the question of "undue preference," it may be presumed that Congress, in adopting the language of the English Act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. *McDonald v. Hovey*, 110 U. S. 619 [28: 269].

There is nothing in the objection that party rate tickets afford facilities for speculation and that they would be used by ticket brokers or "scalpers" for the purpose of evading the law. The party rate ticket, as it appears in this case, is a single ticket covering the transportation of ten or more persons, and would be much less available in the hands of a ticket broker than an ordinary single ticket, since it could only be disposed of to a person who would be willing to pay two thirds of the regular fare for that number of people. It is possible to conceive that party rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law, and for the purpose of cutting rates, but should such be the case, the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy.

Upon the whole, we are of the opinion that party rate tickets, as used by the defendant, are not open to the objections found by the Interstate Commerce Commission, and are not in violation of the Act to Regulate Commerce, and the decree of the court below is, therefore, affirmed.

ALABAMA SUPREME COURT.

STATE OF ALABAMA, *Appt.*, v. JOHN C. HARRUB.

SAME, *Appt.*, v. GEORGE MELVIN.

1. A statute prohibiting the shipment out of the state of oysters taken in the public waters of

the state, while they are in shells, and which also prohibits the taking of such oysters by any

NOTE.—For the subject of game laws as affecting interstate commerce, which is akin to the question 4 INTER S.

involved in the main case, see *State v. Geer* (Conn.) 13 L. R. A. 804.

person who is not a resident of the state, is not unconstitutional as a regulation of interstate commerce.

2. The title of an Act "To Regulate the Planting and taking of Oysters in the Waters" of the

state, is sufficient to cover provisions against the taking of oysters by non-residents and the transportation out of the state by any person of oysters in shells.

Decided April 5, 1892.

APPEAL by the State from a judgment of the City Court of Mobile discharging the defendants upon habeas corpus from custody in which they had been placed for an alleged violation of the statute regulating the planting and taking of oysters. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. William L. Martin, Atty-Gen., and Gaylord B. Clark, for the state:

When the revolution took place the people of each state became sovereign, and in that character held the absolute right to all navigable waters, and the soils under them for their own common use.

There has been no grant of power over the fisheries.

These remain under the exclusive control of the state, which may pass such laws as may be deemed expedient to secure to its own citizens the enjoyment of their common property.

New Orleans v. United States, 35 U. S. 10 Pet. 662, 9 L. ed. 578; *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997; *Pollard v. Hagan*, 44 U. S. 3 How. 212, 11 L. ed. 565; *Den v. The Jersey Co. Assn.* 56 U. S. 15 How. 426, 14 L. ed. 757; *Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159; *Hooker v. Cummings*, 20 Johns. 80, 11 Am. Dec. 249; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Smith v. Levinus*, 8 N. Y. 472; *Dunham v. Lamphere*, 3 Gray. 268; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57; *Com. v. Bailey*, 13 Allen. 541; *Haney v. Compton*, 36 N. J. L. 507; *Hess v. Muir*, 3 Cent. Rep. 891, 65 Md. 586; *Huntington v. Lovendes*, 40 Fed. Rep. 625; *Gould, Waters*, (2d ed.) §§ 32, 36, 38, 189; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

The people of Alabama, acting through their Legislature, may appropriate this property to their own exclusive use and enjoyment, or share it with their neighbors, just as the individual citizen may do with that which is his own. They may direct whether and to what extent oysters may be placed on the market, select the market and the means of transportation thereto.

The state may forbid all such acts as would render the public right less valuable, or destroy it altogether.

Smith v. Maryland, 59 U. S. 17 How. 71, 15 L. ed. 269.

The unrestricted shipping of oysters in the shell beyond the state would defeat the utilization of the shells in the propagation of oysters, and thereby render the public right less valuable.

If in any view, the prohibition against shipping oysters in the shell out of the state can be held to affect interstate commerce, it will not
4 INTER S.

be considered as an exercise of that power but as flowing from the acknowledged power of the state to regulate and control the subject.

See *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 846; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442; *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584; *Morgan's L. & T. R. & S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352; *Kimish v. Ball*, 129 U. S. 217, 32 L. ed. 695.

The fact that the oyster when caught, culled, inspected and the tax paid, becomes an article of commerce within the state of Alabama, does not constitute it an article of interstate commerce; and until it becomes such, it remains a part of the general mass of property of the state and subject to the control, exclusively, of the legislative power of the state.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715.

Messrs. Gregory L. & H. T. Smith and M. D. Wickersham, for appellee:

The state cannot place burdens or restrictions upon interstate commerce in a commodity which is an article of commerce within its boundaries.

Leisy v. Hardin, 135 U. S. 109, 34 L. ed. 132.

Nor place limitations or burdens on their importations.

Tiernan v. Rinker, 102 U. S. 125, 26 L. ed. 108; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *McCall v. California*, 136 U. S. 105, 34 L. ed. 392; *Brimmer v. Rebmam*, 138 U. S. 78, 34 L. ed. 862.

The purpose of vesting in the United States the exclusive regulation of commerce was to prevent the different states from discriminating in favor of their own products and citizens, against the products and citizens of other states.

County of Mobile v. Kimball, 102 U. S. 697, 26 L. ed. 239.

This may be accomplished as well by prohibiting exporting to other states, as by prohibiting imports from them.

Leisy v. Hardin and *McCall v. California*, *supra*.

Under the law under discussion, the oyster is allowed to be shipped from a point in Alabama to any other point in Alabama, through other states, for the purpose of sale. This not only makes it an article of state commerce, but also of interstate commerce.

Lord Goodall SS. Co. 102 U. S. 541, 26 L. ed. 224.

Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity has commenced.

The "*Daniel Ball*," 77 U. S. 10 Wall. 565, 19 L. ed. 1002; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 846.

Whenever the state Legislature seeks to restrict, burden or prevent interstate transportation, sale, purchase, exchange, or traffic in a commodity it is violative of the Constitution of the United States whether the restraint, burden, or prohibition be placed upon the exportation of the commodity from the state or the importation into the state.

The direct question involved, has, however, been considered and adjudicated in two sister states.

State v. Indiana & O. Oil, Gas & Min. Co. 6 L. R. A. 579, 120 Ind. 575; *Territory v. Evans* (Idaho) 7 L. R. A. 288; *McBride v. Heitz*, 19 Kan. 123.

Coleman, J., delivered the opinion of the court:

The defendants were arrested for a violation of the Act of February 18, 1891, pp. 1072-1084, entitled "An Act to Regulate the Planting and Taking of Oysters in the Waters of this State." Upon habeas corpus proceedings the defendants were discharged, the court holding that the Act of the Legislature was unconstitutional and void as contravening subdivision 8, § 8, art. 1, of the Constitution of the United States. Subdivision 8, § 8, art. 1, provides that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Sections 1 and 2 of the Act of the Legislature under consideration read as follows: "Section 1. That the title to and property in all oysters in the waters of this state, whether upon public reefs or in so-called 'private beds,' or whether the same be transplanted by riparian proprietors under authority of law or otherwise, or whether the same be a growth from natural deposit, is and shall remain in the state until such title shall be divested in manner and form as herein authorized or provided. Sec. 2. That a license is hereby given to resident citizens of the state of Alabama to catch and take oysters, the property of the state, from the public reefs or from private beds planted and owned by them, or in which they have secured an interest or permission from the proprietor thereof to take such oysters, upon the terms and conditions and subject to the restrictions and regulations hereinafter set forth and enacted, but no person or persons not a resident of the state of Alabama is or shall be authorized to take or transport any such oysters from, in, or through any of the waters of the state of Alabama; and it is unlawful for any person, whether a citizen of the state of Alabama or of any other state or country, to ship beyond the limits of this state any oysters taken from the waters of this state while the same are in the shells: provided, that between the middle of December and the middle of January oysters in the shells may be shipped in barrels by railroad to other states: and provided, further, that such oysters in the shell may be shipped bona fide from any point in the state of Alabama to any other point in said state by the lines of transportation which lie partly within and partly without the state of Alabama: and provided, further, that any resident citizen of the state of Alabama who

shall lawfully take any oysters from the tide-waters of this state, as in this Act authorized, shall have a qualified interest or property in the oysters so lawfully taken while in the shell, which he may sell and transfer to any other person within the limits of the state of Alabama: and after said oysters have been shelled within the state of Alabama such lawful taker, or his assigns, as the case may be, shall be vested with all of the state's property and title in and to said oysters, and shall have the right to sell such oysters and shells, or ship the same beyond the limits of this state, without restriction or reservation: provided, further, that in case of any infringement of the foregoing qualified interest in said taker of oysters, said taker may, in his own name, maintain an action against the wrong-doer, either in case or trover, as may be proper; and in case of larceny or other public offense concerning such oysters while in the hands of a lawful taker, the ownership thereof shall be averred in such taker or possessor when by law it shall be necessary to aver ownership."

We deem it unnecessary to set out the whole Act. The principles of law applicable to the facts of the cases before us do not call for a discussion or adjudication of that clause of section 2 which relates to the shipment of oysters in the barrel by railroad from the middle of December to the middle of January, or that clause which permits transportation by lines which lie partly within and partly without the state. *Jones v. Black*, 48 Ala. 540. The agreed facts are that the oysters were taken and shipped in the shell beyond the limits of the state by the defendants in the month of September in sailing vessels; that Harrub was a citizen of Alabama and Melvin a citizen of the state of Mississippi; and that both were guilty of a violation of the statute. The question involved is as to the constitutionality of the Act.

The first question we will consider is as to the extent of the ownership and control of the state of Alabama in and over the oyster-beds and oysters within her territorial limits. In the case of *Martin v. Waddell*, 41 U. S. 16 Pet. 411, 10 L. ed. 1018, *Chief Justice* Taney declares as a general principle that "when the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government." In the case of *Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269, the question was as to the constitutionality of an Act of the state of Maryland, which was an "Act to Prevent the Destruction of Oysters in the Waters of This State." The court laid down this principle: "But this soil is held by the state not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell fish as floating fish. The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable or destroy it alto-

gether. This power results from the ownership of the soil from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held." In the case of *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248, the foregoing principles were reaffirmed, and the court went further, and declared: "The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the state, which consequently has the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. . . . It is in fact a property right, and not a mere privilege or immunity of citizenship. . . . It does not belong of right to the citizens of all free governments, but only to the citizens of Virginia. They, and they alone, owned the property to be used, and they alone had the power to dispose of it as they saw fit. . . . The state may, by appropriate legislation, confine the use of the whole to its own people alone." In the case of *Haney v. Compton*, 86 N. J. L. 522, it was said: "But it cannot with any propriety be said that a statute which simply prohibits nonresidents on board a vessel from subverting the soil of the state and carrying away her property, or that of her grantees, leaving such vessel to pass and repass, and go whithersoever those in charge of her may desire, is a regulation of commerce with foreign nations or among the states. It is a law for the protection of property,—at most an internal police regulation, entirely within the competency of the state to adopt, and it is not perceived that it can by possibility interfere with commerce in the senses in which that word is used in the Federal Constitution." In *Manchester v. Massachusetts*, 189 U. S. 259, 35 L. ed. 164, the court reaffirmed the principle declared in the case of *McCready v. Virginia*, *supra*; and the same principle is announced in *Dunham v. Lamphere*, 8 Gray, 268.

We think it clearly established that the people of Alabama own absolutely the oyster-beds and oysters in question, and that it is a property right as complete and perfect as that held to any other property. As was said by Mr. Justice Waite in *McCready v. Virginia*, *supra*, "the principle is not different from the planting of corn upon dry land." We think it further settled that the people of Alabama, through its Legislature, alone have the power to dispose of their property rights in their oyster-beds and oysters, and if they see proper may dispose of them to their own people only. It is further settled that the Legislature has ample authority to adopt all precautions and regulations deemed desirable or necessary for the preservation and increased production of its fisheries. That the power of Congress to regulate commerce with foreign nations, and among the several states, and with the In-

dian tribes, is unlimited and exclusive of the power of the state, is settled law. Any statute of a state not authorized by Congress which in any way obstructs or interrupts free navigation, or restricts or burdens any commodity which is an article of interstate commerce, must be declared null and void. *Tiernan v. Rinker*, 102 U. S. 125, 26 L. ed. 108; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Brimmer v. Reberman*, 188 U. S. 78, 84 L. ed. 862; *Leisy v. Hardin*, 185 U. S. 109, 34 L. ed. 132. To constitute commerce there must be traffic and intercourse, and to constitute interstate commerce there must be traffic and interstate intercourse,—an "intermingling" between different states. As Mr. Chief Justice Marshall says in the case of *Gibbons v. Ogden*, 22 U. S. 9 Wheat, 1, 6 L. ed. 23: "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one." "The completely internal commerce of a state may be considered as reserved to the state itself." We understand this great case to distinctly recognize the absolute power and control of the state upon such subjects within its territorial jurisdiction are not articles of foreign or interstate commerce. The case of *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, decides an important principle as to the right of the state to tax its products, although the owner may intend them for exportation, and although they may be in process of preparation for exportation at the time of the assessment of the tax; but the case is important in the present connection in determining that "there must be a time when they (the products) cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial legislation,"—quoting from the case of *The "Daniel Ball"*, 77 U. S. 10 Wall. 565, 19 L. ed. 1002, as follows: "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced." But that movement, says the court, "does not begin until the article has been shipped or started for transportation from the one state to the other." Carrying it from the farm or forest to the depot is only an interior movement of the property, and, although it may be for the purpose of exportation, this is no part of the exportation itself. If the statute of Alabama under consideration militates against any of these well established principles in regard to interstate commerce, it must yield to the dominant supremacy of the federal Constitution. We do not understand the power vested in Congress to regulate interstate commerce gives it power over domestic commerce, or authorizes it to regulate the commerce between the citizens of the same state or different parts of the same state. This power belongs to the several states, and is exclusive of the power of Congress. If the state of Alabama should attempt, by legislation, to tax or burden or restrict the shipment of oysters from the state of Mississippi or other states, such legislation would be unconstitutional; or if the state of Alabama should attempt to impose similar or other conditions upon the shipment of any articles of interstate commerce from this state to another state, that would be

an interference with the law of interstate commerce, which power alone is vested in Congress. To constitute interstate commerce, however, as we have said, there must be an article or commodity the subject of commerce, and destined to pass from one state to another. These authorities do not militate but recognize the power of the state to confine the use of the oyster to its own citizens, and to regulate its shipment and disposition within its borders for their use. This would be domestic commerce as distinguished from interstate commerce. Neither do we understand the power of Congress to regulate interstate commerce in any way interferes with or restricts the right of the state to prohibit its own property, to which it has an exclusive title, from becoming an article or commodity of interstate commerce. In the same line may be cited the case of *American Exp. Co. v. People*, 133 Ill. 649, 9 L. R. A. 188. The statute of Illinois, for the protection of game, permitted the killing of game birds for two months in the year. The statute forbade the sale of the game birds at any other time, and made it unlawful, under a penalty, for any carrier or corporation knowingly to receive and transport or convey them beyond the state for sale. Under the Act, at the proper time, a person was permitted to kill game for his own use, but not to go upon the market as an article of commerce. The constitutionality of the Act was upheld, the court declaring: "The ownership was in the people of the state. This being so, it necessarily follows that the Legislature had the right to permit persons to kill or take game upon such terms and conditions as its wisdom might dictate, and that the person killing game might have such property interest in it, and such only, as the Legislature might confer. The Legislature never conferred an absolute property in quail upon the person who might kill the same." It was held that the discretion of the Legislature in making rules and regulations for the preservation and protection of the game birds was not subject to judicial control.

The property rights of the oyster being in the state exclusively, and the Legislature having full authority to prohibit it from becoming an article of interstate commerce, and to reserve the oyster for the sole use of its own citizens, and to regulate the sale between its own citizens and between different parts of the state, the question arises, When does the oyster, under the statute, become an article of interstate commerce, and what provision of the statute attempts to burden, restrict, or control it after it has this character? The first section explicitly declares that "the title and property in all oysters in the waters of this state . . . shall be divested in manner and form as herein authorized and provided." That this is a valid enactment, under the principles of law declared in many of the foregoing decisions, cannot be questioned. The second section gives a license to resident citizens to catch and take oysters, the property of the state, and further enacts that "no person or persons not a resident of the state of Alabama is or shall be authorized to take or transport any such oysters from, in, or through any of the waters of the state of Alabama; and it is unlawful for any person, whether a citizen of the state of Alabama or

of any other state or country, to ship beyond the limits of this state any oysters taken from the waters of this state while the same are in the shells, provided that between the middle of December and the middle of January oysters in the shell may be shipped in barrels by railroad to other states," etc. That the state has the right to license its own citizens to catch and take oysters, and to deny to citizens of another state the right to take and transport them, and absolutely to prohibit the shipment of oysters beyond the limits of the state, and to regulate the sale of them within its own limits, not imposing any conditions or burdens or restrictions upon the oyster as a commodity after it has entered another state, or after it may be legally delivered in this state for exportation to a common carrier or ways by which interstate commerce is effected, we think is clearly established by the following authorities: *Haney v. Compton*, 86 N. J. L. 522; *The "Daniel Ball"*, 77 U. S. 10 Wall. 557, 19 L. ed. 999; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346; *Philadelphia & R. R. Co. v. Pennsylvania*, 82 U. S. 15 Wall. 250, 21 L. ed. 146.

If the state has the power to prohibit the exportation of its oysters absolutely, *a fortiori* it may limit the shipment of such oysters to such as may have been shelled. If the Legislature sees proper, as a means to prevent the exhaustion of its oyster-beds, to grant to the takers, who can only be resident citizens of the state, or their grantees within the state, such a qualified property right in the oyster as will permit its exportation only after it is shelled, where is the authority to judicially control this discretion, or what principle of the Interstate Commerce Law is violated by such an enactment? The oyster is the absolute property of the state. It certainly has the power to prevent its becoming an article of interstate commerce. Until it becomes an article of interstate commerce Congress has no authority or control in the premises. The state, by the statute itself, expressly retains the title to the oyster, and prohibits its shipment beyond the state until shelled. Only after it is shelled does the state relinquish its title, and the grantee, previously having but a qualified interest, becomes the absolute owner, and the oyster may then become an article of interstate commerce. When shelled, and the state has parted with its property rights, the state no longer interferes with the article. The owner ships it wherever he pleases and by whatsoever transportation he prefers. The statute nowhere interferes with or obstructs the sailing of the vessels. They can come and go when and whithersoever those in control see proper; but this did not authorize them to subvert the soil of Alabama, and to transport in September oysters in the shells from the reefs of Alabama to other states. The statute expressly prohibited it. The error in the argument of the defendants' counsel is in assuming that the oyster in the shell was an article of commerce, when in fact the taker, who could only be a citizen of the state, as we have seen, had but a qualified interest in the oyster, which he could dispose of only in the state. It would

be unsound reasoning to hold that the state could prohibit absolutely the taking of its oysters, or confine the use of them exclusively to its own citizens, and yet could not prevent the taker from shipping them beyond the limits of the state. If the statute had undertaken to invest the taker or his grantee with a full and absolute property right and title to the oyster in the shell, so as to invest him with the power to convert it into an article of commerce, and had then undertaken to prevent its shipment, or burden its shipment with a tax, a different question might arise. That is not the case here. The state carefully guards against this condition, and it is only after being shelled can it be said that the oyster has become an article of interstate commerce. These conclusions are fully sustained by the reasonings and principles declared in the case of *Kidd v. Pearson*, *supra*, in which Mr. Justice Lamar discusses at length and with great clearness the doctrine of interstate commerce, and the application of the principles stated in *Gibbons v. Ogden* and *Coe v. Errol*, *supra*, and other cases cited above.

The policy of the Legislature in making provision to keep the shells within the state might be based upon many considerations.

However, this court is not called upon to adjudicate upon the policy of the Legislature, and we will not consider this view further than to make the following citations from section 5, vol. 2, U. S. Com. Fish, etc., 564: "Besides being useful for making roads, streets, filling wharves and lowlands, and making lime, the shells are of great utility as stools for new oyster-beds, as experiments beginning fifty years ago have demonstrated. . . . These and other minor utilizations are disappearing, however, along the northern coast, through the increased value of the shells to spread on the bottom for the foundation of new colonies, as has been explained; and before long no doubt nearly all the shells accumulated will be saved by planters for this purpose as a better economy than to sell them." When tested by the rule declared in *Bailentyne v. Wickersham*, 75 Ala. 583, the statute is not obnoxious to the objections that it contains subjects not clearly expressed in the title. The rule, as there held, is, that it is "sufficient if they [the subjects] are all referable and cognate to the subject expressed" in the title. Our conclusion is that the Act is not unconstitutional, and that the court erred in its judgment.

Reversed and remanded.

BEFORE THE INTERSTATE COMMERCE COMMISSION.

PHELPS & Co.

v.

THE TEXAS & PACIFIC RAILWAY COMPANY.

(No. 380.)

ANSWER OF DEFENDANT.

The Texas & Pacific Railway Company,

Insists that the facts set out in the complaint do not constitute a violation of the Act to Regulate Commerce, and prays that complaint be dismissed for insufficiency.

Defendant alleges that it is only fair and reasonable, where shipments are received from other carriers, that until the actual weight is ascertained, either at point of shipment or destination, that shippers should pay for a minimum weight and have any excess returned to them afterwards, and that defendant is not bound or controlled by weights inserted in the bills of lading by other carriers from whom consignments are received.

RE WABASH RAILROAD COMPANY.

(Order.)

At a General Session of the Interstate Commerce Commission, held at its office in the City of Washington, D. C., on the 18th day of June, A. D. 1892.

Present: Hon. William R. Morrison, Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. James W. McDill, Hon. Judson C. Clements—*Commissioners*.

(No. 343.)

Whereas: Informal complaint has been made to the Interstate Commerce Commission that the Wabash Railroad Company, in its business of

transporting property from divers places and stations in Nebraska *via* Chapin, Illinois, to Toledo, Ohio, for Reynolds Bros. of Toledo, Ohio, Melman, Boardman & Company, of New York City, and Gill & Fisher, of Baltimore, Maryland, and others, through the device of fictitious expense bills and otherwise, unjustly discriminate in favor of said shippers upon traffic over the route aforesaid.

And Whereas: The Interstate Commerce Commission of its own motion has decided to investigate the said informal complaint by inquiring into the business of the said Wabash Railroad Company between the points aforesaid.

Therefore, it is hereby ordered, That the Wabash Railroad Company on or before the 7th day of July, 1892, do file its specific verified answer with the Secretary of the Interstate Commerce Commission at Washington, in the District of Columbia, setting forth all the facts and circumstances connected with the transportation by it of property for any or all of said shippers during the past year, and particularly to set forth all sums of money paid or allowed to any or all of said firms during that period, whether in form of expense bills or otherwise,

And it is also hereby further ordered, That the Wabash Railroad Company do appear before the Interstate Commerce Commission at the United States Court House at Omaha, in the state of Nebraska, at 10 o'clock in the forenoon on Monday the 18th day of July, 1892, when the said Commission will proceed to make inquiry into and investigate the management of the business aforesaid by the carrier aforesaid.

In testimony whereof, etc.

Re BALTIMORE & OHIO RAILROAD COMPANY *et al.*

(Order.)

At a General Session of the Interstate Commerce Commission, held at its offices in the city of Washington, D. C., on the 18th day of June, 1892.

Present: Hon. William R. Morrison, Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. James W. McDill, Hon. Judson C. Clements—*Commissioners.*

(No. 844.)

Whereas: Informal complaint has been made to the Interstate Commerce Commission, that notwithstanding the fact that the various railroad companies engaged in transporting passengers and property from Chicago to eastern seaboard points have filed with the Interstate Commerce Commission tariffs and schedules of rates, fares and charges as required by law, that persons representing said companies at Chicago, aforesaid, solicit transportation at rates less than the rates named in the tariffs filed with the Commission and published by them as required by the Act to Regulate Commerce.

And Whereas: It is stated in said complaint that the said carriers resort to ingenious devices whereby rates less than the established rates are given to favored shippers,

And Whereas: The Interstate Commerce Commission of its own motion has decided to investigate said informal complaints by inquiring into the business of the carriers engaged in the transportation of property from Chicago to Eastern seaboard points.

Therefore, it is hereby ordered, That the Baltimore & Ohio Railroad Company, The Chicago & Eastern Illinois Railroad Company, The Chicago & Grand Trunk Railway Company, The Grand Trunk Railway Company of Canada, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, The Chicago & Erie Railroad Company, The Michigan Central Railroad Company, The Lake Shore & Michigan Southern Railway Company, The Pennsylvania Company, The New York, Chicago & St. Louis Railroad Company, The Wabash Railroad Company, The Delaware, Lackawanna & Western Railroad Company do appear before the Interstate Commerce Commission, at the office of the United States attorney, in the United States Postoffice Building in Chicago aforesaid, at 10 o'clock in the forenoon on Wednesday the 18th day of July, A. D. 1892, when the said Commission will proceed to make inquiry into and investigate the management of the business aforesaid, by the carriers aforesaid.

In testimony whereof, etc.

J. K. FARRELL and 54 others

THE LOUISVILLE & NASHVILLE R. Co.
and 81 other railroads.

(No. 381.)

ANSWERS OF DEFENDANTS.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY

Demands proof as to who the complainants are and what they do.

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Denies that they are common carriers under any common control, management or arrangement with any of the defendants.

That Columbia is located on the Nashville & Decatur Railroad, which is operated by defendant under a lease.

That the Nashville, Florence & Sheffield Railway extends from or near Columbia to Florence and Sheffield, Ala.; that defendant owns a majority of the stock, but does not operate it. That the distances between Columbia and places named are not stated correctly and the following are correct:

Louisville to Nashville	185 miles
Louisville to Columbia	232 "
Columbia to Nashville	47 "
Columbia to Evansville	202 "
Columbia to Cincinnati	342 "
Nashville to Birmingham	209 "
Nashville to Montgomery	305 "
Nashville to New Orleans	628 "

Rates on coal from mines at Earlington and Providence, Ky., to Nashville April 1st to June 30th, \$1.00 per ton.

July, August, September, October.
\$1.10 \$1.20 \$1.30 \$1.40 per ton

November 1st to March 31st \$1.50 per ton.

The rates through Nashville to Columbia June, July and August \$1.75 per ton. September 1st to May 31st \$2.10 per ton.

That the rates on coal to Nashville for manufacturing purposes from the mines \$1.00 per ton and on the same kind to Columbia is \$1.80 per ton.

That the rates named in complaint on coal to Columbia from Coaldale, Pierces, Warrior and Maples are not correct, they are \$1.75 per ton. From Watts, Broke, Jefferson and New Castle \$1.90 per ton and from Birmingham and south \$2.10 per ton.

The rates to Nashville from same mines are, May 1st to July 31st \$1.50 per ton, August \$1.60, September \$1.70, October 1st to April 30th \$1.80 per ton.

That rates named in complaint are not correct and following are the correct rates:

To Nashville			To Columbia		
From	C. D. F.		C. D. F.		
St. Louis	18 15 34		30 24 60		
Louisville	11 10 20		24 19 48		
Evansville	11 10 20		25 20 48		
Henderson	11 10 20		24 19 48		
Jeffersonville	11 10 20		24 19 48		
Owensboro	11 10 20		24 19 48		
Paducah	11 10 20		25 20 48		
To Huntsville, Decatur, Florence and Sheffield	C. D. F.		Birmingham, Selma, Montgomery, Ala.	C. D. F.	
From St. Louis	28 22 58			31 25 54	
Louisville					
Evansville					
Henderson					
Jeffersonville	19 17 39		24 20 40		
Owensboro					
Paducah					

That where the rate is more to Columbia than to farther points, it is on account of the rail and water competition, and that the freight, if transported by the competition, would not have to pass through Columbia to reach its destination.

Admits the following rates are correct:

Louisville to Nashville, class C	11 cents
" " "	" F. 20 "
" " Columbia	" C. 25 "
" " "	" F. 48 "

but denies that the rates are unjust or discriminating.

Admits that on class C to Huntsville, De-

catur, Florence, Tusculmbia and Sheffield, the rate per 100 pounds is one half cent less than class F, being flour in barrels and being estimated at 200 pounds and as long as the difference between class C and F is maintained from St. Louis and Ohio river points, the same relative adjustment is maintained on shipments from Columbia to the same points of destination.

Admits that the rates stated in complaint to Georgia and Florida points are correct and that from Nashville and Columbia the rate on class C is generally 4 cents higher than class D, which is grain.

That the through rate to Palatka on class C is 8 cents per 100 pounds higher than class D, from Nashville as well as Columbia.

That the relation between classes C, D, F, is not in every case uniform to Palatka, for instance, the rates are made by adding certain arbitraries or local rates from Jacksonville, which rates are controlled by boats on the St. John's river, which allows the rails line to secure on flour in sacks a higher rate than in barrels, and that in the adjustment of the rates on class C, D and F, that is no discrimination in favor of Nashville as against Columbia.

That the rate on grain, Nashville to New Orleans is 15 cents per hundred except wheat, which is 18 cents per 100 pounds; the rate from Evansville to New Orleans on grain is 18 cents per 100 pounds, and from Louisville it is 20 cents per 100 pounds, and Columbia to New Orleans, a distance of 579 miles, it is 25 cents per 100 pounds.

Admits that Columbia is 47 miles nearer New Orleans than Nashville.

Denies that it is 232 miles nearer from Columbia to New Orleans than Louisville by the short line or rate making line between Louisville and New Orleans.

That the rates on grain from Nashville, Louisville and Evansville to New Orleans are controlled by rail and water competition.

That the rates on corn from Columbia to interior points are in no case more than 3 cents per 100 pounds more than from Nashville; that the rate was 5 cents for a long time and this defendant, after careful consideration of the conditions surrounding the shipments of grain from Columbia and other points in the same territory and with a view of protecting the interests of the farmers and millers, voluntarily reduced the rates.

Denies that the rates on grain from Columbia to all northern cities are 10 cents per 100 pounds higher than from Nashville to the same points.

From		
Nashville to Louisville	9	Cincinnati
Columbia	19	28

From			
Nashville to Baltimore, Philadelphia, N. Y. Boston	31	32	34
Columbia	39	40	42

From	
Nashville to Virginia cities, including Newport News and Norfolk	25 cents

Columbia	25 3/4 cents
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Denies that the rates from Louisville to Columbia are excessive or that the circumstances and conditions of transportation are the same as to Nashville, as the water compe-

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tition controls the rates to Nashville and that the low rates forced by the competition to Nashville has benefited the citizens at Columbia and adjacent points on the Nashville & Decatur Railroad.

The rates on sugar from New Orleans to Nashville in barrels per car load is 19 cents per 100 pounds; less than car loads 22 cents, and if not in barrels, in any quantity 22 cents, and to Columbia in any quantity 37 cents.

That rate on coffee to Nashville from New Orleans is 28 cents and to Columbia 38 cents; on rice and molasses to Nashville 22 cents; to Columbia 37 cents.

Denies that the service to Columbia is exactly the same as that to Nashville, or is performed under similar circumstances and conditions, but is widely different, and that the rates named of 37 cents per 100 pounds from New Orleans to Columbia on sugar or similar articles a distance of 575 miles are reasonable and low and if it was not on account of the low rates to Nashville, the rates to Columbia would be higher than they now are.

The rates on meal, bran and grain from Nashville to Decatur is 10 cents per 100 pounds and from Columbia it is 18 cents.

Denies that there is a rate of \$180.00 per car on oranges from Florida points to Columbia and \$160.00 to Nashville; that the rates are 42 cents per box to Nashville and 58 cents to Columbia.

Admits that the rates on potatoes in car load lots are 8 cents per 100 pounds more from Columbia than Nashville to Birmingham and other points, but denies that the service performed is the same or that the charge is unjust or unreasonable.

That the rates given in complaint are not correct to points in Alabama on class B and the following are correct:

Class B to Talladega, Anniston, Birmingham, from

Nashville	25	25	28
Columbia	40	40	38

Denies that on all freights carried into Columbia, no matter where from, the rate charged is the Nashville rate, plus the local from Nashville to Columbia or that it is often or at any time higher than the Nashville plus the local, and that there is any lawful preference given to Nashville merchants in violation of the Interstate Commerce Law.

Defendant alleges that it would be unjust to them and Nashville and many other places situated like Columbia to give to Columbia the same rates as Nashville, that the rates now charged are just and reasonable and if any citizen of Columbia has been charged over the tariff rates, that defendant is ready at any time on proof of the same to refund the overcharge.

THE MOBILE & OHIO RAILROAD COMPANY

Denies each and every allegation of the complaint.

Denies that they have a tariff rate in force over their road to or from Columbia.

Allege that they had no shipments of freight over their road to or from Columbia during the year 1891, and up to March 10th, 1892.

Prays that they be dismissed as a defendant to the complaint.

THE NORFOLK & WESTERN RAILROAD COMPANY

Allege that they have no control in making the rates to or from Columbia.

Prays that the complaint be dismissed.

THE CAPE FEAR & YADKIN VALLEY RAILROAD COMPANY

Allege that they have no rates over their line to or from Columbia.

Prays that complaint be dismissed.

THE OLD DOMINION STEAMSHIP COMPANY, THE BALTIMORE STEAM PACKET COMPANY and THE SEABOARD & ROANOKE RAILROAD COMPANY

Allege that they have no information as to who the complainants are.

Admit they are common carriers and subject to the Act to Regulate Commerce.

Allege that they are members of the Southern Railway & Steamship Association.

Allege that they have not transported over its road any of the coal, flour, grain, or any of the freight mentioned in the complaint.

Allege that complainants have no ground of complaint against them and that they should not be a party to the proceedings, and prays that complaint be dismissed.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, for themselves and as lessee of the Western & Atlantic Railroad Company

Allege that they are operating the Western & Atlantic Railroad as lessee.

That they are not advised as to the business of complainants.

Admits they are common carriers, but not under a common control, management or arrangement with defendants.

Admits that Columbia is the terminus of one of its branch lines, extending from Columbia to Dechard, Tenn.

Deny that they are interested in and parties to rates charged for transportation over the respective lines made defendants between Columbia and Nashville, Tenn., and various points in the United States outside of the state of Tennessee, or that Columbia is nearer to all points in Georgia reached by Nashville, Chattanooga & St. Louis Railroad, than Nashville is.

Allege that Dechard is half way between Columbia and Nashville.

Denies that its classification and tariffs are unjust and unlawful on classes C and F, in that they haul sack flour, class C, from Ohio river points to Nashville at 11 cents, and on class F at 20 cents, and charge to Columbia, class C, 25 cents and class F, 48 cents. Submit Exhibit A as correct rates.

Denies that the Columbia shippers to all points covered by southeastern tariff, except Huntsville, Decatur, and points named in Alabama pay a higher rate on class C than class F, or that the rate is generally 4 cents per 100 pounds more on C than F class, and that the rates named in complaint are all correct.

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Exhibit A.

Nashville to	C. D. F.			Columbia to	C. D. F.		
	C.	D.	F.		C.	D.	F.
Americus, Ga.	34.	20.	40 $\frac{1}{2}$.	Same	31.	27 $\frac{1}{2}$.	55.
Jessup, Ga.	30.	25.	51 $\frac{1}{2}$.	Same	33 $\frac{1}{2}$.	33.	67 $\frac{1}{2}$.
Charlotte, N. C.	33.	29.	66.	Same	33.	35.	76.
Greenville, S. C.	34.	28.	59.	Same	39.	33.	68.
Newberry, S. C.	36.	32.	65.	Same	41.	36.	73.
Palatka, Fla.	31.	23.	45.	Same	41 $\frac{1}{2}$.	32 $\frac{1}{2}$.	65.
Jacksonville, Fla.	21.	17.	34.	Same	31 $\frac{1}{2}$.	29 $\frac{1}{2}$.	53.

Tariff Sheet January 12.

Rome, Ga.	20.	15.	32.	Same	25.	22.	44.
Fernandina, Fla.	21.	17.	34.	Same	31 $\frac{1}{2}$.	23.	56.
Gadsden, Ala.	20.	16.	32.	Same	25.	22.	44.
Columbus, Ga.	22.	not by our line	Same	26.	21.	43.	
Augusta, Ga.	23.	19.	38.	Same	29 $\frac{1}{2}$.	24 $\frac{1}{2}$.	48.

Denies that Columbia ever gave to the Nashville, Chattanooga & St. Louis Railroad Company any sums of money to have a competing road or to give Columbia the same rates that were given to Nashville.

Allege that on October 2d, 1879, they leased the Duck River Valley Railroad for forty years, and agreed that the rates from Columbia and other points named to Chattanooga and Atlanta should be the same as from Nashville, and the rates from Chattanooga and Atlanta should be the same to Columbia as Nashville; that on November 23d, 1887, it purchased in fee simple the railroad under no other consideration than that the road should be changed from a narrow gauge to a standard gauge by December 31st, 1888, and that no mention was then made as to what rates were to be charged and the lease was canceled by consent of both parties.

Denies that the transportation of freight over the branch line to Columbia is under similar circumstances and conditions as on its main line, as the branch line is very expensive to operate on account of the high grades, which will average 50 feet to the mile more than the main line.

Denies that its rates are unlawful or discriminating, or that it has violated Section 4 of the Act to Regulate Commerce.

THE NEWPORT NEWS & MISSISSIPPI VALLEY RAILROAD COMPANY, and THE LOUISVILLE, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY

Demur to the complaint upon the following grounds:

That complainant states no cause of action or grievance against demurrants.

That not one of the different lines over which petitioner's shipments are said to be overcharged or discriminated against are or allege to be under the control of the demurrants.

The specifications of the complaint show rates made from sundry points over lines of the Louisville & Nashville Railroad, and the Nashville, Chattanooga & St. Louis Railroad, not one thereof being over lines or routes owned or controlled by demurrants, or with which they have any connection in anywise whatsoever.

The demurrants waiving no rights under their demurrer, answer—

That their lines beginning at Louisville, Ky. and run down the Ohio river to Paducah, Ky., with a branch line from Evansville to the main line at Princeton and down the Mississippi river to Memphis, Vicksburg and New

Orleans, but do not pass within 200 miles of Columbia.

That they are competitors of the Louisville & Nashville Railroad, and not in anywise connected with business for Columbia, and have never participated in any of the alleged illegal rates.

That a few shipments of live stock or grain may have been transported over their line to be delivered to the Nashville, Chattanooga & St. Louis Railway at Paducah Junction, to be carried to Nashville and by the Louisville & Nashville Railroad to Columbia, but in such and every case in which the rates are complained about, were those charged by the Louisville & Nashville Railroad for their haul, in which respondents had no share.

THE WESTERN RAILWAY OF ALABAMA

Admits that they are common carriers, but not under a common control, management or arrangement.

Admits the rates from Nashville as set out in complaint which affects defendant, are correct except to Jessup, Rome, Fernandina and Columbus, which are not correctly stated.

Denies each and every other allegation of complaint and demands proof of the same.

Denies that it has been a party to any unlawful discrimination or has, violated the Interstate Commerce Law.

Prays that complaint as to defendant be dismissed.

THE ATLANTA & WEST POINT RAILROAD COMPANY

Has no knowledge as to who the complainants are or what they do and demands proof of the same.

Admits they are common carriers, but not under a common control, management or arrangement.

The location of Columbia may be correct.

Has no knowledge as to the control of the roads into Columbia and demands proof of the same.

That freight transported from Ohio river points or Birmingham and Montgomery do not pass over defendant's line.

That the allegation as to the Georgia, North Carolina, South Carolina, and Florida rates be stricken out as to defendant, as no charge is alleged that defendant made any illegal rate.

Denies that they have violated the Act to Regulate Commerce.

THE ILLINOIS CENTRAL RAILROAD COMPANY.

That defendant's only relation to matters complained of in the complaint, is that it connects with the Nashville, Chattanooga & St. Louis Railway and quotes through rates from Cairo to Nashville and Columbia and other points.

The rates to Columbia are higher than to Nashville on account of the water competition at Cairo to Nashville, and Columbia is the longer haul, and the freight transported either to Nashville or Columbia over defendant's line, leaves it at Martin, 55 miles from Cairo, and the interest in the business is the same to both places.

4 INTER 8.

That the other allegations of complaint relate to matters over which this defendant has no control.

THE KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD,

Without waiving any insufficiency in complaint and insisting that the same does not show a breach of any legal duty that defendant should perform, answer:

Denies that it has ever carried freight for any of the complainants to or from Columbia, or that they have ever issued itself or in connection with other defendants rates to or from Columbia, and demands proof that it has ever discriminated against Columbia or violated the Interstate Commerce Law.

Admits that it is a common carrier, but not under a common control with defendants; that the only connection that is made is with the Louisville & Nashville Railroad, and the only tariff in which defendant is interested in the Tennessee rates over the Louisville & Nashville Railroad is Tariff Rate No. 718, April 22, 1891, and mailed to the Commission on April 8, 1891.

That as to the other allegations of complaint they constitute no charge against the defendant as it was not a participant in any of the rates or classifications therein mentioned.

THE JOINT ANSWER OF THE RICHMOND & DANVILLE RAILROAD AND THE GEORGIA PACIFIC RAILWAY

Denies that they have violated the Interstate Commerce Law.

Denies that they are common carriers under common control or management.

Allege that the complaint does not charge the defendants with violation of any kind that the Commission can investigate or cause these defendants to become parties to this action and asks that they be dismissed.

THE CENTRAL RAILROAD OF GEORGIA.

That the Louisville & Nashville Railroad Company being the initial line, that their answer shall be the answer of this defendant.

SALT LAKE CHAMBER OF COMMERCE, Petitioner, v.

THE UNION PACIFIC RAILWAY *et al.* Defendants.

(No. 338.)

ANSWERS OF DEFENDANTS.

THE SOUTHERN PACIFIC COMPANY

Admits they are common carriers.

Denies that the rates for transportation of freight from Missouri river points to Salt Lake City are unreasonable or unjust or in violation of the first section of the Act to Regulate Commerce, and alleges that the cost of the actual movement of freight does largely exceed one half of one cent per ton per mile and denies that the charges collected in any case is nine times, or in no case less than three times the cost of movement.

Denies that the rates from Missouri river points to San Francisco and Salt Lake City constitutes unjust discrimination or in violation of section four of the Act to Regulate Commerce, or gives a preference or advantage to the merchants of San Francisco in transportation of freight over the merchants of Salt Lake City.

Denies that the transportation of freight from Missouri river points to Salt Lake City are made under substantially similar circumstances and conditions as to San Francisco.

Denies that Salt Lake City is the largest or only important centre of trade between Denver and San Francisco.

Denies that the rates charged for transportation of freight are excessive or unlawful or in violation of the Act to Regulate Commerce.

THE UNION PACIFIC RAILWAY

Admits that complainants are a body corporate and for the purposes alleged.

Admits that they are common carriers, but not under a common control or management.

Denies that the rates are unreasonable or unjust and that the cost of transportation as alleged by complainants is true, and alleges that the cost does exceed one half of one cent per ton per mile.

Denies that freight transported from Missouri river points to Salt Lake City are under substantially similar circumstances and conditions as to San Francisco.

Admits that the distances mentioned in complaint between river points and Salt Lake City are correct and that it is the most important centre of trade on their line between Denver and San Francisco, but denies the fact of the favorable situation and natural advantages as a source of supply to the large surrounding country, and denies that the rates charged are in violation of the Act to Regulate Commerce.

Alleges that Salt Lake City is an inland city which does not enjoy the natural advantages afforded by being a sea port town and that San Francisco is situated practically upon the Pacific Ocean and, therefore, the circumstances and conditions are entirely dissimilar and the rates to San Francisco are controlled by the water competition and the rates to Salt Lake City are controlled only by rail lines and has not the benefits that would be derived if it had the water competition.

Denies that the rates to Salt Lake City from Missouri river points are unjust or unreasonable, or that they are a discrimination in favor of any city.

THE BURLINGTON & MISSOURI RIVER RAILROAD,

THE DENVER & RIO GRAND RAILROAD,

Denies that the rates for transportation of freight from Missouri river points to Salt Lake City are unreasonable or unjust.

That they do not participate in any traffic between San Francisco and Salt Lake City, which originates at or terminates in Salt Lake City.

Alleges that the cost of movement of freight over its line exceeds one half of one cent per ton per mile.

4 INTER 8.

Denies that it gives any undue advantage to the merchants of San Francisco against the merchants of Salt Lake City.

Denies that the circumstances and conditions affecting rates between Missouri river points and Salt Lake City are substantially similar to those of San Francisco; that the water competition regulates the rates to San Francisco and that Salt Lake City being an inland town, freight is transported by rail competition only, and that if defendants did not compete for the through business, the rates to Salt Lake City would have to be much higher than they now are.

THE RIO GRANDE WESTERN RAILWAY

Admits that complainants are a corporate body for the purposes alleged.

Admits they are common carriers, but not under common control or management.

Denies that the rates between Missouri river points and Salt Lake City are unjust or unreasonable.

Alleges that the cost of movement of freight exceeds one half of one cent per ton per mile, and that the charges collected are not over nine times, or not less than three times, the cost of movement.

Denies that they give to the merchants of San Francisco an undue advantage over those of Salt Lake City.

Denies that the conditions and circumstances of the transportation of freight to Salt Lake City are similar to those of San Francisco.

Alleges that the haul between Missouri river points and Salt Lake City over their line is 292 miles; that 100 miles is a desert with almost no local business, and the other part is over mountain ranges with steep grades, and that portions of its line which are tillable and settled districts are parallel to competing lines and the cost of maintaining and operating its line of road compared with the amount of traffic, is necessarily greater and requires higher rates to be reasonable than on roads with a large local traffic and light grades, and with the competition the rates are as low as can be made reasonable and compensatory.

That the water compensation controls the rates to San Francisco, and that Salt Lake City, being an inland city, does not enjoy the benefits derived by cities so situated where there is water competition.

That Salt Lake City merchants, have no market between said city and San Francisco which can be reached by San Francisco merchants, unless for a short distance on the Southern Pacific Railroad west from Ogden, and those points are 37 miles nearer Ogden than to Salt Lake City and the merchants ship from the east to Ogden and any difference in rates from said common points to Salt Lake City and San Francisco, would not equal the local rate back from San Francisco to any point which Salt Lake City merchants have a market.

THE ATCHISON, TOPEKA & SANTA FE RAILROAD,

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY,

Admits they are common carriers.

Denies that the rates from Missouri river

points or San Francisco to Salt Lake City are unjust or unreasonable, or in violation of the Act to Regulate Commerce.

Alleges that the cost of transportation exceeds one half of one cent per ton per mile, or that it charges over nine times or not less than three times the cost of transportation of freight over its line.

Denies that the rates are discriminating against Salt Lake City in favor of San Francisco, or that they violate the 4th section of the Act to Regulate Commerce.

Denies that the transportation of freight from Missouri river points to Salt Lake City are under similar circumstances and conditions as to San Francisco, and freight transported for San Francisco over defendant's line does not pass through Salt Lake City.

JAMES & ABBOT
v.

CANADIAN PACIFIC R. CO., MAINE CENTRAL R. CO., BOSTON & MAINE R. CO.
(No. 834.)

ANSWER OF DEFENDANTS.

The defendants answering the complaint, admit they are common carriers. Admits that the rates named in the complaint on the 20th of February, 1892, were correct. That the rates now charged are as follows:

From Maine points.

Lumber, 15½ cents per 100 pounds.

Shingles, 26½ " " "

Province of New Brunswick points.

Lumber, 14½ cents per 100 pounds.

Shingles, 20 " " "

That the circumstances and conditions attending the traffic at the two groups of places, are substantially dissimilar as to value, volume and relation to other traffic over the same line of railway.

That the water competition exercises a controlling effect upon the rates of freight obtainable from Fredericton to Boston, but which does not exist at Fort Fairfield, Hurds Siding and Stevens Siding.

That the said Maine points are situated on a branch line and that the character and volume of the traffic on said branch line, and the cost of hauling said traffic and operating said branch line, render the rates now in force barely remunerative, and that any further reduction in said through rates would compel defendant, the Canadian Pacific Railway Company, to operate the said branch line, the Arnostook Railroad of Maine, as a local line.

Denies that the rates now in force from the circumstances are unjust or discriminating.

Denies that they have violated the Act to Regulate Commerce.

Denies that the complainants are entitled to any damages under the proceedings.

The complainants were informed of the change in the rates, and replied that they were not satisfied and demanded a hearing unless the rates on shingles from Fort Fairfield were reduced to 18½ or 19 cents per 100 pounds to Boston.

Complaint was then served.

4 INTER S.

F. FEARNLEY
v.

CENTRAL RAILROAD COMPANY OF NEW JERSEY
SEY et al.

(835.)

ANSWER OF DEFENDANTS.

THE CENTRAL RAILROAD OF NEW JERSEY.

Admits they are common carriers.

That in August, 1891, complainant shipped from Lebanon, N. J., to Buffalo, N. Y., six car loads of peaches on which freight was charged at 22 cents per basket, with a minimum number of baskets for each car of 500, and return the baskets free.

That the peaches were transported under a published rate given to the public, of which the agent at Lebanon had in his possession a copy.

Admits that the official classification of peaches are rated 1½ first class, and that it was by the regular freight trains that such shipments would be transported, but the special rate of 22 cents per basket is by special fast freight trains, which are fitted up at large expense and includes the cost of handling and returning the baskets free.

Denies that they have violated the Interstate Commerce law and prays that complaint be dismissed with costs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD

Admits they are common carriers.

Admits that in August, 1891, they transported six cars of peaches for complainant Lebanon, N. J., to Buffalo, N. Y.

Denies that there was any overcharge in rate or weight.

The the official classification and tariff did not apply to shipments of peaches from points on Central Railroad of New Jersey, but were carried under a joint special tariff 28-51, dated July 15, 1887, issued by Central Railroad of New Jersey and took effect July 25, 1887, copy of which was filed with the Commission.

That the number of baskets reported to the railroad agent at Lebanon in the six cars was 3404 and on arrival at Buffalo 8556 baskets were found in the six cars and freight on the excess was charged for and collected.

Denies that they have violated the Interstate Commerce law and prays that complaint be dismissed.

E. J. DANIELS
v.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILROAD COMPANY AND THE SIOUX CITY & NORTHERN RAILROAD COMPANY.

(No. 387.)

The complaint alleges:

That complainant is a merchant at Sioux Falls, South Dakota, engaged in shipment of interstate commerce from Duluth, Minnesota.

That defendants are common carriers under common control, management or arrangement for transportation of property from South Dakota and Iowa to points in Minnesota and are subject to the Act to Regulate Commerce.

That the rates from Duluth to Sioux Falls from September, 1890, to February 9, 1891, were the same as to Sioux City as follows:

September 29, 1890.

Classes.

1.	2.	3.	4.	5.	A.	B.	C.	D.	E.
70.	58.	42.	28.	21.	23.	23.	18.	16.	15.

January 15, 1891.

Classes.

1.	2.	3.	4.	5.	A.	B.	C.	D.	E.
75.	60.	42.	30.	25.	30.	25.	20.	17½.	16.

That on February 9, 1891, the rates were increased to Sioux Falls as follows:

Classes.

1.	2.	3.	4.	5.	A.	B.	C.	D.	E.
81.	65.	45.	32.	27.	32.	27.	22.	19.	17.

That the distance to Sioux Falls is at least 72 miles less than to Sioux City over the same lines.

That the rates are unjust and unreasonable and a discrimination in favor of Sioux City against Sioux Falls.

That the rates are greater for a short than the long haul.

ANSWERS OF DEFENDANTS.

THE GREAT NORTHERN RAILWAY,

Admits they are common carriers.

Admits complainant is a merchant at Sioux Falls.

Admits that the rates stated in complaint are correct.

Admits that the distance from Duluth to Sioux Falls is 72 miles less than to Sioux City over defendants' line.

That the distance from Duluth to Sioux Falls by defendants' line and the Willman & Sioux Falls Railway is 844 miles.

Denies that the rates from Duluth or Lake Superior points to Sioux Falls are unreasonable or discriminating.

That the rates are the same as those made by the completing lines, and defendants must adopt the rates made by the Chicago lines or abandon the business.

THE SIOUX CITY & NORTHERN RAILROAD,

Admits they are common carriers.

That in connection with the Great Northern Railway it is enabled to engage in the transportation of freight and by the competing lines being the shortest route, the rate established by them has to be adopted to secure any of the business.

That the rates are not unreasonable or discriminating against Sioux Falls in favor of Sioux City.

4 INTER 5.

E. J. DANIELS

v.

THE GREAT NORTHERN RAILWAY COMPANY AND THE SIOUX CITY & NORTHERN RAILWAY COMPANY.

(No. 386.)

The complaint alleges:

That complainant is a merchant in Sioux Falls, South Dakota, and engaged in shipment of interstate commerce from Chicago.

That defendants are common carriers.

That the rates charged for transportation of freight from Chicago to Sioux Falls from September 22, 1890, to February 14, 1891, were the same as to Sioux City, to wit:

September 22, 1890.

Classes.

1.	2.	3.	4.	5.	A.	B.	C.	D.	E.
70.	58.	42.	28.	21.	23.	23.	18.	16.	15.

January 1, 1891.

Classes.

1.	2.	3.	4.	5.	A.	B.	C.	D.	E.
75.	60.	42.	30.	25.	30.	25.	20.	17½.	16.

That on February 14, 1891, the rates to Sioux Falls were increased and are now the same, to wit:

Classes.

1.	2.	3.	4.	5.	A.	B.	C.	D.	E.
81.	65.	45.	32.	27.	32.	27.	22.	19.	17.

That the distance to Sioux Falls is at least 50 miles less than to Sioux City over defendant's lines and a greater rate is charged for the short than the long haul.

That the rates now charged by defendants to Sioux Falls are unreasonable and unjust, and discriminating against Sioux Falls merchants in favor of other merchants of Sioux City, in violation of the Act to Regulate Commerce.

That defendants be required to answer complaint and an order be made commanding them to cease and desist from violating the Act to Regulate Commerce.

ANSWERS OF DEFENDANTS.

THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY, and THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY

Admits that complainant is a merchant located at Sioux Falls, South Dakota.

Admits that they are common carriers.

Admits that rates for transportation mentioned in complaint are correct.

Admits that the distance from Chicago to Sioux City by the lines of these defendants to the complaint is greater than to Sioux Falls than by the lines of the Chicago, Rock Island & Pacific Railway and the Burlington, Cedar Rapids & Northern Railway.

Denies that the rates are unjust or unreasonable and that they discriminate against Sioux Falls in favor of Sioux City, or that they have violated the Act to Regulate Commerce.

Alleges that the defendant's line or the Burlington, Cedar Rapids & Northern Railway reaches Sioux City; that the distance from Chicago to Sioux Falls *via* these lines is not included in the distance from Chicago, which is 622 miles; that from Lester, where the de-

defendant connects with the Burlington, Cedar Rapids & Northern Railway, it is 73 miles to Sioux City, while it is 24 miles to Sioux Falls.

That the rate to Sioux Falls and Sioux City is made by the short line, the same being to Sioux City 517 miles and to Sioux Falls 555 miles.

That the defendants' line being the longer line by 105 miles, to participate in the transportation of the freight from Chicago to Sioux City, the rates of the short line have to be adopted.

That the following are the distances:

Chicago to Sioux Falls *via* C. B. & Q. and B. C. R. & N. 555 miles.

Chicago to Sioux Falls *via* C. R. H. P. & B. C. R. & N. 573 miles.

Chicago to Sioux Falls *via* Illinois Central Railway 580 miles.

Chicago to Sioux Falls *via* C. M. & St. P. Railway 590 miles.

THE SIOUX CITY & NORTHERN RAILROAD

Admits they are common carriers.

Denies that the rates are unjust or unreasonable or that they discriminate against Sioux Falls in favor of Sioux City, and have violated the Act to Regulate Commerce.

Alleges that it has no line into Sioux Falls or out of Chicago.

That its western terminus is Sioux City and that there are three lines from Sioux City to Chicago, the Illinois Central, the Chicago, Milwaukee & St. Paul and the Chicago & Northwestern Railroad.

That the defendant connects at Lester, Iowa, with the Burlington, Cedar Rapids & Northern Railway and it connects with the Chicago, Rock Island & Pacific at West Liberty and by rail route to Sioux City defendants are enabled to ship goods from the east.

That the said mentioned roads from Chicago to Sioux City are shorter lines than defendants and have established rates and defendants have to adopt the same to engage in the transportation of the freight.

That Sioux City is much larger than Sioux Falls and that the freight transported to Sioux City is largely in excess of that to Sioux Falls.

That if defendants are compelled to reduce the rates from Chicago to Sioux Falls to the same as to Sioux City, they will be unable to compete for the business with the shorter and competing lines.

RE ILLINOIS STEEL COMPANY *et al.*

(ORDER.)

At a General Session of the Interstate Commerce Commission, held at its offices in the city of Washington, D. C., on the 14th day of June, A. D. 1892.

Present: Hon. William R. Morrison, Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. James W. McDill, Hon. Judson C. Clements—*Commissioners.*

(No. 841.)

Whereas: Informal complaint has been made to the Interstate Commerce Commission, that

the Illinois Steel Company, a corporation created, chartered and existing under and by virtue of the laws of the state of Illinois, has caused to be incorporated under the laws of the state of Illinois, The Calumet & Blue Island Railway Company for the purpose of operating its switches and side tracks at South Chicago in the state of Illinois, and engaging in traffic by a continuous shipment from cities and places without the state of Illinois to cities and places within the state of Illinois in connection with the Baltimore & Ohio Railroad Company, the Baltimore & Ohio Southwestern Railroad Company, the Illinois Central Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Pittsburgh, Fort Wayne & Chicago Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company and the Belt Railway Company of Chicago; and has also caused to be incorporated the Chicago & Southeastern Railway Company (of Illinois) under the laws of the state of Illinois for the purpose of operating its switches and side tracks at Chicago in the state of Illinois, and engaging in traffic by a continuous shipment from cities and places without the state of Illinois to cities and places within the state of Illinois in connection with the Chicago & Alton Railroad Company and the Chicago Railway Transfer Company; and has also caused to be incorporated the Joliet & Blue Island Railway Company under the laws of the state of Illinois for the purpose of operating its switches and side tracks at Joliet, Illinois, and engaging in traffic by a continuous shipment from cities and places without the state of Illinois to cities and places within the State of Illinois, in connection with the Chicago & Alton Railroad Company, the Atchison, Topeka & Santa Fé Railway Company, the Elgin, Joliet & Eastern Railway Company and the Chicago, Rock Island & Pacific Railway Company; and has also caused to be incorporated under the laws of the state of Illinois the Chicago & Kenosha Railway Company for the purpose of operating its switches and side tracks at Chicago aforesaid, and engaging in traffic by a continuous shipment from cities and places without the state of Illinois to cities and places within the state of Illinois, in connection with the Chicago & Northwestern Railway Company and the Chicago, Milwaukee & St. Paul Railway Company; and has also caused to be incorporated under the laws of the state of Wisconsin the Milwaukee, Bay View & Chicago Railroad Company for the purpose of operating its switches and side tracks at or near Milwaukee in the state of Wisconsin, and engaging in traffic by a continuous shipment from cities and places without the state of Wisconsin to cities and places within the state of Wisconsin in connection with the said Chicago, Milwaukee & St. Paul Railway Company and the Chicago & Northwestern Railway Company;

And Whereas: It is stated in said informal complaint that the said Illinois Steel Company owns and controls certain of the above-named companies, to wit, the Calumet & Blue Island Railway Company, the Chicago & Southeastern Railway Company, the Joliet & Blue Island

Railway Company, the Chicago & Kenosha Railway Company, the Milwaukee, Bay View & Chicago Railroad Company and operates the same in connection with the railroads of the other railroad companies hereinabove named, as a device for the purpose of evading the provisions of the Act to Regulate Commerce, and obtaining special illegal, unjust and unreasonable rates for the transportation of interstate traffic and operates the same by the connivance and consent of said other connecting railroad companies in such a manner as to give to the said Illinois Steel Company an illegal, undue and unreasonable preference and advantage and subjecting other persons, firms and companies to undue and unreasonable prejudice and disadvantage as to the transportation of property from divers cities and places without the states of Illinois and Wisconsin to divers cities and towns within those states and between those states;

And Whereas: It has been made to appear that the said railroad companies so owned, controlled and operated by the said Illinois Steel Company for more than six months last past have been and still are engaged in the transportation of property by railroad in connection with the other companies above named, under a common control, management or arrangement for a continuous carriage or shipment from divers cities and towns without the states of Illinois and Wisconsin, to divers cities and places within those states and between those states, and it appearing that none of the said railroad companies so owned, controlled and operated by the Illinois Steel Company have filed copies of their contracts, agreements and common arrangements with the said other companies, nor have they filed with the Interstate Commerce Commission tariffs or schedules of their rates, fares, and charges for the transportation of interstate business as required by the 6th section of the Act to Regulate Commerce;

And Whereas: The Interstate Commerce Commission, of its motion, has decided to investigate the said informal complaint by inquiring into the business of all said railroad companies, both those so owned, controlled and operated by the Illinois Steel Company and also said other railroad companies operated in connection therewith and the management thereof by all of such carriers with reference to the alleged making of illegal, unjust and unreasonable special rates and also as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company, as well as the failure on the part of said carriers to file their contracts, agreements or tariffs as required by law.

Therefore, it is hereby ordered, That the Calumet & Blue Island Railway Company, the Chicago & Southeastern Railway Company, the Joliet & Blue Island Railway Company, the Chicago & Kenosha Railway Company, the Milwaukee, Bay View & Chicago Railroad Company, the Baltimore & Ohio Railroad Company, the Baltimore & Ohio Southwestern Railroad Company, the Illinois Central Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Pittsburg, Fort Wayne & Chicago Rail-

way Company, the Pennsylvania Company, the Pennsylvania Railroad Company, the Belt Railway Company of Chicago, the Chicago & Alton Railroad Company, the Chicago Railway Transfer Company, the Atchison, Topeka & Santa Fé Railroad Company, the Elgin, Joliet & Eastern Railway Company, the Chicago & Northwestern Railway Company and the Chicago, Milwaukee & St. Paul Railway Company on or before the 7th day of July, A. D. 1892, do severally make and file with the Secretary of the Interstate Commerce Commission, at its office in Washington, in the District of Columbia, a full, complete, perfect and specific verified answer setting forth all and singular the facts and circumstances in regard to the matters and things thereof complained against them as hereinbefore set forth, and particularly, the said railroad companies are required to state and make known in their said answers, as follows:

1. Does any traffic contract, agreement or arrangement in writing or otherwise exist between the companies above alleged to be under the control of and operated by the said Illinois Steel Company and any of the other companies with reference to interstate traffic? If so, state the contract, agreement or arrangement.

2. Are any tariffs of rates and charges for the transportation of interstate property in effect between said companies above alleged to be under the control of and operated by the Illinois Steel Company and said other railroad companies? If so, what are they and what are the divisions thereof between the several carriers.

3. Have the companies above alleged to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned, during the six months last past, or have they delivered any such traffic to such other carriers during that time, for any person, firm or company, other than the Illinois Steel Company, and if so, to what amount.

And it is also hereby further ordered, That all of said companies appear before the Interstate Commerce Commission, at the office of the United States attorney, in the United States Postoffice building in Chicago aforesaid, at 10 o'clock in the forenoon on Wednesday the 18th day of July, A. D. 1892, when the said Interstate Commerce Commission will proceed to make inquiry and investigate into the management of the business aforesaid, by the carriers aforesaid.

RE CHICAGO & GRAND TRUNK RAILROAD COMPANY *et al.*

(Order.)

At a General Session of the Interstate Commerce Commission, held at its offices in the city of Washington, D. C., on the 18th day of June, A. D. 1892.

Present: Hon. William R. Morrison, Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. James W. McDill, Hon. Judson C. Clements, *Commissioners*.

(No. 842.)

Whereas: It appears from Tariff No. 1129 filed by the Chicago & Grand Trunk Railway

Company on behalf of itself and the Cincinnati, Saginaw & Mackinaw Railroad Company and the Grand Trunk Railway Company of Canada, effective since June 18, 1892, that said railroad companies make a different and less charge for the transportation of all classes of property from Chicago and other western points to Montreal, Point Levi, Portland and Boston if said property is intended for transatlantic carriage than they make if said property is destined to the same points and not intended for export.

And, Whereas: Informal complaint has been made to the Interstate Commerce Commission that the aforesaid practices by said railroad companies subjects divers persons, companies, firms, corporations, localities and traffic to an undue and unreasonable prejudice and disadvantage.

And, Whereas: The Interstate Commerce Commission of its own motion has decided to investigate said informal complaints by inquiry into the business of said railroad companies with reference to the making of said alleged illegal, unjust and discriminative rates.

Therefore, it is hereby ordered, That the Chicago & Grand Trunk Railway Company, The Cincinnati, Saginaw & Mackinaw Railroad Company and the Grand Trunk Railway Company of Canada do severally make and file with the Secretary of the Interstate Commerce Commission on or before the 7th day of July, 1892, at its office in Washington, in the District of Columbia, specific and verified answers setting forth all and singular the facts and circumstances in regard to the matters and things thereof complained against them as hereinbefore set forth.

And it is also hereby further ordered, That all of said companies appear before the Interstate Commerce Commission, at the office of the United States attorney, in the United States Postoffice Building in Chicago aforesaid, at 10 o'clock in the forenoon on Wednesday the 18th day of July, A. D. 1892, when the said Interstate Commerce Commission will proceed to make inquiry into and investigate the management of the business aforesaid, by the carriers aforesaid.

In testimony whereof, etc.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

THE INTERSTATE COMMERCE COMMISSION

v.

THE TEXAS & PACIFIC RAILWAY CO.

Upon the petition of the Interstate Commerce Commission, filed in this court under the sixteenth section of the Act to Regulate Commerce, for the enforcement of its order requiring the defendant to cease and desist from carrying any article of imported traffic shipped from any foreign port upon through bills of lading to any place within the United States at any other than the same rates established by the inland tariff of the defendant for the carriage of other like kind of traffic, *Held*,

1. That the proceeding is not defective because the Southern Pacific Company, a connecting carrier participating with defendant in the carriage between certain points, was not made a party defendant herein. If the defendant is violating a

proper order of the Commission it should be restrained from doing so and it cannot escape upon the objection that another wrong-doer is also violating it.

2. The Interstate Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that, unless it is given, the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them unless given exceptional rates to justify that one in making the discrimination in his favor on the ground of the necessity of the situation. The order prayed for in the petition is granted.

Decided October 5th, 1892.

For report and opinion of the Interstate Commerce Commission with reference to the previous steps in the case, see 8 Inters. Com. Rep. 417; see also *ante*, p. 62.

Edward Mitchell, U. S. District Attorney, *Simon Sterne* and *John D. Kernan*, for Commission.

John F. Dillon and *Winslow S. Pierce*, for defendant.

OPINION OF THE COURT.

Wallace, J.:

This is an application to enforce an order of the Interstate Commerce Commission, made January 29th, 1891, in a proceeding instituted by the New York Board of Trade and Trans-

portation. The petition in that proceeding complained of unjust discrimination made by various railway carriers. The defendant was duly notified of the complaint and appeared in the proceeding and submitted its rights. It was shown to the Commission, as appears by the findings of fact in their report, that the defendant, in conjunction with the Southern Pacific Company, made joint rates from New Orleans to San Francisco covering carriage of traffic by the rails of the defendant from New Orleans to El Paso and thence by the rails of the Southern Pacific Company to San Francisco; and also made joint rates with vessel owners in London and Liverpool covering carriage of traffic from those places to San Fran-

cisco *via* New Orleans. It was also shown that the ordinary tariff rates charged by the two companies upon traffic delivered to the defendant at New Orleans and shipped at New York, Chicago and other places in this country for carriage from New Orleans to San Francisco, were somewhat more than double the rates charged for carriage of similar traffic sent from Liverpool or London by through bills of lading to San Francisco *via* New Orleans. To illustrate, it was shown that the rates made by the two companies in conjunction with Liverpool vessel owners, by through bills of lading from Liverpool to San Francisco by the rails of the defendant from New Orleans to El Paso, were, per hundred pounds on books, on carpets and on cutlery, \$1.07, while the regular tariff rates of the two companies upon the articles when sent to New Orleans from other places in this country were, per hundred pounds, on books, \$2.64, on carpets, \$2.88, and on cutlery, \$3.26, and that the rates on these articles when shipped from Liverpool were 80 cents per hundred pounds for carriage from New Orleans to San Francisco. The defendant contended that it was justified in making the discrimination between the foreign and domestic traffic because owing to the competition of sailing vessels and foreign carriers between Liverpool and San Francisco it could not get any appreciable amount of foreign traffic without meeting the competitive rates by making the rates given. The Commission while conceding the facts to be as asserted by the defendant ruled against the validity of the excuse and made an order which in substance required the defendant to desist from carrying any article of imported traffic shipped from any foreign port upon through bills of lading destined to any place within the United States at any other than the same rates established by the inland tariff of the defendant for the carriage of other like kind of traffic. It is admitted by the answer of the defendant that since the order of the Commission was made it has maintained a substantially similar disparity in its transportation rates for these articles as well as in those for the transportation of numerous other articles depending upon the foreign or domestic origin of the shipment. The defendant insists that its action in this regard is not prohibited by the provisions of the Interstate Commerce Act, and that as it has not been guilty of any unjust discrimination within the meaning of that Act, the order of the Commission ought not to be enforced. It also insists that the proceeding is defective because the Southern Pacific Company is not made a party to the defense. If the order made by the Commission was a lawful one I see no reason why the defendant should not be compelled to obey it, notwithstanding the Southern Pacific Railway Company is not at present pursued. If the defendant is violating a proper order of the Commission it should be restrained from doing so and it cannot escape upon the objection that another wrong-doer is also violating it. The real question, as it seems to me, is whether the existence of the peculiar facts which were relied upon before the Commission by the defendant as an excuse for its discrimination, justifies its conduct.

4 LYNN S.

It must be conceded as true, for the purposes of the present case, that the rates for the transportation of traffic from Liverpool and London to San Francisco are in effect fixed and controlled by the competition of sailing vessels between those ports and also by the competition of steamships and sailing vessels in connection with railroads across the Isthmus of Panama, none of which are in any respect subject to the Act to Regulate Commerce. It must also be conceded that the favorable rates given to the foreign traffic are, for reasons to which it is now unnecessary to advert, somewhat remunerative to the defendant; and it must also be conceded that the defendant would lose the foreign traffic by reason of the competition referred to and the revenue derived therefrom unless it carries it at the lower rates and by doing so it is enabled to get a part of it which would otherwise go from London and Liverpool to San Francisco around the Horn or by the Isthmus of Panama. The case presents a question of much interest and importance to the defendant and carriers similarly situated, and also to our own merchants and manufacturers who in supplying the wants of consumers at places within the United States, have to meet the competition of foreign merchants and manufacturers and are placed at a serious disadvantage if they are compelled by the railway carriers to pay higher rates of transportation upon their goods. The question does not, however, seem to be such a doubtful one as to require more than a brief statement of the conclusions reached. The second section of the Interstate Commerce Act prohibits unjust discrimination and declares that the common carrier charging a greater or less compensation for any service rendered in the transportation of passengers or property than it charges any other person for doing a like and contemporaneous service in the transportation of a "like kind of traffic under substantially similar circumstances and conditions," shall be deemed guilty of unjust discrimination. The third section provides that it shall be unlawful for the carrier to make or give any undue or unreasonable preference or advantage to any particular person, locality, or particular description of traffic in any respect whatsoever, or to subject any particular person or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The third section is substantially taken from the second section of the English Act of Parliament known as the Railway and Canal Traffic Act of 1854.

Either section is sufficiently comprehensive in its terms to prohibit an interstate carrier from making an unfair discrimination between different shippers in charges for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. But neither section is intended to prohibit all discriminations or preferences. In considering whether an undue discrimination has been made, the fair interests of the carrier are to be taken into account, and although lower rates are given to one shipper or class of shippers than to another for carrying the same kind of traffic, the latter have no just ground of com-

plaint of unjust discrimination if the conditions of the service enable the carrier to take the traffic of the former at a less cost; nor is the discrimination unjust if made conformably to some agreement by which the favored shipper gives the carrier an adequate consideration for the reduced rates. Upon this principle it was decided not to be an unjust preference under the English Act for a railway company to carry at a lower rate, in consideration of a guarantee of large quantities and full train loads at regular periods, provided the real object of the Company was to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect might be to exclude from the lower rate those shippers who could not give such guarantee. *Nicholson v. Great Western R. Co.* 4 C. B. N. S. 886. The discrimination between different shippers is a lawful one if it is such as the carrier may fairly give because of the difference in cost, expense or the exceptional character of the service. *United States v. Delaware, L. & W. R. Co.* 2 Inters. Com. Rep. 617, 40 Fed. Rep. 101.

Prior to the enactment of the Interstate Commerce Act the courts were of the opinion that discriminations by railway carriers in the rates of freight charged to shippers based solely on the ground of the quantity of freight shipped, without reference to any conditions, tending to decrease the cost of transportation, were contrary to sound public policy and inconsistent with the obligations of such carriers to the public. *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309; *Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co.* 81 Fed. Rep. 652.

It might well be that shippers would be induced to increase their traffic with a carrier by the offer of such discrimination, perhaps by withdrawing part of it from a rival carrier, perhaps by stimulating the shipper to enlarge his business operations and thus the discrim-

ination might be profitable to the carrier. The English courts, in cases arising under the English Traffic Act, have held that preferences given to particular shippers to induce them not to divert traffic from the carrier or to induce them to transfer traffic to one carrier which otherwise would go to another carrier, are unlawful and cannot be justified on the ground of profit to the carrier allowing them. *Harrison v. Cockermouth & Warrington R. Co.* 3 C. B. N. S. 698; *Evershed v. London & N. W. R. Co.* L. R. 2 Q. B. Div. 254.

In the first of these cases the judges in opinion pointed out that if they were to justify a discrimination upon such reasons a railway company might in any case grant a preference to one person over another, provided it acted *bona fide* in the belief that such a course would be to its advantage. In the second case the court in pronouncing against the validity of the justification used this language:

"We think that a railway company cannot, merely for the sake of increasing their traffic, reduce their rates in favor of individual customers, unless at all events there is a sufficient consideration for the reduction which shall lessen the cost to the company of the conveyance of their traffic or some other equivalent or other services are rendered to them by such individual in relation to such traffic."

The Interstate Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that unless it is given the traffic obtained by giving it would go to the competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them unless given exceptional rates to justify that one in making the discrimination in his favor on the ground of the necessity of the situation.

The order is granted.

THE NEW YORK & NORTHERN RAILWAY COMPANY

v.

THE NEW YORK & NEW ENGLAND RAILROAD COMPANY.

Upon the petition of the New York & Northern Railway Company, filed in this court under the 16th section of the Act to Regulate Commerce, for the enforcement of an order of the Interstate Commerce Commission requiring the defendant, under the third section of said Act, to cease and desist from discriminating in facilities and rates between petitioner and another connecting line, *Held,*

1. The motion to dismiss must be determined upon the assumption that the averments of the petition and the findings of fact of the Commission (made by the statute *prima facie* evidence) correctly set forth the matters therein stated.
2. Neither the case before the Commission, nor its decision therein, was confined to the question of discrimination in rates and charges, and the requirement in the order to cease and desist from refusing to interchange traffic was proper.
3. The respondent has restored the joint through tariff and desisted from refusing to accept freight on through bills, but has so arranged the running

of its trains that the facilities for interchange, forwarding and delivering are (as is alleged) substantially no better than before, and not equal to those afforded to the competing lines; and respondent contends that because no question of the hours of running trains was presented to the Commission its acts in that respect may not be shown before this court, acting summarily under section 16 of said Act. To refuse altogether to receive traffic from one connecting line; to receive it only under arrangements which impose such obligations upon the shippers as to transfer and rebilling as would make the transaction of the business impracticable in competition with a more favored line; to receive it without reshipment and transfer indeed, but to systematically neglect to forward it; to receive and forward it, but to so arrange the hours or manner of delivery as to deprive it of facilities equal to those afforded to traffic coming from the competitor; these and a great variety of other devices which might be suggested, while differing some in detail, are

in substance practically the same. To require petitioner to bring a new proceeding each time the ingenuity of the offending carrier may devise some slight variation of the methods by the means of which its violation of the statute is persisted in, would be to fritter away the system of procedure provided in the statute to secure obedience to its requirements. The order of the Commission was no broader than the petition and proofs before them warranted; and this court may properly investigate the charge that respondent is disobeying the requirements of such order by acts and omissions in substance the same as those considered by the Commission, directed to the same end, and accomplishing precisely the same result.

4. There is nothing in the Act which makes mere distance between connecting points, whether a furlong, a mile, or ten or twenty, controlling of the question of discrimination in facilities to connecting lines. In the face of the finding of the Commission that "the physical conditions for interchange of traffic with both the connecting lines are suitable, adequate, and *substantially equal*," the requirements of the second clause of the third section seem to be plainly applicable. Until such finding is questioned, and the record

in this court completed, further discussion of this point is unnecessary.

5. The only link between respondent and its favored connecting line is such community of interest as springs from the existence of the contract for the interchange of traffic. If it be that such a contract makes each line a mere continuation or extension of the other, it is hard to conceive how a case of refusing equal facilities could ever be made out. The very granting of superior facilities to one line would make it a part of the one that favored it, and no longer a connecting road, when compared with its unsuccessful rival.

6. The "arrangements" between the respondent, the Housatonic road, and the New England Terminal Company, are such that they form a combination of carriers, within the meaning and effect of section 1, so as to make them a legal unit within the provisions of the Act, and, as such, jointly responsible for affording equal facilities in proper cases to competing lines connecting with such combined continuous lines. But, besides the duty which any one of these corporations may owe, jointly with the others, it is not relieved from its obligations under the Act to all roads which connect directly with itself.

Decided May 31, 1898.

For report and opinion of the Interstate Commerce Commission, with reference to previous steps in the case, see 3 Inters. Com. Rep. 542.

Lacombe, Circuit Judge:

This is an application on petition of the New York & Northern Railway Company, as a person interested, to enforce obedience to an order or requirement made May 6, 1891, by the Interstate Commerce Commission, and is presented under section sixteen of the Interstate Commerce Act as amended by chapter 382 of the Laws of 1889. Upon the return day of the order to show cause, heretofore granted, defendant filed its answer, and before any proofs were taken moved to dismiss the petition. Such a motion must be determined upon the assumption that the averments of the petition and the findings of fact of the Commission (made by the statute *prima facie* evidence) correctly set forth the matters therein stated. It seems undesirable at this stage of the case to summarize generally the facts thus assumed to be true, as subsequent evidence taken in this court may modify such assumptions.

The section invoked by the petitioner upon its application to the Commission reads as follows:—

"SECTION 8. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever or to subject any particular person, company, firm, corporation, or locality, or any particular description of

traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier, subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivery of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines.

"But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Section 18 provides that any person (or) corporation . . . complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof may apply to the Commission by petition, which shall briefly state the facts. Under that section this petitioner applied to the Commission, and, after taking proofs, obtained the order or requirement it is now seeking to enforce.

The respondent contends that the second clause of section 8, above quoted, enacts two different and independent subjects as grounds of complaint against carriers, the one being the denying the reasonable, proper and equal facilities for the physical interchange and prosecution of traffic between a company's line and connecting lines, the other being discrimination in respect to rates and charges between such connecting lines. A similar construction is adopted in the opinion of the Commission, which holds that the provision "embraces the imposition of an affirmative

duty to interchange and forward traffic between connecting lines and a prohibition that there shall be no discrimination in rates and charges between such connecting lines." Respondent further contends that the charge and allegations before the Commission dealt only with one of these subjects, and that therefore any order of the Commission requiring the respondent to cease and desist from any violation which is embraced within the other subject would not be a "lawful" order, and apparently also insists that the judgment of the Commission was in fact confined to discrimination in rates and charges. An examination of the record, however, does not support this contention. The petition which was presented to the Commission charged that the respondent was depriving petitioner of reasonable, proper, and equal facilities (as compared with those afforded to the Houstonian Railroad, a competing connecting line) for the interchange of traffic between the petitioner and complainant and for the receiving, forwarding, and delivery of property to and from the line of said petitioner and the line of the respondent. In support of such charge it averred not only a discrimination in rates and the withdrawal of a joint through tariff, which had been theretofore in force and operative between the parties, but also that respondent had threatened to close the through route *via* petitioner's line altogether and had refused to accept freight at all on through bills, thus compelling shippers to attend at Brewster's, the point of connection, to transfer and rebill their goods. This was plainly a charge not only of a discrimination in rates, but of a failure to discharge the affirmative duty, to interchange and forward traffic with the equal facilities required by the first subdivision of the second clause of the third section above quoted. The petition prayed for an order directing the respondent to grant equal facilities for the interchange of traffic and for the receiving, forwarding, and delivering of property to and from the line of petitioner and that of respondent as were here afforded to the Houstonian Railroad. The Commission found that there had been a refusal to afford facilities for the interchange of interstate traffic and the receiving, forwarding and delivering of the same, reasonable, proper, and equal to the facilities afforded to the other connecting road; that the respondent was "guilty of the discrimination charged in the complaint, in its rates and charges for the interchange of interstate traffic, and in the arrangements it makes for through lines for the freight traffic."

And the order or requirement of the Commission commanded the respondent to desist from discriminating against petitioner, (1) by refusing to make such arrangements with or afford such facilities to the petitioner for the interchange at the point of connection of interstate traffic and for the receiving, forwarding, and delivering of such traffic as are reasonable and proper and equal to arrangements made or facilities afforded by it for interchange between respondent's line and the other connecting roads, and also (2) from discriminating in respect to rates and charges, etc.

4 INTER S.

The decision of the Commission manifestly disposed of both subjects of complaint, and it seems quite plain from the record that both subjects were before them.

Since the service of the order the respondent has restored the joint through tariff. It has also desisted from refusing to accept freight on through bills, but has so arranged the running of its trains that the facilities for interchange, forwarding, and delivering are (as is alleged) substantially no better than before, and not equal to those afforded to the competing line. The respondent contends, however, that such acts may not be shown before this court, acting summarily under section 16 in review and enforcement of the order of the Commission, because no question of the hours of running trains was presented to the Commission. It is manifest that equal facilities may be refused quite as much in one way as in the other, and both grounds of complaint relate to the subject-matter of physical interchange and prosecution of traffic instead of to a discrimination in rates. To refuse altogether to receive traffic from one connecting line; to receive it only under arrangements which impose such obligations upon the shippers as to transfer and rebilling as would make the transaction of the business impracticable in competition with a more favored line; to receive it without reshipment and transfer indeed, but to systematically neglect to forward it; to receive and forward it, but to so arrange the hours or manner of its delivery as to deprive it of facilities equal to those afforded to traffic coming from the competitor—these, and a great variety of other devices which might be suggested, while differing somewhat in detail, are in substance practically the same. Any one of them, if satisfactorily proved, may justify the conclusion that a common carrier subject to the provisions of the Act is deliberately refusing to "afford all reasonable, proper, and equal facilities for the interchange of traffic" with a connecting line which the statute makes it his affirmative duty to afford; and there seems no good reason for holding that the order of the Commission should not be as broad as the conclusion directing the carrier to "cease, desist, and thenceforth abstain" from refusing to afford such facilities, when such refusal was the offense charged and proved. To require petitioner to begin a new proceeding each time the ingenuity of the offending carrier may devise some slight variation of the methods by means of which such refusal is persisted in would be to fritter away the system of procedure provided in the statute to secure obedience to its requirements.

It must be held therefore upon this motion, assuming the facts to be as stated, that the order made by the Commission was no broader than the petition and proofs before them warranted; and that this court may properly investigate the charge that respondent is disobeying the requirements of such orders by acts and omissions in substance the same as those considered by the Commission, directed to the same end and accomplishing precisely the same result.

The consideration of the next objection, viz: that the point where the respondent exchanges traffic with the petitioner is sixteen

miles from the point where it exchanges traffic with the competing road, and that it cannot be required to furnish equal facilities to all roads at different places, may be postponed till the proofs are closed. No doubt, as respondent contends, the question of the existence of discrimination and of an actionable refusal of equal facilities is to be ascertained by applying all the considerations of equity affecting the case and should be found to exist only when such facilities can be afforded "under substantially similar circumstances and conditions;" but there is nothing in the Act which makes mere distance between connecting points, whether a furlong, a mile, or ten or twenty, controlling of that question. There is no suggestion here of affording new facilities at a new connecting point; so far as the record shows, the affording of equal facilities to both connecting roads at their several points of connection has been at all times entirely practicable, easy, and convenient, and the existing equality was destroyed by the defendant solely to divert the business of petitioner to a more favored road. In the face of the finding of the Commission that "the physical condition for interchanging of traffic with both the connecting lines are suitable, adequate, and substantially equal—a finding which the form of this motion leaves unchallenged—the requirements of the second clause of the third section seem to be plainly applicable. Until this finding of fact is questioned and the record upon which the case made in this court is to be finally determined is completed, further discussion of this point would be a waste of time.

It is further contended that there is no question here of equal facilities to two connecting lines; that what the petitioner is really asking is that the New England Company shall extend to petitioner's line the same facilities which it extends to its own line. The facts do not seem to warrant such a contention. The Housatonic Company is a separate corporation, independent from the New England Company; the latter, so far as appears, does not own even a share of the former's stock; it neither built nor bought nor leased it; it neither conducts its business nor takes the earnings therefrom. The only link between them is such community of interest as springs from the existence of the contract for the interchange of traffic, which it is claimed secures the former road unequal facilities. If it be that such a contract makes each line a mere continuation or extension of

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the other, it is hard to conceive how a case of refusing equal facilities could ever be made out. The very granting of superior facilities to one line would make it a part of the one that favored it, and no longer a connecting road, when compared with its unsuccessful rival. Nor am I able to see that the mere ownership of half the stock of the Terminal Company, which connects the terminus of the Housatonic road with New York, alters the situation in any way, when the immediate question is as to the respective facilities accorded to the Housatonic Railroad and to the petitioner. Respondent cites the first section of the Act, providing that it shall "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water, when both are used under a common control, management or arrangement for a continuous carriage or shipment from one state, etc., to any other state," etc. That the respondent (considered by itself) is so engaged is not disputed; it runs through or into the states of Massachusetts, Rhode Island, Connecticut, and New York. It is no doubt true that the arrangements between respondent, the Housatonic road, and the Terminal Company are such that they form a combination of carriers within the meaning and effect of section one, so as to make them a legal unit within the provisions of the Act, and as such jointly responsible for affording equal facilities in proper cases to competing lines connecting with such combined continuous line; but, besides the duty which any one of these corporations may owe, jointly with the others, it is not relieved from its obligations under the Act to all roads which connect directly with itself. The New England railroad might perhaps by reason of its combination with the other two be charged with some duty towards lines connecting physically with the Housatonic Railroad, but such combination cannot excuse it from fulfilling its own obligations to roads which connect physically with itself, unless its union with the other combined lines is of such a character that their lines have become its own; and such a state of affairs does not seem to exist here.

The motion to dismiss the petition is therefore denied.

Counsel may arrange for a trial of the issues immediately upon the adjournment of the present jury session.

INTERSTATE COMMERCE COMMISSION.

L. N. TRAMMELL, ALLEN FORT and VIRGIL POWERS, constituting and composing the Railroad Commission of Georgia,

v.

THE CLYDE STEAMSHIP COMPANY, THE SOUTH CAROLINA RAILWAY COMPANY, THE GEORGIA RAILROAD & BANKING COMPANY, THE LOUISVILLE & NASHVILLE RAILROAD COMPANY and THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA, Lessees of the Georgia Railroad, THE RICHMOND & DANVILLE RAILROAD COMPANY and THE GEORGIA PACIFIC RAILWAY COMPANY, Lessees of the Central Railroad of Georgia.

L. N. TRAMMELL, ALLEN FORT and VIRGIL POWERS, constituting and composing the Railroad Commission of Georgia,

v.

THE OCEAN STEAMSHIP COMPANY, THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA, THE GEORGIA PACIFIC RAILWAY COMPANY and THE RICHMOND & DANVILLE RAILROAD COMPANY, Lessees of the Central Railroad of Georgia.

L. N. TRAMMELL, ALLEN FORT and VIRGIL POWERS, constituting and composing the Railroad Commission of Georgia,

v.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Lessee of the Cincinnati Southern Railway, THE CINCINNATI SOUTHERN RAILWAY COMPANY, THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA, THE GEORGIA PACIFIC RAILWAY COMPANY and THE RICHMOND & DANVILLE RAILROAD COMPANY, Lessees of the Central Railroad of Georgia.

L. N. TRAMMELL, ALLEN FORT and VIRGIL POWERS, constituting and composing the Railroad Commission of Georgia,

v.

THE WESTERN & ATLANTIC RAILROAD COMPANY, THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Lessee of the Cincinnati Southern Railway, and THE CINCINNATI SOUTHERN RAILWAY COMPANY.

L. N. TRAMMELL, ALLEN FORT and VIRGIL POWERS, constituting and composing the Railroad Commission of Georgia,

v.

THE SOUTH CAROLINA RAILWAY COMPANY, THE GEORGIA RAILROAD & BANKING COMPANY, THE LOUISVILLE & NASHVILLE RAILROAD COMPANY and THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA, Lessees of the Georgia Railroad, THE RICHMOND & DANVILLE RAILROAD COMPANY and THE GEORGIA PACIFIC RAILWAY COMPANY, Lessees of the Central Railroad of Georgia, THE ATLANTA & WEST POINT RAILROAD COMPANY, and THE WESTERN RAILWAY COMPANY OF ALABAMA.

L. N. TRAMMELL, ALLEN FORT and VIRGIL POWERS, constituting and composing the Railroad Commission of Georgia,

v.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, Individually and as Lessee of the Western & Atlantic Railroad, THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Lessee of the Cincinnati Southern Railway, THE CINCINNATI SOUTHERN RAILWAY COMPANY, THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, THE ATLANTA & WEST POINT RAILROAD COMPANY, and THE WESTERN RAILWAY COMPANY OF ALABAMA.

L. N. TRAMMELL, ALLEN FORT and VIRGIL POWERS, constituting and composing the Railroad Commission of Georgia,

v.

THE CLYDE STEAMSHIP COMPANY, THE SOUTH CAROLINA RAILWAY COMPANY, THE GEORGIA RAILROAD & BANKING COMPANY, THE LOUISVILLE & NASHVILLE RAILROAD COMPANY and THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA, Lessees of the Georgia Railroad, THE RICHMOND & DANVILLE RAILROAD COMPANY, and THE GEORGIA PACIFIC RAILWAY COMPANY, Lessees of the Central Railroad of Georgia, THE ATLANTA & WEST POINT RAILROAD COMPANY and THE WESTERN RAILWAY COMPANY OF ALABAMA.

(No. 814-817, 324-326.)

THE FOURTH section of the Act to Regulate Commerce.

Complaints in Nos. 314, 315, 316 and 317 filed October 22, 1891.—Answers filed November 9, 1891, to January 18, 1892.—Also on March 25, 1892.—Complaints in Nos. 324, 325 and 326 filed January 20, 1892.—Answers filed February 15 to March 25, 1892.—Hearing at Atlanta, Ga., March 24, 25, 1892.—Briefs filed, July 1 to Aug. 24, 1892.—Decided November 11, 1892.

1. The fact of a receivership for a defendant carrier subsequent to complaint should not interfere with the progress of a proceeding brought merely for the purpose of railway regulation.
2. The phrase "common control, management or arrangement for continuous carriage or shipment" in the first section of the Act to Regulate Commerce was intended to cover all interstate traffic carried through over all rail or part water and part rail lines. The receipt successively by two or more carriers for transportation of traffic shipped under through bills for continuous carriage over their lines is assent to a common arrangement for such continuous carriage or shipment and previous formal arrangement between them is not necessary to bring such transportation under the terms of the law.
3. The total rate for through carriage over two or more lines, whether made by the addition of established locals, or of through and local rates, or upon a less proportionate basis, is the through rate that is subject to scrutiny by the regulating authority; how the rate is made is only material as bearing upon the legality of the aggregate charge, and how any reduction may be accomplished is matter for the carriers to determine among themselves.
4. The second, third and fourth sections of the Act to Regulate Commerce compared with provisions in English statutes. English decisions examined, and the frequent citation of such decisions to influence cases brought under greatly dissimilar statutory
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- provisions in this country, without regard to differences in facts, time, extent of country and methods of trade and transportation, considered and criticised.
5. The fourth section of the Act to Regulate Commerce construed, and the principles laid down in *Re Petitions of Louisville & Nashville R. Co.*, 1 Inters. Com. Rep. 278, 1 I. C. C. Rep. 31, reaffirmed, except the ruling therein whereby carriers were permitted to judge for themselves in the first instance of what constitutes "rare and peculiar cases of competition between railroads which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition," which is hereby overruled.
6. The competition of carriers subject to the Act to Regulate Commerce does not create circumstances and conditions which the carriers can take into account in determining for themselves in the first instance whether they are justified under the fourth section in charging more for shorter than for longer distances over their lines.
7. The competition of markets on different lines for the sale of commodities at a given point served by both lines does not create circumstances and conditions which the carriers can take into account in determining for themselves in the first instance whether they are justified under the fourth section in charging more for shorter than for longer distances over their lines. To determine the force and effect of such competition involves consideration of commercial questions pecu

- liar to the business of shippers, such as advantage of business location, comparative economy of production, comparative quality and market value of commodities, all of which are entirely disconnected from circumstances and conditions under which transportation is conducted. Carriers cannot create abnormal situations by making rates which equalize advantages and disadvantages of localities and thereupon claim justification for greater charges on shorter hauls on the ground that the lesser long haul charges which accomplish such equalization are necessary to secure increase in traffic over their lines.
8. The carrier has the right to judge in the first instance whether it is justified in making the greater charge for the shorter distance under the fourth section in all cases where the circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers not subject to regulation under the Act to Regulate Commerce. In other cases under the fourth section the circumstances and conditions are not presumptively dissimilar and carriers must not charge less for the longer distance except upon the order of this Commission.
9. When a carrier on complaint under the fourth section avers substantial dissimilarity in circumstances and conditions as justifying its greater charge for shorter hauls, it is concluded by its pleading and must affirmatively show that the circumstances and conditions of which it is entitled to judge in the first instance are in fact substantially dissimilar; but upon an application for relief under the fourth section proviso the carrier is not limited by such a rule of evidence, and may present to the Commission every material reason for an order in its favor. There seems to be no limitation upon the power of the Commission to grant relief under that proviso when, after investigation, the Commission is satisfied that the interests of commerce and common fairness to the carriers require that an exception should be made.
10. Complaints in cases No. 324 and No. 325 dismissed. In cases Nos. 314, 315, 316, 317 and 326, defendants ordered to cease and desist from charging more to shorter than to longer distance points mentioned in the complaints, or file applications for relief under the proviso clause of the fourth section and show cause thereon, within a time specified.

William A. Little and Robert Berner, for Complainant.

James T. Worthington, for Richmond & D. R. Co., Georgia Pac. R. Co. and Central R. & Bkg. Co. of Ga.

Thomas Cobb Jackson, for Receivers of Central R. & Bkg. Co. of Ga.

Calhoun, King & Spalding, for Atlanta & W. P. R. Co.

George P. Harrison, for Western R. Co. of Ala.

Joseph B. Cumming and Bryan Cumming, for Georgia R. Co. and Georgia R. & Bkg. Co.

William M. Baxter, for East Tennessee V. & G. R. Co.

Ed. Baxter, for Louisville & N. R. Co.

Brawley & Barnwell, for Receiver of South Carolina R. Co.

Edward Colston, for Cincinnati N. O. & T. P. R. Co.

East & Fogg, for Nashville C. & St. L. R. Co., and Western & A. R. Co.

Payne & Tye, for Western & A. R. Co.

REPORT AND OPINION OF THE COMMISSION.

Veasey, Commissioner :

The complaints in the above entitled cases, brought by the members and in the name of the Railroad Commission of the state of Georgia, allege that rates charged by the defendants for the transportation of freights from Cincinnati and other Ohio river points and from New York and other North Atlantic ports to various named places, nearly all within the state of Georgia, are "unreasonable, discriminating and in direct violation of section four of the Act to Regulate Commerce."

The violations of law alleged in the several

complaints being of the same general character, differing only as to points and routes, it was understood at the hearing that the testimony taken in each case would be considered in the others so far as applicable, and it is proper, therefore, that all these cases should be embraced in the same decision.

The main question presented by the pleadings is whether charges which are greater for shorter than for longer distances in the same direction over the defendant lines are unlawful under the statute.

The defendants in their answers deny that transportation to the longer and shorter dis-

tance points is under substantially similar circumstances and conditions, and that therefore the greater charges for shorter distances complained of do not contravene the provisions of the Act to Regulate Commerce. The principal grounds on which this denial is based are the competition of all rail and part rail and part water lines from the same point of consignment to the same point of destination; the competition of all rail and part rail and part water lines from different points of consignment to the same destination; and the influence of water routes which either reach the point of destination direct, or deliver to a connecting carrier at a point in the same territory.

Still another ground of defense was set up in some of the cases, that property destined to intermediate points is not carried under circumstances and conditions substantially similar to those applying at the longer distance points because through rates are given only to the latter, while rates to the shorter distance points are made up of a through rate in effect to a basing point plus local rates of the terminal carrier therefrom.

There are, however, two minor questions to be considered: 1. Is the complainant authorized to bring and maintain these proceedings? 2. Are certain of the defendants common carriers over the line between points mentioned?

The Georgia Railroad Commission, complainant herein, is directed by a statute of the state of Georgia to bring complaint before this Commission whenever, after failure to obtain a satisfactory adjustment of rates, it finds through rates charged into Georgia to be excessive, unreasonable or discriminating, and by section thirteen of the Act to Regulate Commerce, this Commission is directed to investigate any complaint forwarded by the Railroad Commission of any state or territory. It is immaterial whether the complainant be the state Railroad Commission itself, or the parties on whose behalf it requests the investigation to be made. The Georgia Railroad Commission is a proper complainant in these proceedings.

As to the second of the minor questions, whether certain of the defendants, to wit, the Georgia Railroad & Banking Company, the Central Railroad & Banking Company, the Georgia Pacific Railway Company, and the Richmond & Danville Railroad Company, are common carriers controlling rates and operating roads parts of through lines between points of shipment and destination, it seems sufficient to hold generally that only those defendants who are in any degree responsible for transportation charges over the respective roads will be expected to comply with any order for the re-adjustment of those charges which may hereafter be issued in these proceedings.

It was claimed on the hearing that the defendant, the Central Railroad & Banking Company of Georgia, was then in the hands of receivers, and not properly before the Commission. That Company was served with a copy of each complaint in which it was interested and before the receivers assumed control of its affairs; answers were filed on its behalf, and the receivers afterwards appointed were represented by counsel at the hearing. Under these facts the proceedings may well go on without a present determination whether a regulating order in the case would affect the receivers without an order of the court which appointed them. As a general proposition we see no reason why the fact of a receivership subsequent to complaint should interfere with the progress of a proceeding brought merely for the purpose of railway regulation.

Another question in the cases is whether the transportation of property over the roads composing the respective through lines to the intermediate points is conducted under a common control, management, or arrangement for continuous carriage or shipment, but this question is raised by the defendants in connection with the main point in controversy, and should not be determined until after the facts in the cases are found and stated.

In view of the fact that the issues present mainly a single question of violation of the fourth section, the decision of which will also involve the disposition of the subsidiary matters of unreasonable and discriminating rates alleged and denied herein, it seems unnecessary to further analyze the pleadings. The respective routes, points and rates involved in the several cases are described in the following statement of facts, rates to points termed shorter distance points being those of which complaint is made. The cases will, with a single exception, be taken up in the order in which they were heard.

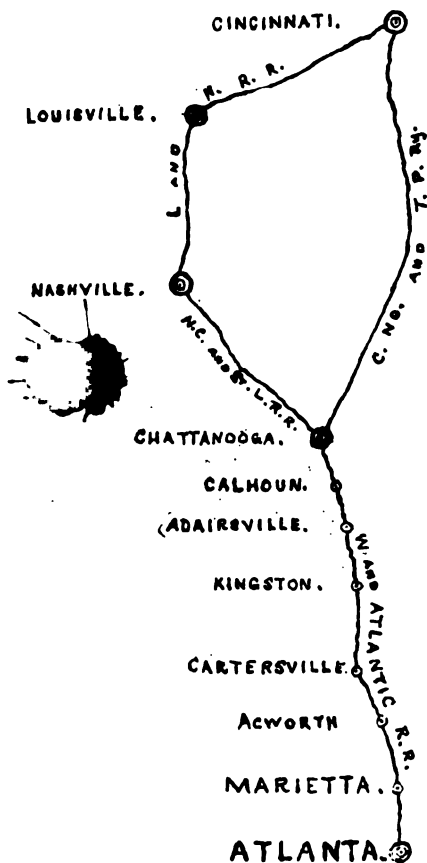
FACTS.

Case No. 317.

1. In this case the route is all rail from Cincinnati or other places called "Ohio river points" over either the Cincinnati, New Orleans & Texas Pacific Railway to Chattanooga or Boyce, near Chattanooga, or the Louisville & Nashville Railroad to Nashville, and the Nashville, Chattanooga & St. Louis Railway to Chattanooga, and from Boyce or Chattanooga by the Western & Atlantic Railroad, operated under lease from the state of Georgia by the Nashville, Chattanooga & St. Louis Railway Company, to Calhoun, Adairsville, Kingston, Cartersville, Acworth and Marietta, shorter distance points, and Atlanta, the longer distance point, all in the state of Georgia. This route will be designated "The Chatta-

nooga-Atlanta All-Rail Route," and is shown below:

THE CHATTANOOGA-ATLANTA ALL-RAIL ROUTE.



Freight is carried from Cincinnati over this route to the various destinations on the Western & Atlantic road as through shipments under through bills of lading issued by the initial line. Through freight is delivered free to consignees in Atlanta either by carting or switching to warehouse doors; no free delivery is made at the local stations on the Western & Atlantic.

2. Rates to Atlanta on property shipped from north of Chattanooga are divided between the carriers in certain proportions, but charges to all points north of Atlanta and south of Chattanooga are combinations of established rates to Chattanooga and local rates of the Western & Atlantic from Chattanooga. In 1887, the Western & Atlantic issued a circular to its connections stating in effect that it would not accept less than its regular local charges on through business to points on its line where competition did not compel it to participate in and agree to lower through rates. This circular does not appear to have been 4 INTER 8.

filed with the Commission, nor were the defendants able to produce it at the hearing, but there is no reason to doubt its having been issued.

When the circular was issued this road was under another management, but the lessee now operating the road introduced evidence concerning the circular and continues to charge according to its terms.

Rates and distances over the Chattanooga-Atlanta route from Cincinnati are shown by the following table. Rates to Chattanooga and Atlanta are single rates, while those to the other points are combination rates to Chattanooga and locals therefrom.

Statement Showing Class Rates from Cincinnati to the Following Stations on the Western & Atlantic R. R.

Miles	From Cincinnati, O. To	1.	2.	3.	4.	5.	6.	A	B	C	D	E	H	F.
386	Chattanooga, Tenn.	76	65	57	47	40	30	26	23	19	34	33	38	
359	Ringgold, Ga.	98	85	75	63	53	41	31	37	30	25	47	49	53
374	Dalton, Ga.	103	89	79	67	56	42	28	36	31	26	48	53	54
386	Calhoun, Ga.	109	95	84	71	59	44	34	40	32	27	53	57	56
405	Adairsville, Ga.	112	98	86	73	60	45	35	41	32	28	54	59	57
415	Kingston, Ga.	115	101	88	75	61	46	36	42	31	27	55	61	55
426	Cartersville, Ga.	118	103	90	76	62	47	37	43	34	29	56	62	59
439	Acworth, Ga.	124	107	94	78	64	49	39	45	35	30	58	64	61
453	Marietta, Ga.	127	109	96	79	65	50	38	45	35	30	59	65	62
463	Vinings, Ga.	123	106	94	78	65	51	36	43	33	29	57	63	59
74	Atlanta, Ga.	107	92	81	68	56	46	28	35	28	24	48	53	48

The local rates and distances over the Western & Atlantic from Chattanooga and intermediate points are as follows:

Statement Showing Class Rates from Chattanooga to Local Stations on the Western & Atlantic R. R.

Miles	From Chattanooga To	1.	2.	3.	4.	5.	6.	A	B	C	D	E	H	F.
23	Ringgold, Ga.	22	20	18	16	13	11	11	11	7	6	13	16	15
38	Dalton, Ga.	27	24	22	20	16	12	12	12	8	7	16	20	16
60	Calhoun, Ga.	33	30	27	24	19	14	14	14	9	8	19	24	18
60	Adairsville, Ga.	36	33	29	26	20	15	15	15	9	9	20	26	19
70	Kingston, Ga.	39	36	31	28	21	16	16	16	10	9	21	28	20
90	Cartersville, Ga.	42	38	33	29	22	17	17	17	11	10	22	29	21
103	Acworth, Ga.	48	42	37	31	24	19	19	19	12	11	24	31	23
117	Marietta, Ga.	51	44	39	32	25	20	20	20	13	12	25	32	24
127	Vinings, Ga.	54	46	41	33	26	21	21	21	13	12	26	33	25
138	Atlanta, Ga.	57	48	43	34	27	22	22	22	12	11	27	34	24

The proportions received by the carriers of the rate from Cincinnati to Atlanta were not testified to, but the Commission is informed that the following divisions were in effect some time ago:

C. N. O. & T. P. to Chattanooga, 386 miles	70	9-10	per cent.
W. & A. to Atlanta, 128 miles	20	1-10	" "
	474	100	

Out of the rate of \$1.07 first class, this would

give to the C. N. O. & T. P. about 76 cents, its regular rate to Chattanooga, and the W. & A. 31 cents, and it gets this proportion by either route from Cincinnati. The local rate of the Western & Atlantic, Chattanooga to Atlanta, is 57 cents per hundred pounds.

3. Other lines which reach Atlanta from Cincinnati are:

Cincinnati, New Orleans & Texas Pacific to Chattanooga, 836 miles; and East Tennessee, Virginia & Georgia to Atlanta, 152 miles, through distance 486 miles.

Louisville & Nashville to Nashville, 295 miles, Nashville, Chattanooga & St. Louis to Chattanooga, 151 miles; East Tennessee, Virginia & Georgia to Atlanta, 152 miles; through distance, 598 miles.

Louisville & Nashville, and Nashville, Chattanooga & St. Louis to Chattanooga, 446 miles, or Cincinnati, New Orleans & Texas Pacific to Chattanooga, 836 miles, and from thence the Chattanooga, Rome & Columbus (now Central of Georgia) to Kramer, 125 miles, and Georgia Pacific to Atlanta, 53 miles; through distances, respectively, 624 miles and 514 miles.

Louisville & Nashville system to Jellico, 216 miles, and East Tennessee, Virginia & Georgia to Atlanta 289 miles; through distance 505 miles.

Either the Cincinnati, New Orleans & Texas Pacific or the Louisville & Nashville is the initial carrier in each of these competing through lines, and both are defendants herein. The Louisville & Nashville owns most of the capital stock of the Nashville, Chattanooga & St. Louis Railway Company, and the latter leases from the state of Georgia and operates the Western & Atlantic Railroad. The through distance over this line is 584 miles. The Louisville & Nashville in sending traffic from Cincinnati to Atlanta prefers this route, while the Cincinnati, New Orleans & Texas Pacific favors the East Tennessee, Virginia & Georgia with which it connects at Chattanooga. The short line to Atlanta from Cincinnati is the Cincinnati, New Orleans & Texas Pacific to Boyce and the Western & Atlantic to Atlanta, distance about 474 miles, but the rate is the same by either line. The Cincinnati, New Orleans & Texas Pacific reaches Chattanooga by its own line over the shorter distance from Cincinnati and its local rate to Chattanooga is the joint rate over the longer line of the Louisville & Nashville, and Nashville, Chattanooga & St. Louis roads.

4. There is competition for the sale of commodities in Atlanta between Cincinnati and other cities, such as Boston, New York, Philadelphia and Baltimore, and the transportation from these Atlantic points is either all rail or water and rail by the Atlantic Coast Line, Seaboard Air-Line, Richmond & Danville, Norfolk & Western and East Tennessee and others.

The water lines run to the ports of Norfolk, Portsmouth, Charleston, Savannah, Brunswick, and possibly through Port Royal and Jacksonville. From these ports Atlanta is reached by rail; the South Carolina & Georgia roads from Charleston, the Central of Georgia the Savannah, Florida & Western and East Tennessee, from Savannah; the East Tennessee from Brunswick; the Port Royal & Augusta Railway from Port Royal, the Queen and Crescent and Louisville & Nashville run from New Orleans, and Mobile stands on similar footing.

There are also rail lines from various Mississippi and Ohio river points, which compete for Atlanta trade such as Vicksburg, Greenville, Memphis, Cairo, Paducah, Evansville and Louisville.

Freight from Cincinnati for Atlanta might reach Atlanta by a rail line over the Chesapeake & Ohio and Richmond & Danville roads, or by water and rail through Baltimore, and steam or sail craft could also be employed to the South Atlantic ports, but these routes are very circuitous, and would only be used under very exceptional conditions. Freight might go from Cincinnati to Memphis by water, and from thence by rail to Atlanta, but it was not made to appear that any appreciable amount of general-freight actually does go that way in competition with the all rail route; the distance from Memphis to Atlanta by the Kansas City, Memphis & Birmingham and Georgia Pacific is about 418 miles, only 56 miles less than the through all-rail route from Cincinnati to Atlanta.

There is no competition by independent water routes to Atlanta. Traffic shipped from any Ohio or Mississippi river point, or from a North Atlantic port must pass over a line of one or more railroads in order to reach Atlanta, and such traffic is forwarded as a through shipment and taken either by all rail or by water and rail carriers under through bills of lading and at agreed through rates. The distance from Baltimore to Atlanta through the port of Charleston for the purpose of rate divisions is put at 160 constructive miles by the water way to Charleston, and about 310 miles for the rail carriage from that port to Atlanta, or about 470 miles through. The distance from Baltimore to Atlanta by the Richmond and Danville and Baltimore and Potomac roads, the direct all-rail line is 691 miles.

The rates of the eastern rail lines from New York and other seaboard cities to Cincinnati are very low, for instance, the first class rate New York to Cincinnati is 65 cents. The first class rate New York to Chattanooga is \$1.14 and the all rail rate to Atlanta is \$1.22.

The present adjustment of rates to Atlanta is the outcome of severe competition between lines leading from competing markets like

St. Louis, Baltimore, Cincinnati, etc., and, with some modifications occurring from time to time, has been in effect for a considerable period. The lines controlling rates to Georgia territory are all members of the Southern Railway & Steamship Association and there is not now any actual competition between them as to rates on through business to points in that territory from one market like Cincinnati, or from different markets like Cincinnati and Baltimore or New York. These rates resulted from agreement between the several lines. The Atlanta rates were agreed upon by the lines with a view of affording to each some share of the traffic.

The Rome Railroad connects Kingston, Ga. with the East Tennessee and Central of Georgia at Rome, Ga. From Marietta the Marietta & North Georgia Railroad runs northerly 204 miles to Knoxville, Tenn. where it connects with the East Tennessee line, and also with the Knoxville, Cumberland Gap & Louisville Railroad which extends 72 miles to Middlesboro, Ky., and there meets the Louisville & Nashville system by which Cincinnati can be reached over a distance of 280 miles from Middlesboro; this gives a possible competing line from Cincinnati to Marietta of 506 miles, and to Atlanta of 527 miles. From Cartersville, Ga., the East and West Railroad of Alabama runs westerly to Rock Mart 22 miles, connecting with the East Tennessee and 16 miles farther it reaches the Central of Georgia at Cedartown. Competition has not forced rates down at Kingston, Marietta or Cartersville. No railroad other than the Western & Atlantic runs to Calhoun, Adairsville or Acworth.

6. On December 27, 1890, the Western & Atlantic Railroad was leased by the state of Georgia to the Nashville, Chattanooga & St. Louis Railway Company for 29 years at an annual rental of \$420,012.00. The operation of the leased line has not been separately reported since that date. Prior to that time the road was operated under lease by the Western & Atlantic Railroad Company, at an annual rental of \$300,000. The road being owned by the state no report was made of "Capital Stock" or "Cost of Road, Equipment and Permanent Improvement" by the lessee Company. From the report of this road to this Commission for the year ending June 30, 1890, the following statement is compiled:

The "Gross Earnings from Operation" were \$1,562,059.76; "Operating Expenses," \$1,022,668.70; "Income from Operation," \$539,391.06; "Income from Other Sources," \$10,615.89; "Total Income" \$550,006.95. From this amount there were paid as "Deductions from Income" \$312,677.24, \$300,000.00 of which was the rental paid by the operating company to the state of Georgia, leaving a "net income"

of \$237,329.71. From this last named item there was paid \$78,225.00 on income bonds for principal and coupons, so that the "Surplus from Operations of year ending June 30, 1890" was \$159,104.71. This combined with the "Surplus" from the previous year made the "Surplus on June 30, 1890" \$381,077.86. The "Freight Revenue" was \$1,255,778.49, from which there were repayments on account of "Overcharge to shippers" \$71,787.27, and "Other Repayments," \$18,110.53, — Total \$4,847.80, leaving "Total Freight Revenue" \$1,170,980.69.

A reference to the "Comparative General Balance Sheet" shows that the company operating the road has as "Assets," \$8,350.00, "Stocks" and "Bonds of other companies owned," "Cash and Current Assets," \$414,611.98; "Materials and Supplies," \$4,815.89. Their "Liabilities" were "Current Liabilities," \$96,199.96, and "Profit and Loss" ("Surplus"), \$381,077.86.

Referring to the "Freight Traffic" of the road, it appears that the "Number of tons carried of freight earning revenue" were 1,083,336; the "Number of tons carried one mile" 125,220,827, which shows the "Average distance haul of one ton" 115.96 miles. It appears that of the "Number of tons carried of freight earning revenue," 156,585 tons only originated on the road, and the balance, 926,751 tons was "Received from Connecting Roads and other Carriers." The "Average receipts per ton per mile," were .00,985 cents; "Estimated cost of carrying one ton one mile," .00,555 cents; "Freight earnings per train-mile," \$1.03,052; and "Estimated cost of running a freight train one mile," .61,201 cents.

By the foregoing it appears that of the 1,083,336 tons carried that year only 156,585 tons originated on the road, the balance, 926,751 being received from connecting and other carriers; that is to say, less than 15 per cent, or but very little over one seventh of the total tonnage was local business, and some of this was doubtless carried over the whole line. The average distance haul per ton of the entire tonnage was 115.96 miles or nearly 84 per cent of the road's length of 138 miles. The bulk of the local business may be assumed to consist of shipments between Chattanooga or Atlanta and intermediate stations, and as the average distance haul per ton of the total tonnage was over 115 miles, say as far as Marietta, only 21 miles from Atlanta, going south, and Ringgold, only 23 miles from Chattanooga, going north, it may be stated as a fact that nearly all of the freight traffic received from other carriers was carried over the entire distance between Chattanooga and Atlanta, the termini of the road.

7. Rates from Cincinnati to Calhoun, Adairsville and Kingston are higher than the rates to

Atlanta on all classes except class 6. To Cartersville, Acworth and Marietta they are higher on all classes. To bring rates to these points down to the level of Atlanta rates will require the following reductions per hundred pounds.

Classes.....	1	2	3	4	5	6	A	B	C	D	E	H	F
Calhoun cts.	2	3	3	3	3	3	6	5	4	3	5	4	8
Adairsville....	5	6	5	5	4	4	7	6	4	4	6	6	9
Kingston.....	8	9	7	7	5	8	7	8	4	3	7	8	7
Cartersville...	11	11	9	8	6	1	9	8	6	5	8	9	11 1/4
Acworth.....	17	15	13	10	8	8	11	10	7	6	10	11	13
Marietta.....	20	17	15	11	9	4	10	10	7	6	8	12	14
Vinings.....	15	14	13	10	9	5	8	8	5 1/2	5	9	10	11 1/4

Rates on classes A, B, C, D, E, H and F are also somewhat higher to Ringgold and Dalton than to Atlanta, but they are lower to these points on classes 1 to 6, inclusive. There is no evidence showing even approximately the amount of traffic carried to Calhoun, Adairsville, Kingston, Cartersville, Acworth and Marietta, from points on other lines, but as stated in the last finding, the bulk of the traffic received from connecting and other carriers was carried over the whole length of the road, and therefore the number of tons shipped from Cincinnati and other northerly points to Calhoun and other more distant intermediate stations must have been comparatively insignificant.

The rates per ton per mile on the highest and lowest classes from Cincinnati and Chattanooga to the above named stations on the Western & Atlantic road are as follows:

Rates per Ton per Mile.

From Cincinnati. From Chattanooga.

	Class 1	Class A	Mis	Class 1	Class A	Mis
Chattanooga	4.52 c.	1.19 c.	336			
Ringgold	5.46 "	1.74 "	359	19.13 c.	9.56 c.	23
Dalton	5.51 "	1.50 "	374	14.21 "	6.31 "	38
Calhoun	5.50 "	1.72 "	396	11.00 "	4.66 "	60
Adairsville	5.53 "	1.73 "	405	10.44 "	4.34 "	69
Kingston	5.54 "	1.74 "	415	9.87 "	4.05 "	79
Cartersville	5.54 "	1.74 "	426	9.33 "	3.78 "	90
Acworth	5.65 "	1.78 "	439	9.32 "	3.69 "	103
Marietta	5.61 "	1.68 "	453	8.73 "	3.42 "	117
Vinings	5.31 "	1.55 "	463	8.50 "	3.30 "	127
Atlanta	4.51 "	1.18 "	474	8.26 "	3.19 "	138

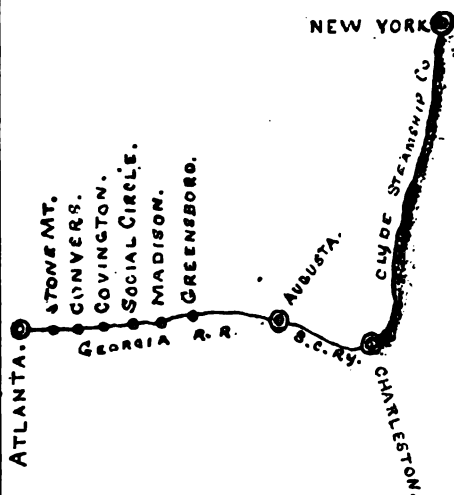
Case No. 314.

8. This route is from New York and other North Atlantic ports over the through water and rail line formed by steamships of the Clyde Steamship Company delivering at Charleston to the South Carolina Railway which connects with and delivers to the Georgia Railroad at Augusta; the points of destination being located on and along the latter line, which terminates at Atlanta. The intermediate points to which rates are complained of as being higher than for the longer distance to Atlanta are Greensboro, Madison, Social Circle, Covington, Conyers and Stone Mountain.

This will hereinafter be called "The Augusta-Atlanta Part Water Route."

of which appears by the following diagram.

THE AUGUSTA-ATLANTA PART WATER ROUTE.



The Georgia Railroad is owned by the defendant the Georgia Railroad & Banking Company, and jointly operated under lease by the defendants, the Louisville & Nashville Railroad Company and the Central Railroad & Banking Company of Georgia.

Freight is carried over this route to the points above mentioned under through bills from the point of shipment. The facts before stated with reference to the Chattanooga-Atlanta route in regard to competing lines for Atlanta traffic, including free delivery of freights at that point, apply also to this route.

9. Rates to Augusta and Atlanta are divided between the carriers upon a proportionate basis. Rates to points intermediate between Augusta and Atlanta are combination rates made up of rates to the terminal points with locals added. Charges to these intermediate points are based as follows: Greensboro and Madison on the Augusta rate; Social Circle, classes 1 and B on Atlanta; Class 3, 4, 5, 6, A, C, D, E, H & F on Augusta; class 2 on either Augusta or Atlanta; Covington; Classes 1, 2, 3, A & B, on Atlanta the others on Augusta; Conyers, Classes 1, 2, 3, 4, A, B & H, on Atlanta; Classes 6, C, D, E and F, on Augusta, and Class 3, on either; Stone Mountain, Classes D & F on Augusta, Class C, on either, and the other Classes on Atlanta.

When rates are based on Atlanta, they consist, of the charge through the point of destination to Atlanta, plus the local back. The following table shows the rates:

*From New York, Philadelphia, etc. via Charleston to Georgia
Railroad Stations.*

CLASSES.	1	2	3	4	5	6	A	B	C	D	E	H	F
Augusta.....	.96	.81	.70	58	47	37	28	42	31½	31	43	54	61
Greensboro.....	1.37	1.18	1.02	87	69	54	45	59	42½	41	65	83	82½
Madison.....	1.44	1.23	1.07	89	71	56	47	60	43	42	67	85	84
Social Circle.....	1.44	1.25	1.09	90	72	57	48	61	43½	42½	68	86	85
Covington.....	1.41	1.22	1.08	91	73	58	48	60	44	43	69	87	86
Conyers.....	1.38	1.19	1.05	90	74	59	47	59	44½	43	70	87½	86
Stone Mountain.....	1.32	1.14	1.01	85	71	58	45	57	47	44	69	80	80½
Atlanta.....	1.14	.98	.86	78	60	49	36	48	40	39	58	68	78

Local Rates on Georgia R. R. From Augusta.

To	Miles	1	2	3	4	5	6	A	B	C	D	E	F
Greensboro.....	89	41	37	32	29	22	17	17	17	11	10	22	21½
Madison.....	109	48	42	37	31	24	19	19	19	11½	11	24	23
Social C.....	119	51	44	39	32	25	20	20	20	12	11½	25	24
Covington.....	130	54	46	41	33	26	21	21	21	12½	12	26	25
Conyers.....	140	57	48	43	34	27	22	22	22	13	12½	27	26½
Stone Mt.....	155	62	52	46	36	29	24	24	24	14	13	29	28½
Atlanta.....	171	64	54	47	37	30	25	25	25	15½	14½	30	31

The evidence does not show how rates to Atlanta are divided between the carriers over this route. The Commission has reason to believe, however, that these rates are divided upon a mileage basis, the Clyde line being allowed 250 miles for the distance to Charleston. On the basis of such mileage the divisions of the rate to Atlanta, \$1.14 first class, would be about 51 cents for the Clyde line's 250 miles to Charleston; 29 cents for the South Carolina road's 187 miles to Augusta, and 34 cents for the Georgia road's 171 miles to Atlanta.

The rates per ton per mile to the Georgia railroad stations from Augusta on the high est and lowest class rates are as follows.

	Class 1.	Class D.
Greensboro.....	9.88 cents	2.41 cents
Madison.....	9.22 "	2.14 "
Social Circle.....	8.57 "	1.93 "
Covington.....	8.30 "	1.84 "
Conyers.....	8.14 "	1.78 "
Stone Mountain.....	8.00 "	1.68 "
Atlanta.....	7.49 "	1.70 "

The through first class rate, rail or water and rail, from New York to Chattanooga is \$1.14, the same as the water and rail rate to Atlanta, and is in effect over all routes. The first class all rail rate to Atlanta is \$1.23, water and rail \$1.14; to Augusta the all rail rate is \$1.04 and by water and rail it is 96 cents. But the first class rate to Augusta or Atlanta from Cincinnati is \$1.07, while to Chattanooga it is 76 cents. From Baltimore to Augusta the all rail charge is 97 cents, while the water and rail rate is 89 cents; to Atlanta the water and rail rate is \$1.07 and by all rail it is \$1.15. Rates on the other classes are similarly adjusted. A full statement of through rates to various important basing points from New York, Baltimore and Cincinnati is hereinafter set forth.

10. Of the intermediate points mentioned, namely Greensboro, Madison, Social Circle, Conyers, Covington and Stone Mountain, only 4 INTER 8.

two, Madison and Social Circle, are junction points. At Madison the Georgia Railroad connects with the branch of the Richmond & Danville running between Macon and Lula on the Atlanta & Charlotte Division of the main line. The distance from Lula to Madison is 72 miles; the distance from Lula to Atlanta by the Richmond & Danville is 66 miles; practically the same distance. At Social Circle the Georgia Railroad connects with the Gainesville, Jefferson & Southern Railroad which extends from Social Circle to Gainesville, a distance of 52 miles, where it connects with the Atlanta & Charlotte division of the Richmond & Danville line. The distance from Atlanta to Gainesville by the Richmond & Danville is 53 miles, about the same as from Social Circle to Gainesville. The first class water and rail rate from New York to Madison or Social Circle is \$1.44 as against \$1.14 to Atlanta. The fact that different lines run to these two points has not compelled reductions in rates thereto, but it was stated in evidence that the fact of direct railroad connection between Madison and Macon would soon be likely to cause a lowering of rates to Madison, the short water and rail route from New York being through Brunswick and Macon.

11. The following is taken from the report of the Georgia Railroad Company to the Commission for the year ending June 30, 1891. The report states in regard to "Capital Stock" as follows: "The franchise owned by the lessee organization is not capitalized. Said franchise is a lease of the Georgia R. R. and branches (not including Banking Department) for a period of 99 years from and after April 1, 1881, at a rental of \$600,000.00 per annum payable by the lessee organization, \$300,000.00 on April 1, and \$300,000.00 on October 1, in each year." It has no "Funded Debt." Its "Current Liabilities" are \$335,228.35 which includes \$600,976.47 which is designated as "Ownership Debt," and is explained by a foot-note. "The owners of the lease have advanced to the lessee organization." The "Cost of Road, Equipment, and Permanent Improvements" is reported by the lessor organization. However, the lessee expended during the year in improvements which it included in "Operating Expenses," \$185,399.79. The "Gross Earnings from Operation" were \$1,905,159.94.

"Operating Expenses" \$1,236,796.65. "Income from Operation" \$668,863.29. "Income from other Sources" \$60,618.00. "Total Income" \$729,481.29. From this "Total Income" there was paid as "Deductions from Income" \$610,302.42 of which \$600,000.00 was on account of rental paid for the use of the road. This leaves the "Net Income" \$118,678.87, which was carried to "Surplus from Operations of Year ending June 30, 1891." On June 30, 1890, there was a "Deficit" of \$494,479.47 which would leave the "Deficit on June 30, 1891," \$365,800.60. The "Freight Revenue" was \$1,291,732.69, from which there were repayments on account of "Overcharge to Shippers" and "Other Repayments" of \$16,751.20, which leaves the "Total Freight Revenue" \$1,274,981.49. The road also received other freight earnings on account of "Stock Yards," "Elevators," and "Other Items," \$538.90, making its "Total Freight Earnings" \$1,375,520.39.

The total "Assets" shown in the "Comparative General Balance Sheet," including the "Cash and Current Assets," "Materials and Supplies," and "Profit and Loss" (deficit), were \$963,150.70. The "Liabilities," in addition to the "Current Liabilities" heretofore referred to, were "Agents' Deposits" \$20,900.00, and "Annual Inventory" \$107,027.35.

Referring to the "Freight Traffic" of this road, it appears that the "Number of tons carried of freight earning revenue" was 669,784. The "Number of tons carried one mile" was 90,870,108, which indicates that the "Average distance haul of one ton" was 135 miles. The "Average receipts per ton per mile" were .01411 cents; the "Estimated cost of carrying one ton per mile" was .00935 cents. Of the "Number of Tons carried of freight earning revenue," it appears that 180,730 tons originated on this road and 489,054 tons were "Received from Connecting Roads and other Carriers."

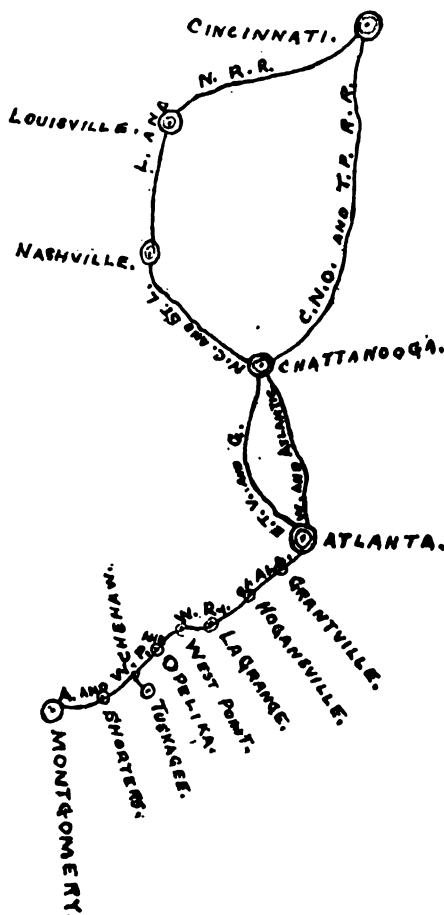
Case No. 325.

13. In this case the transportation involved is from Cincinnati and other Ohio river points over the Cincinnati, New Orleans & Texas Pacific to Chattanooga, or else to the same point on the Louisville & Nashville and Nashville, Chattanooga & St. Louis roads, and from Chattanooga to Atlanta by either the East Tennessee or the Western & Atlantic; from Atlanta the traffic goes to the several destinations on the lines of the Atlanta & West Point and Western Railway of Alabama, to wit, Grantville, Hogansville, La Grange, West Point and Shorters, shorter distance points to which rates are complained of and Opelika and Montgomery, the longer distance points, Opelika being nearer, however, than Shorters to Atlanta.

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This route will be called the Atlanta & West Point All-Rail Route, and is shown below:

THE ATLANTA & WEST POINT ALL-RAIL ROUTE.



Traffic is carried under through bills to the several destinations, but the Nashville, Chattanooga & St. Louis does not participate in traffic to points between Montgomery and West Point except on consignments from points on the Ohio river below Henderson, and such consignments probably go *via* the Louisville & Nashville from Nashville and through Montgomery instead of Atlanta; but freight from any other Ohio river point for stations on the Atlanta & West Point, including West Point, may go over its line through Chattanooga and be forwarded *via* Atlanta. Therefore traffic from points below Henderson to points on the Western Railway of Alabama, except West Point, going over the N. C. & St. L. does not pass through the intermediate points above named, and such points are longer instead of shorter distance points as to traffic so shipped and routed.

The Louisville & Nashville operates its own lines from Cincinnati, Louisville, Owensboro, Evansville, Henderson and other points on the Ohio river through Nashville, Decatur, and Birmingham to Montgomery, and freights from those points consigned over its road for Montgomery and points on the Western Railway of Alabama, are carried over this line instead of the route through Chattanooga and Atlanta mentioned in the complaint, but it does send traffic by the route complained of to Atlanta & West Point stations east of West Point. West Point freight goes over the Montgomery route unless directed to be forwarded *via* Atlanta. The distance from Cincinnati to Montgomery by the Louisville & Nashville is 600 miles; by the Atlanta & West Point route it is 640 miles; but the shortest distance to Montgomery from Cincinnati is by the Cincinnati, New Orleans & Texas Pacific to Birmingham, 478 miles, and the Louisville & Nashville from that point to Montgomery 96 miles; total 574 miles. Montgomery can therefore be reached from Cincinnati and other Ohio river points over shorter routes than the one involved in this controversy.

The Louisville & Nashville connects at Birmingham with the Columbus & Western Railroad, operated by the Central of Georgia, and extending from that point to Opelika and Columbus. The distance from Cincinnati to Birmingham by the Louisville & Nashville is 504 miles, and from Birmingham to Opelika by the Columbus & Western, it is 128 miles, a total of 632 miles. The distance from Cincinnati to Opelika by the Atlanta route is 583 miles; by the Louisville & Nashville to Montgomery and Western of Alabama, it is 666 miles; and by the Cincinnati, New Orleans & Texas Pacific through Montgomery it is 640 miles. The Cincinnati, New Orleans & Texas Pacific is the shortline to Birmingham from Cincinnati, being 478 miles, and in connection with the Columbus & Western Opelika is 606 miles from Cincinnati by this route. The distance from Montgomery to Shorters, one of the shorter distance points mentioned in the complaint, is 23 miles, and the mileage from Cincinnati to Shorters *via* Montgomery is only 597 miles, while *via* Atlanta it is 626 miles. The evidence does not show how the Cincinnati, New Orleans & Texas Pacific routes its traffic to stations on the Western Railway of Alabama between Montgomery and West Point.

The shortest distance from Cincinnati to West Point is by the Atlanta route, 561 miles, and the bulk of freight for that point may go that way when shipped over the Cincinnati, New Orleans & Texas Pacific.

13. Montgomery is situated upon the Alabama river which empties into Mobile Bay. There is possible direct water communication between points on the Ohio river and Montgomery, and some water competition on freight from Western and Ohio river points has existed for six or seven years. The all water competition was not shown to be active under railroad rates now in effect. The Mobile & Ohio Railroad carries freight from St. Louis to Mobile at the prevailing low rate, and this can come up the river to Montgomery.

Two lines of steamers run up the Alabama river from Mobile. There is water transportation of freights from eastern points to Mobile also, one line being the New York & Mobile Steamship Company. No water route extends to Opelika, but the Apalachicola and Chattahoochee rivers are navigable from Apalachicola up to Columbus except during a portion of the summer. It was not shown, however, that this route is much used except for lumber ships, or that it can be extensively employed by all vessels until the channel is materially improved. Columbus is 29 miles from Opelika, and connected therewith by the Columbus & Western road, operated by the Central of Georgia. There is competition by eastern cities, as Baltimore, Philadelphia, New York and Boston over all rail and water and rail lines through South Atlantic ports for the sale of traffic in Montgomery, Opelika, and all points in Georgia and Alabama territory.

14. Rates to West Point, Opelika and Montgomery are divided between the carriers upon an agreed basis, but those in effect to Grantville, Hogansville, La Grange and Shorters are found by the addition of locals and rates to Atlanta, Montgomery or Opelika, whichever gives the lowest combination. Opelika rates are adjusted with reference to Montgomery rates, and West Point rates are based upon either Montgomery or Opelika, whichever gives the lowest rates, but West Point rates are the subject of agreement between the lines.

The following table shows rates from Cincinnati, O., to stations on the Atlanta & West Point and Western Railway of Alabama:

Rates from Cincinnati, O., to Stations on Atlanta & West Point Railroad and Western Railway of Alabama.												
Cincinnati, O., to Atlanta & West Point R. R.		Classes.										
	Miles	1	2	3	4	5	6	A	B	C	D	E H
Atlanta,	474	1.07	.92	.81	.68	.57	.46	.28	.35	.28	.24	.48 .53
Grantville,	525	1.40	1.21½	1.08½	.92	.76	.60½	.42½	.49½	.37	.32	.68 .77
Hogansville,	532	1.43½	1.25	1.10½	.94½	.77	.61½	.43½	.50½	.37	.32½	.69 .79½
La Grange,	545	1.46½	1.28½	1.13	.96½	.78	.62½	.44½	.51½	.37½	.33	.70 .81½
West Point,	561	1.35	1.18	1.05	.88	.78	.59	.41	.50	.38	.33½	.68 .65
4 INTER S.												.68

Western Ry. of
Alabama.

Opelika,	583	1.17	1.02	.91	.76	.63	.52	.32	.38	.31	.27	.54	.58	.54
Shorters,	626	1.36	1.28	1.12	.91	.76	.60	.45	.48	.39	.32	.70	.57	.72
Montgomery,	649	1.08	1.02	.88	.71	.59	.47	.33	.33	.26	.22	.52	.37	.44

(See analysis of mileage to Shorters and Opelika above set forth).

Rates as above taken from Louisville and Nashville, S. E., No. 20, effective March 16, 1892,
and Louisville Tariff of Arb. No. 012, S. E., January 12, 1892.

How the Rates are Made.

		Miles from Atlanta.	Classes.												
			1	2	3	4	5	6	A	B	C	D	E	H	F
Grantville, local	51		.33	.29½	.27½	.24	.20	.14½	.14½	.14½	.9	.8	.20	.24	.17½
Atlanta, through			1.07	.92	.81	.68	.56	.46	.28	.35	.28	.24	.48	.53	.46
Grantville, through			1.40	1.21½	1.08½	.92	.76	.60½	.42½	.49½	.37	.32	.68	.77	.65½
Hogansville, loc.	58		.36½	.33	.29½	.26½	.21	.15½	.15½	.15½	.9	.8½	.21	.26½	.18
Atlanta, through			1.07	.92	.81	.68	.56	.46	.28	.35	.28	.24	.48	.53	.46
Hogansville, thro'			1.48½	1.25	1.10½	.94½	.77	.61½	.43½	.50½	.37	.33½	.69	.79½	.66
La Grange, local	71		.39½	.36½	.32	.28½	.22	.16½	.16½	.16½	.9½	.9	.22	.28½	.19
Atlanta, through			1.07	.92	.81	.68	.56	.46	.28	.35	.28	.24	.48	.53	.46
La Grange, through			1.46½	1.28	1.18	.96½	.78	.62½	.44½	.51½	.37½	.33	.70	.81½	.67
West Point, thro'	87		1.35	1.18	1.05	.88	.73	.59	.41	.50	.38	.33½	.68	.65	.68
Opelika, through	109		1.17	1.02	.91	.76	.63	.52	.32	.38	.31	.27	.54	.58	.54
Shorters, local	152		.28	.26	.24	.20	.17	.13	.18	.15	.13	.10	.18	.20	.28
Montgomery thro'	175		1.08	1.02	.88	.71	.59	.47	.32	.33	.26	.22	.52	.37	.44
Shorters, through			1.36	1.28	1.12	.91	.76	.60	.45	.48	.39	.32	.70	.57	.72
Montgomery, thro'	175		1.08	1.02	.88	.71	.59	.47	.32	.33	.26	.22	.52	.37	.44

Rates as above taken from Louisville & Nashville, S. D., No. 20, effective March 16, 1892,
and Louisville Tariff of Arb. No. 012, S. E. effective January 1st, 1892.

The following statement shows the rate per ton per mile on the highest and lowest classes, according to the shortest mileage over any route from Cincinnati.

To	Miles	Class 1. cts.	Class D. cts.
Atlanta	474	4.51	1.01
Grantville	535	5.38	1.22
Hogansville	532	5.39	1.22
La Grange	545	5.36	1.21
West Point	561	4.81	1.19
Opelika	588	4.01	0.93
Shorters	597	4.55	1.07
Montgomery	574	3.76	0.76

Following is a statement showing the rate per ton per mile to local stations from points on which rates to these local stations are based:

Rate per Ton per Mile of Local Rates.			
From Atlanta,			
To	Class 1.	Class D.	
Grantville	12.94 cents	3.14 cents	
Beansville	12.55 "	2.98 "	
La Grange	11.12 "	2.58 "	
From Montgomery to			
Shorters,	24.35 "	8.70 "	

4 LETTER S.

15. The Atlanta & West Point and Western Railway of Alabama are corporations independent of each other, but for purposes of economy the roads are operated under one set of officers and the same crews, cars and engines run over both lines. The following financial statements are made up from reports to the Commission of these companies for the year ending June 30, 1891:

Atlanta & West Point Railroad Company:—
The "Capital Stock" of this road was \$1,232,200.00. "Funded Debt" \$1,232,200.00; "Current Liabilities" \$95,067.78; "Cost of Road, Equipment, and Permanent Improvements" \$2,464,400.00. The "Gross Earnings from Operation" were \$483,053.50; "Operating Expenses" \$343,689.45; "Income from Operation" \$139,364.05. There was paid from this as "Deductions from Income" \$36,873.82, leaving "Net Income" \$52,485.73. There was also paid a dividend of 6 per cent on Common Stock of \$73,982.00, leaving the "Deficit from Operations of Year ending June 30, 1891,"

\$21,440.27. There was a "Surplus on June 30, 1890," of \$124,359.28, which would make the "Surplus on June 30, 1891," \$102,918.01. The "Freight Revenue" was \$274,651.80, from which there was repaid as "Overcharge to Shippers" \$7,100.83, which leaves the "Total Freight Revenue" \$267,550.97. In addition to the "Cost of Road" heretofore referred to, the road returns in its "Comparative General Balance Sheet" as "Assets," "Cash and Current Assets" \$180,837.85; "Materials and Supplies" \$17,642.94. Its only "Liabilities" in addition to the "Capital Stock," "Funded Debt" and "Current Liabilities" hereinbefore referred to, are the "Profit and Loss" (surplus), \$102,918.01. The "Grand Total" of the Balance Sheet is \$2,662,380.79.

Referring to the "Freight Traffic," it appears that the "Number of tons carried of freight earning revenue" was 196,300. The "Number of tons carried one mile" was 13,761,055, which indicates that the "Average distance haul of one ton" was 70 miles. The "Average receipts per ton per mile" were .01,944 cents; the "Estimated cost of carrying one ton per one mile," .01,245 cents. Of the "Number of tons carried of freight earning revenue" 109,716 tons originated on this road and 86,584 tons were "Received from Connecting Roads and other Carriers."

Western Railway Company of Alabama: The "Capital Stock" of this road is \$3,000,000.00; "Funded Debt" \$1,548,000.00; "Current Liabilities" \$168,771.88. The "Cost of Road, Equipment and Permanent Improvements" is \$4,543,000.00. The "Gross Earnings from Operation" were \$572,220.49; "Operating Expenses" \$400,911.19, which leaves an "Income from Operation" of \$171,309.30. The "Income from Other Sources" was \$6,460.46, making the "Total Income" \$177,769.76. From this there was paid as "Deductions from Income" \$137,617.31, leaving the "Net Income" \$40,152.45, which was carried to "Surplus from Operations of Year ending June 30, 1891." The "Surplus on June 30, 1890," was \$47,990.40, which would make the "Surplus on June 30, 1891," \$88,142.85. The "Freight Revenue" was \$340,802.21, from which there were repayments on account of "Overcharge to Shippers" of \$5,499.29, leaving the "Total Freight Revenue" \$335,302.92.

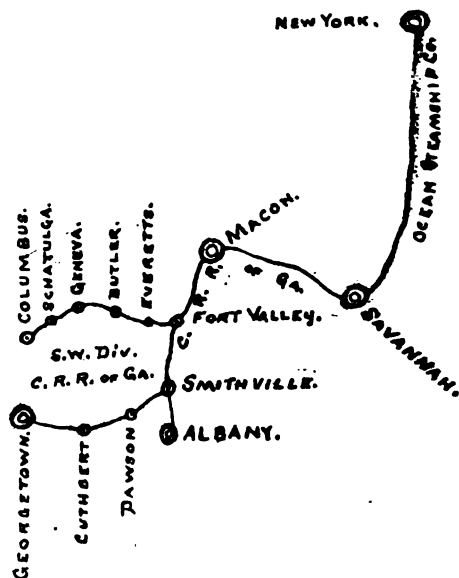
Reference to the "Comparative General Balance Sheet," discloses that in addition to the "Cost of Road" heretofore referred to, the road has "Assets" of "Cash and Current Assets" \$204,792.87; "Materials and Supplies" \$52,121.36, making the "Grand Total" of the "General Balance Sheet" \$4,799,914.23. Its "Liabilities," in addition to the "Capital Stock," "Funded Debt" and "Current Liabilities," were the "Profit and Loss" (surplus),

\$88,142.85. Reference to the "Freight Traffic" shows that the "Number of tons carried of freight earnings revenue" was 320,428. The "Number of tons carried one mile" was 20,323,159, which shows that the "Average distance haul of one ton" was 63 miles. The "Average receipts per ton per mile" were .01,650 cents, and the "Estimated cost of carrying one ton one mile" was .01,061 cents. Of the "Number of tons carried of freight earning revenue," 148,474 tons originated on this road, and 171,954 tons were "Received from Connecting Roads and other Carriers."

Case No. 315.

16. This was the next case heard, and the route is a water and rail line from New York and other North Atlantic ports by steamships of the Ocean Steamship Company to Savannah, which delivers to the Central Railroad of Georgia for carriage to points on its South-western Division beginning at Macon. The points involved are situate on two terminating roads both in the same division of the Central of Georgia system. These points are, 1, Everett's, Butler, Geneva and Schatulga, shorter distance points, and Columbus, the longer distance point, 2, Smithville, Dawson and Cuthbert, shorter distance points, and Georgetown, the longer distance point. These terminal roads will hereinafter be called the Columbus Branch and the Georgetown Branch, respectively. A drawing of this route is here given under the title of:

THE MACON-COLUMBUS-GEORGETOWN PART WATER ROUTE.



The Central Railroad of Georgia has close traffic relations with the Ocean Steamship line. Traffic over this route is carried under through bills to the several destinations.

17. Rates to the shorter and longer distance points are straight rates and are not based on a combination of rates to and from basing points. The highest first class rate to any point is \$1.81 and the lowest is \$1.14, except to Macon, \$1.09, and Albany, which takes the Macon rate. Macon is a shorter distance from New York than any of the stations on this division, and Albany is not "on the same line" with the shorter and longer distance points directly involved in this case. The table shown below sets forth the rates to various points on this division, but as above stated rates are complained of only to Everett's, Butler, Geneva and Schatulga on the Columbus Branch, and Smithville, Dawson and Cuthbert on the Georgetown Branch.

Statement showing Class Rates from New York, N. Y., Philadelphia, Pa., etc., to the following stations on the Southwestern Division of the Central Railroad of Georgia, January 20, 1892.

Distance from Macon, Ga., To	Miles.	1.	2.	3.	4.	5.	6.	A.	B.	C.	D.	E.	H.	Per Bbl. F.
Everett's	36	.181	.111	.98	.82	.67	.56	.46	.52	.40	.37	.67	.78	.75½
Butler,	50	.181	.111	.98	.88	.69	.56	.46	.53	.41	.38	.67	.78	.78
Geneva,	70	.181	.111	.98	.88	.69	.56	.46	.54	.42	.39	.67	.78	.80
Schatulga,	91	.181	.111	.98	.88	.69	.56	.46	.55	.43	.40	.67	.78	.82
Columbus,	100	.114	.98	.86	.73	.60	.49	.36	.48	.40	.39	.58	.68	.78
To Macon		.109	.96	.83	.70	.59	.48	.34	.47	.35	.34	.52	.60	.58
Fort Valley,	29	.114	.98	.86	.73	.60	.49	.36	.48	.40	.37	.58	.68	.75½
Marshv.	37	.114	.98	.86	.73	.60	.49	.36	.48	.40	.37	.58	.68	.75½
Montezuma,	49	.114	.98	.86	.73	.60	.49	.36	.48	.40	.38	.58	.68	.78
Americus,	71	.114	.98	.86	.73	.60	.49	.36	.48	.40	.39	.58	.68	.78
Leesburgh,	96	.181	.111	.98	.88	.69	.56	.46	.55	.41	.40	.67	.78	.81
Albany,	107	.109	.96	.83	.70	.59	.48	.34	.47	.35	.34	.52	.60	.68
Smithville,	88	.181	.111	.98	.88	.69	.56	.46	.55	.41	.39	.67	.78	.80
Dawson,	98	.181	.111	.98	.88	.69	.56	.46	.55	.42	.40	.67	.78	.81
Cuthbert,	118	.181	.111	.98	.88	.69	.56	.46	.56	.42	.39	.67	.78	.82
Georgetown,	141	.114	.98	.86	.73	.60	.49	.36	.48	.40	.39	.58	.68	.78

At Columbus the following lines center: The Central of Georgia, Southwestern Division, and The Columbus & Western Division, which runs to Birmingham; Georgia Midland & Gulf to McDonough, Columbus Southern to Albany, Columbus & Rome to Greenville, and Mobile and Girard to Seagriff, the two latter being also a part of the Central of Georgia system. Georgetown is the first station east and two miles from Eufaula, the terminus of the Georgetown branch, and takes Eufaula rates. The Montgomery & Eufaula division of the Central of Georgia extends from Eufaula to Montgomery. Everett's, Butler and Schatulga have no railroad communication except the Central of Georgia. Smithville is the junction of the Albany and Eufaula, or Georgetown, branches. Dawson has connection between the Central of Georgia and Columbus Southern. Cuthbert is the junction of the Georgetown road with a branch for Fort Gaines.

4 INTER 8.

19. There is possible competition to Columbus and Eufaula from New York by steamship to Jacksonville, rail to the Chattahoochee river, and steamer up that river to Eufaula and Columbus, or by water all the way if a line were established, but under present rates and navigable conditions the river route is not a dangerous competitor. The various lines all-rail and water and rail, which penetrate this territory are competitors for the carrying trade, but the Central system controls the rates to Eufaula and Columbus, in a large degree, except by the river.

20. For the year ending June 30, 1890: The "Average receipts per ton per mile" of the Central of Georgia Railroad System was .01,903 cents, and the "Estimated cost of carrying one ton one mile" was .01,428 cents, .00,474 cents, nearly half a cent less than the rate received. Its "Net Income" was \$1,026,597.66, from which was paid an 8 per cent dividend on

\$7,500,000, the entire "Capital Stock," amounting to \$600,000 and the balance \$426,597.66 was carried to the "surplus" account, which on June 30, 1890, was \$950,113.22. The "Number of tons carried of freight earning revenue" was 1,705,688, of which 944,521 tons originated on the road, and 761,162 tons were "Received from Connecting Roads and other Carriers." This report is based on an operated mileage of 1,317.46 miles. The report was made by the "Central Rail road and Banking Company of Georgia."

Case No. 316.

21. This is an all rail route from Cincinnati and Ohio river points over the Cincinnati, New Orleans & Texas Pacific Railway to Chattanooga, the East Tennessee, Virginia & Georgia to Atlanta and the Atlanta Division of the Central Railroad of Georgia to the points of consignment mentioned in the complaint as

Jonesboro, Hampton, Griffin, Barnesville and Forsyth, intermediate stations, and Macon the terminus, to which, though a longer distance, lower rates are charged than to the shorter distance points mentioned. This route is here termed the Atlanta-Macon All Rail Route, and is as follows:

ATLANTA-MACON ALL RAIL ROUTE.



Traffic goes over this route under through bills of lading to the various destinations named above. By this line Atlanta is 488 miles from Cincinnati and 108 miles from Macon, making the distance to Macon from Cincinnati 591 miles. There is no water route to Macon, but the same strong competition exists between carriers and markets for the Macon as for the Atlanta trade.

22. The same rates are in effect to both Atlanta and Macon from Cincinnati, except on classes B, C, D, E, H and F, which are two cents higher to Macon. Some of the rates to intermediate points are based on rates to Atlanta or Macon, plus the locals therefrom, especially rates on the higher classes, the others are straight rates. A table of these rates with distances from Cincinnati is here given:

Rates taken from Cincinnati, New Orleans & Texas Pacific R. R. Supplement No. 2.

From Cincinnati, O.,		Classes, rates in cents per 100 pounds.													Per bbl.	
	Miles		1	2	3	4	5	6	A	B	C	D	E	H	F	
To Atlanta	488	Ga.	107	92	81	68	56	46	38	35	28	24	48	53	48	
Jonesboro	509	"	129	112	99	83	69	57	39	46	35	30	61	68	61½	
Hampton	520	"	133	115	103	87	71	58	40	47	35½	31	63	72	63	
Griffin	531	"	139	121	107	87	72	57	42	49	36½	32	66	73	65½	
Barnesville	548	"	139	121	107	91	75	60	42	50	37	32½	69	78	66	
Forsyth	564	"	181	114	101	86	70	58	40	48	36½	32	65	73	65	
Macon	591	"	107	92	81	68	56	46	28	38	33	29	50	55	58	

4 INTER S.

Through Tariff No. 15, effective August 24, 1891, and through Freight Tariff No. 15 effective April 16, 1891.

The rates per ton per mile on the highest and lowest classes are as follows:

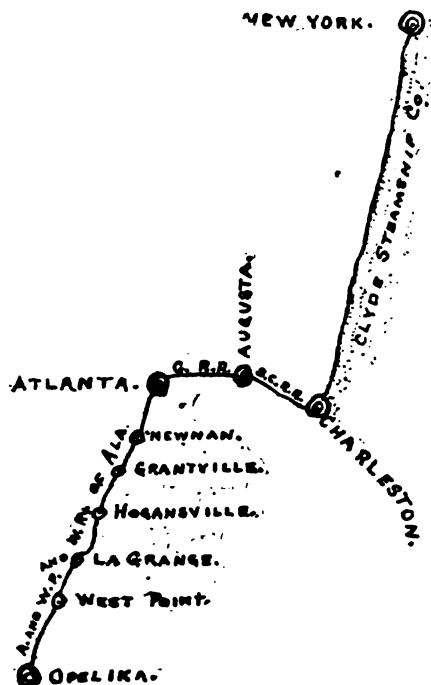
To	Class 1.	Class D.
Atlanta	4.33 Cents	.96 Cents
Jonesboro	5.07 "	1.18 "
Hampton	5.12 "	1.19 "
Griffin	5.23 "	1.20 "
Barnesville	5.07 "	1.18 "
Forsyth	4.64 "	1.18 "
Macon	3.62 "	0.96 "

23. Jonesboro, Hampton and Forsyth have no other railroad service than that afforded by the Central of Georgia roads. Griffin has railroad connection with the Georgia Midland and Gulf, and is also the junction of the Atlanta and Chattanooga divisions of the Central of Georgia. The distance to Griffin from Cincinnati over the C. N. O. & T. P. to Chattanooga and the Central of Georgia from Chattanooga is 584 miles, only 3 miles greater than by the way of Atlanta. Barnesville is the junction of the Atlanta Division and the Upson County Branch, a 16 mile road to Thomastown. On freights from New York, Philadelphia & Boston, Griffin enjoys the Atlanta water and rail rate of \$1.14 first class, and also the Atlanta water and rail rate from Baltimore of \$1.07, but from Cincinnati its first class rate is as above stated \$1.39. Macon has a rate of \$1.09 from New York, and \$1.02 from Baltimore.

Case No. 326.

24. This case was heard last of all, but as the remaining case refers only to one commodity, while this, like the others, extends to all classes of freights, the facts pertaining to it will be stated now. The route here is water and rail from New York and other North Atlantic ports *via* the Clyde Steamship line to Charleston, the South Carolina Railway to Augusta, the Georgia Railroad to Atlanta, and the Atlanta & West Point and Western Railway of Alabama to the destinations mentioned in the complaint, which are Newnan, Grantville, Hogansville, La Grange and West Point, shorter distance stations and Opelika the longer distance point. This route is distinguished by the name:

“THE ATLANTA & WEST POINT PART WATER ROUTE.”



25. The rates are as follows:

From New York, N. Y.
Philadelphia, Pa.

To Atlanta West Point R. R.
Atlanta Ga.
Newnan
Grantville
Hogansville
La Grange
West Point
Western R. R. of Alabama.
Opelika, Ala.

Classes, Rates in cents
per 100 lbs.

Per
bbl.

1	2	3	4	5	6	A	B	C	D	E	H	F
114	98	86	78	60	49	36	48	40	39	58	68	78
131	111	98	88	69	56						78	
147	128	114	97	80	64						94	
151	131	116	100	81	65						97	
154	135	118	102	82	66						99	
142	124	110	98	77	63						88	
114	98	86	78	60	49	36	48	40	39	58	68	78

Rates taken from Tariff issued by R. D. Carpenter, Commissioner of Associated Railways of Virginia and the Carolinas for March, 1892 (How to Ship).

Rates by the way of the Ocean Steamship line to Savannah and the Central of Georgia and connections are substantially the same.

Except Newnan, the stations in this case were considered in the findings under Case 325, relating to traffic from Cincinnati over the Atlanta & West Point all rail route.

26. The distance by the Central of Georgia from Savannah to Atlanta is 295 miles, 13 miles less than the distance from Charleston to Atlanta. The distance from Savannah to Augusta by the Central of Georgia is 132 miles, 5 miles less than the mileage from Charleston

to Augusta by the South Carolina road. The distance from Savannah to Opelika by the Central of Georgia through Macon and Columbus is 321 miles, 26 miles less than the distance to Newnan, the first shorter distance point, over the route from Charleston, and only 13 miles greater than the distance from Charleston to Atlanta. The Central of Georgia route Savannah to Opelika is with the exception of the 29 miles from Columbus, wholly in the state of Georgia. Freights can be shipped by the Central of Georgia from Savannah through Opelika to West Point and La Grange, and carried over a less distance than by the route from Charleston or the routes from Savannah through Augusta or Atlanta. It is only 6 miles farther to Hogansville *via* Savannah and Opelika than from Charleston; only 20 miles greater distance to Grantville, and but 44 miles farther to Newnan. There is a still shorter route from Savannah to Opelika, namely the Central of Georgia to Lyons, 75 miles, the Savannah, Americus & Montgomery, called the “Sam” road, to Americus, 124 miles, and the Central system to Opelika, 98 miles, or 292 miles in all. It is a less distance by this route from Savannah through Opelika to all the shorter distance stations named in the complaint, except Newnan, than from Charleston.

From the port of Brunswick, Ga., Opelika can be reached by the Savannah, Florida & Western to Albany, 169 miles, and the Central

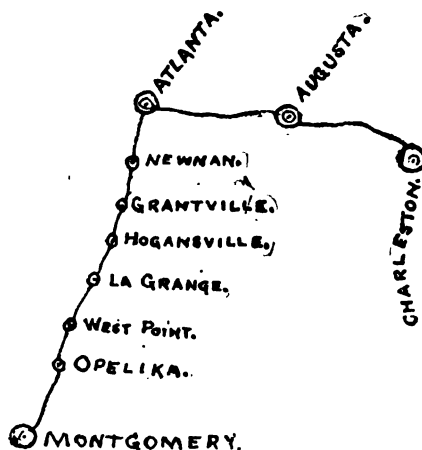
of Georgia to Opelika, 124 miles, or a distance of 298 miles through. It is nearer from Brunswick *via* Opelika to all the shorter distance points in this case, except Newnan, than to these points from Charleston *via* Atlanta, and it is only 21 miles farther to Newnan from Brunswick than from Charleston.

But Savannah traffic can also reach Newnan by the Central of Georgia to Griffin and its Chattanooga division over a short distance of 288 miles, 7 miles less than the distance from Savannah to Atlanta and 20 miles less than from Charleston to Atlanta. Newnan is 89 miles from Atlanta, and therefore the mileage from Charleston to Newnan is 847 miles as against only 288 miles from Savannah.

Case No. 324.

27. This case relates to rates on fertilizers from Charleston to points on the Atlanta & West Point and Western Railway of Alabama. The route from Charleston is all rail and the same as the rail portion of the route in Case No. 326. The destinations are also the same. This route, denominated The Atlanta & West Point Fertilizer Route, is set out in the diagram below:

"THE ATLANTA & WEST POINT FERTILIZER ROUTE."



Traffic is shipped under through bills to the various points.

28. The rates and distances from Charleston are as follows:

Rates on Fertilizers from Charleston.

To	Distance	Rate per ton Dollars.	Rate per ton per mile Cts.
Atlanta	306	3.14	1.02
Newnan	347	3.25	0.98
Grantville	359	3.72	1.04
Hogansville	366	3.62	1.04
La Grange	379	3.89	1.03
West Point	395	3.70	0.94
Opelika	417	3.00	0.72
Montgomery	483	3.00	0.62

These rates are the same as those in effect from Savannah to the same points over a route to the shorter distance points mentioned which may be wholly within the state of Georgia, and the rates from Savannah are subject to approval by the Georgia Railroad Commission, the complainant in this case.

The fertilizer rate to Newnan where competition in carrying exists by the Central of Georgia is only 11 cents more than the Atlanta rate, while to Grantville only 12 miles farther from Atlanta it is 58 cents above Atlanta and 47 cents higher than the rate to Newnan.

29. Fertilizers are low grade freight and much of it comes by water to South Atlantic ports. The rail rate per ton on fertilizers to all stations beyond Atlanta on the Atlanta & West Point road, including West Point, is the same from Richmond, West Point, Norfolk, Portsmouth or Pinners Point, namely, \$4.35 per ton, and it is \$3.89 from Wilmington, the same as the rate from Charleston to La Grange and West Point. The rate to Opelika from Wilmington is \$3.89 and from the other ports it is \$4.25 per ton.

31. The following statements show rates by all-rail and rail and water routes from New York, Baltimore and Cincinnati to the more important basing points in the territory under consideration.

Statement showing Freight Rates on Classified Traffic from New York, Baltimore and Cincinnati to various Southern points named, in effect at the present time.

Distance.	From	To	Route.	Rates in cents per hundred pounds.													per ton.
				1	2	3	4	5	6	A	B	C	D	E	H	F	
8	New York	Chattanooga	Rail and Water.	114	98	86	73	60	49	36	48	40	39	58	68	78	
884	New York	Chattanooga	All Rail.	114	98	86	73	60	49	36	48	40	39	58	68	78	
877	New York	Atlanta	Rail and Water.	114	98	86	73	63	49	36	48	40	39	58	68	78	
877	New York	Atlanta	All Rail.	122	104	91	77	63	51	38	50	42	41	61	72	82	
802	New York	Augusta	Rail and Water.	96	81	70	58	47	37	28	42	34	31	43	54	61	
802	New York	Augusta	All Rail.	104	87	75	62	50	39	30	44	33	33	46	58	65	
688	Baltimore	Atlanta	Rail and Water.	107	92	81	68	56	46	34	45	37	36	55	65	72	
688	Baltimore	Atlanta	All Rail.	115	98	86	72	59	48	36	47	39	38	58	69	76	
474	Cincinnati	Atlanta	All Rail.	107	92	81	68	56	46	34	45	37	36	55	65	72	
474	Baltimore	Chattanooga	Rail and Water.	106	90	83	70	57	46	33	45	37	36	55	65	72	
650	Baltimore	Chattanooga	All Rail.	106	90	83	70	57	46	33	45	37	36	55	65	72	
339	Cincinnati	Chattanooga	All Rail.	6	65	57	47	40	30	20	28	23	19	34	23	38	
613	Baltimore	Augusta	Rail and Water.	89	75	65	53	43	34	26	39	28	28	40	51	59	
613	Baltimore	Augusta	All Rail.	97	81	70	57	46	36	28	41	30	30	43	55	60	
645	Cincinnati	Augusta	All Rail.	107	92	81	68	56	46	34	45	37	36	50	55	62	
927	New York	Macon	Rail and Water.	109	96	83	70	59	48	34	47	35	34	52	60	68	
927	New York	Macon	All Rail.	117	102	88	73	62	50	38	49	37	36	55	64	72	
991	New York	Birmingham	Rail and Water.	114	98	86	73	60	49	36	48	40	39	58	68	78	
991	New York	Birmingham	All Rail.	114	98	86	73	60	49	36	48	40	39	58	68	78	
1052	New York	Montgomery	Rail and Water.	114	98	86	73	60	49	36	48	40	39	58	68	78	
1052	New York	Montgomery	All Rail.	114	98	86	73	60	49	36	48	40	39	58	68	78	
986	New York	Opelika	Rail and Water.	114	98	86	73	60	49	36	48	40	39	58	68	78	
986	New York	Opelika	All Rail.	122	104	91	77	63	51	38	50	42	41	61	72	82	

Statement showing Freight rates on Classified Traffic from New York, Philadelphia and Baltimore to South Atlantic points named, in effect at present time.

		VIA ALL-RAIL ROUTES.													
FROM	TO	CLASSES.												Per Bbl.	
		In Cents Per 100 Lbs.													
		1	2	3	4	5	6	A	B	C	D	E	H		F
New York and Philadelphia.	Charleston	78	64	53	38	31	26½	26½	26½	26½	26½	35	36½	47½	
Baltimore	Charleston	78	64	53	38	31	22	22	22	22	22	35	32	44	
New York and Philadelphia.	Savannah	78	64	53	38	31	26½	26½	26½	26½	26½	35	36½	47½	
Baltimore	Savannah	78	64	53	38	31	22	22	22	22	22	35	32	44	
New York, Philadelphia and Baltimore	Brunswick	81	67	60	54	48	32	32	32	32	32	43	34	54	
New York, Philadelphia and Baltimore	Jacksonville	106	90	76	57	47	39	38	38	38	37½	47	47	72½	

Statement showing Freight Rates on Classified Traffic from New York, Philadelphia and Baltimore to the South Atlantic points named, in effect at present time.

FROM	TO	VIA RAIL AND WATER ROUTES.														Per Bbl.
		CLASSES.														
		In Cents Per 100 Lbs.														
		1	2	3	4	5	6	A	B	C	D	E	H	F		
New York and Philadelphia	Charleston	70	58	48	34	28	24½	23½	23½	23½	23	32	30	43½		
Baltimore	Charleston	60	50	45	34	26	18	17	17	17	17	30	26	34		
New York and Philadelphia	Savannah	70	58	48	34	28	24½	23½	23½	23½	23	32	32½	43½		
Baltimore	Savannah	70	58	48	34	28	20	20	20	20	20	32	28	40		
New York and Philadelphia	Brunswick	73	61	55	50	45	30	30	30	30	30	40	30	60		
Baltimore	Brunswick	73	61	48	34	27	20	18½	18½	18½	18	32	32	33½		
New York and Philadelphia	Jacksonville	73	61	48	34	28	24½	23½	23½	23½	23	32	32	43½		
Baltimore	Jacksonville	73	61	48	34	28	23½	22½	22½	22½	22	32	32	41½		

Statement showing Freight Rates on Classified Traffic from Cincinnati, O., to the South Atlantic points named, in effect at present time.

FROM	TO	CLASSES. In Cents Per 100 Lbs.												Per Bbl.
		1	2	3	4	5	6	A	B	C	D	E	H	
		F												
Cincinnati, O.	Charleston	96	80	75	70	58	46	35	35	27	23	40	40	46
	Brunswick													
	Jacksonville													

Statement showing present Freight Rates via Trunk Line Routes on Classified Traffic to Cincinnati, Ohio, from the Eastern cities named.

FROM	TO	CLASSES.					
		In Cents Per 100 Lbs.					
		1	2	3	4	5	6
New York or Boston	Cincinnati	65	57	44	30	26	22
Philadelphia	Cincinnati	59	51	42	28	24	20
Baltimore	Cincinnati	57	49	41	27	23	19

82. The complainant, the Georgia Railroad Commission, under authority conferred by the Legislature of the state of Georgia, has jurisdiction of railroad transportation wholly within the borders of that state, but that Commission has no control over passengers or property transported wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement for a continuous carriage or

shipment, between points in different states or territories of the United States. The defendants in these several cases arrange for the through carriage of property from Ohio river points, or North Atlantic ports, as the case may be, to the destinations named in the complaints. The initial line accepts traffic for through carriage and issues through bills at rates of charge for the whole distance. The carriers concerned receive the property and transport

it on to the point of destination where it is delivered to the consignee who pays to the terminal carrier the total expense of transportation, unless it has been prepaid by the shipper, and the money so collected is paid by the carrier receiving it, after deducting its own share, to the other carriers composing the through line according to the proportion which, by previous understanding or arrangement, each is entitled to receive. The initial carrier of each route is fully acquainted with the terms which each of the other carriers exacts for receiving, forwarding and delivering traffic.

The Western & Atlantic, and others, it may be assumed, have soliciting agents at Cincinnati. The various through lines are represented at important points of shipment, either by their agents or by railroad association officials, or by agents of friendly initial carriers from those points.

83. The following extracts from "Rules Governing the Transportation of Freight," issued by the Georgia Railroad Commission were put in evidence:

"RULE 6."

"Regulations Concerning Freight Rates.—The freight rates prescribed by the Commission are maximum rates, which shall not be transcended by the railroads. They may carry, however, at less than the prescribed rates, provided, that if they carry for less for one person, they shall for the like service carry for the same lessened rate for all persons except as mentioned hereafter; and if they adopt less freight rates from one station, they shall make a reduction of the same per cent at all stations, along the line of road, so as to make no unjust discrimination as against any person or locality."

"But when there are between any two points in this state two or more competing roads not under the same management or in the same system, then the longer line or lines, in order to give said points the benefit of competition, may reduce the rates between said two points below the standard tariff, without making a corresponding reduction at all stations along the lines of said roads: *Provided*, said reduction shall not make the rates less than the standard tariff rates for the shortest line between the two points. *Provided further*, that before taking effect, the proposed change of rates shall be submitted to and approved by the Commission."

By Circular No. 6 issued April 29, 1880, the Georgia Commission added the following language to "Rule 6."

"Competing lines, not all within the jurisdiction of the Commission:—But when from any point in this state there are competing lines, one or more, subject to the jurisdiction of the Commission, then any line or lines which are so subject may at such competing point make rates below the standard freight tariff, to meet such competition, without making a corresponding reduction along the line of road."

The following is an extract from a letter of 4 INTER S.

the Commission dated June 3, 1880, to Virgil Powers, then General Commissioner of the Southern Railway & Steamship Association, now a member of the Georgia Railroad Commission, the complainant in these cases:

"Under the law, freights coming from or going beyond the boundary of the state are not within the jurisdiction of the Commissioners. A shipment from Rome to Charleston, passing over the Rome, Western & Atlantic, Georgia, and South Carolina Railroads, for example, could not in any way be regulated by the Commissioners. This line then is not subject to the jurisdiction of the Commission. It competes with lines to the sea, however, which are within the jurisdiction of the Commission. All such cases are intended to be covered by Rule 6 to the end that our own roads and seaports may be able to compete with roads and seaports without the state. Shipments covered by note 1, over more than one road in this state, being shipped from any point in this state to another point in the state, are held to be within the meaning of that note—the intention being to give the railroads the largest liberty in fostering the industries of the state—and each road in such line can lower rates on such articles without conflicting with Rule 6."

"Two or more roads in the state desirous of making joint rates between points on their respective roads, may make such joint rates on articles not controlled by Note 1, by taking the rate allowed for an equal distance, if the points were on one road, and applying it to the different roads. For example:

First class—Marietta to Atlanta	20 miles	
per 100 pounds		20 cents
Atlanta to Macon,	108 miles	
per 100 pounds		48 cents
Macon to McRae,	76 miles	
per 100 pounds		30 cents

The sum of these locals for 199 miles would be \$1.07

But the rate for 199 miles, if on one road, would be per 100 pounds—first class—70 cents. Now a joint rate of \$1.07 or of 70 cents for 100 pounds could be made or a rate between these amounts—the railroads making their own divisions of the total rates between themselves."

In regard to the denial of several of the defendants that they participate in the transportation of property between points mentioned in the complaints under a common control, management or arrangement, upon the facts stated in the findings we decide that the transportation of property between points of shipment and destination named in the complaints is conducted by the connecting defendant lines under a common arrangement for continuous carriage or shipment within the meaning of the first section of the Act to Regulate Commerce.

The receipt successively by two or more carriers for transportation of traffic shipped under through bills for continuous carriage over their

lines is assent to a common arrangement for such continuous carriage or shipment, and previous formal arrangement between them is not necessary to bring such transportation under the terms of the law.

Traffic is either state or interstate traffic according to its origin and destination. It is shipped by the consignor in the state where the consignee dwells, or it is not. If not, it is interstate traffic, and when carried over two or more lines, it is, by the fact of having been received, forwarded, and delivered as one through shipment, transported under a common control, management or arrangement, as the case may be, for continuous carriage or shipment.

The phrase "common control, management or arrangement for continuous carriage or shipment" in the first section was intended to cover all interstate traffic carried through over all rail, or part water and part rail lines. The "arrangement" for continuous carriage or shipment is complete whenever the carriers have arranged for delivering and receiving through traffic to and from each other and such an arrangement is necessarily "common."

This construction of the words "common arrangement" as used in the first section of the law is in line with our decisions in *Boston Fruit & Produce Exch. v. New York & N. E. R. Co.* 3 Inters. Com. Rep. 498, 4 I. C. C. Rep. 664, and *Mattlingly v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 806, 3 I. C. C. Rep. 592, and with other rulings of the Commission.

In several of these cases the through charge to intermediate stations is made by the addition of the terminal carrier's local rate to the through rate in effect to a point on its line. This practice has been disapproved of by the Commission in other cases. *Re Tariffs and Classifications of Atlanta & West Point R. Co.* 2 Inters. Com. Rep. 461, 3 I. C. C. Rep. 19; *Hamilton v. Chattanooga, Rome & Columbus R. Co.* 3 Inters. Com. Rep. 482, 4 I. C. C. Rep. 686.

The addition of a local rate to a reasonable through rate in order to fix the through charge to the local station is liable to produce a relatively unreasonable rate to that station. The difference in situation of the basing and local points in respect of through traffic is not properly measured by the local rate for carriage between them. The reasonableness of the added local, as a local rate, is not under consideration in a case where the rate complained of is the total charge over different lines. The total rate or charge for through carriage over two or more lines, whether made by the addition of established locals, or of through and local rates, or upon a less proportionate basis, is the through rate that is subject to scrutiny by the regulating authority; how the rate or charge is

made is only material as bearing upon the legality of the aggregate charge, and how any reduction ordered may be accomplished, whether by lowering locals or proportions, is matter for the carriers to determine among themselves.

The rate over through connecting lines is correctly adjusted upon the distance through, and not upon the shorter distances over the several lines. *Coze Bros. v. Lehigh Valley R. Co.* 3 Inters. Com. Rep. 460, 4 I. C. C. Rep. 535. Through and continuous lines imply through rates which must be reasonable rates. *Brady v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 78, 2 I. C. C. Rep. 181.

Where two or more roads forming a continuous connecting line between points in different states bill and carry interstate traffic through to certain stations on the last road forming such line, neither the roads together nor any one of them can evade the obligations of the Act to Regulate Commerce by declaring that as to such traffic destined to such stations on such terminal road it is a local carrier. *James & Mayer Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.*, 3 Inters. Com. Rep. 682, 4 I. C. C. Rep. 744.

As these cases all stand upon the charge of violation of the long and short haul clause, the fourth section of the statute, it becomes necessary to consider whether the defendants are justified in their conceded disregard of the prohibitive part of the provision. The point of the defense is that the transportation for shorter distances is under circumstances and conditions which are substantially dissimilar to those surrounding the transportation to the longer distance points; and this upon the assumption that they may in any case determine the question for themselves in the first instance.

The phrase "substantially similar circumstances and conditions" occurs in both the second and fourth sections of the Act to Regulate Commerce. An intelligent construction of this phrase involves the duty of ascertaining how it originated in the statute.

The words "under substantially similar circumstances" were in the discrimination clause of the original House Bill reported by the Commerce Committee of the House of Representatives in 1884. In the Reagan substitute bill the words did not appear, nor were they in the bill as it passed the House in January, 1885. The words "under similar circumstances" were used in connection with discriminations in the summary statement of causes of complaint against the railroad system contained in the Report of the Senate Select Committee presented in 1886; and the phrase "under substantially similar circumstances and conditions" was a part of the sec-

ond section of the original Senate Bill which was introduced by Senator Cullom.

During the debate upon amendments proposed by Senator Camden and Senator Aldrich some discussion was being had in regard to the word "quantity." Senator Camden proposed that the words "of a like kind of property under substantially similar circumstances and conditions" be substituted for the amendments offered, and the substitute was adopted.

A short history of the framing of the fourth section is given in the opinion of the Commission, in *Re Petitions of the Louisville & Nashville R. Co.* 1 Inters. Com. Rep. 278, 1 I. C. C. Rep. 81.

The words "under similar circumstances" had been put into a short haul provision by the legislature of Connecticut before the interstate commerce law was enacted and that statute was referred to in the Congressional debates.

The words "under the same circumstances" are in section 90 of the English Act of 1845, and they and also the words "under like circumstances," have been frequently employed by the courts of England.

Whatever use may have been made in English decisions of the word "circumstances" or of the word "conditions" the value of these decisions as precedents to be followed in deciding cases in this country depends greatly upon the similarity of the statutory provision governing the English case to the provision of our law under which the case to be determined is brought. A comparison of certain clauses in English statutes with the second, third and fourth sections of the Act to Regulate Commerce is shown below :

EQUALITY CLAUSE.

English Act.

Sec. 90 Railway Clauses Act 1845.

"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties or for the purpose of collusively or unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit:

4 INTER S.

UNJUST DISCRIMINATION CLAUSE.

American Act.

Sec. 2, Act to Regulate Commerce, 1887.

That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrim-

ination, which is hereby prohibited and declared to be unlawful.

provided, that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway.

UNDUE PREFERENCE CLAUSE.

English Act.

Sec. 2, Railway and Canal Traffic Act, 1864.

Sec. 11, Railway and Canal Traffic Act, 1873.

* * * and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, * * *

UNDUE PREFERENCE CLAUSE.

American Act.

Sec. 8, Act to Regulate Commerce.

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

THE 4TH SECTION OF THE ACT TO REGULATE COMMERCE.

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance; *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

At the time of the enactment of this section no similar provision was contained in any English statute. The Railway and Canal Traffic Act of 1888, after re-enacting the undue

preference clause of 1854, also provides in paragraph 3, section 27, as follows:

"The Court or the Commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway."

The difference between the English and American acts in respect to long and short hauls is that there the Commission or the Court is *empowered to prohibit* the greater charge for the shorter distance, while here the law itself prohibits the greater charge for the shorter distance when the circumstances and conditions surrounding the transportation are substantially similar, but *empowers the Commission to authorize* the less charge for longer distances.

In England a complaint of greater charge for the shorter haul is triable under the undue preference clause, which is nearly identical with a portion of section 3 of our law, and the English Commission or Court may prohibit such greater charge. But in the United States such a proceeding must be brought under the fourth section of the Act to Regulate Commerce.

In either country a complaint of undue preference or prejudice must (prior to the English Statute of 1886 which shifted the burden to the carrier) be supported by proof of damage which makes the preference or prejudice unreasonable or undue, but in cases brought under our fourth section or long and short haul clause, which particularly describes the act it declares to be unlawful, such proof is not required.

A case of undue or unreasonable preference or advantage or prejudice or disadvantage includes, as the terms themselves imply, consideration of all those circumstances and conditions which bear, not only upon the transportation by the carrier, but also often relate to the value and volume of the traffic, the favorable or unfavorable location of the places involved in the controversy, character of grades on different divisions, lateral lines, and other essential elements which enter more particularly into matters of relative services and relative rates.

This undue preference clause may justly be termed an omnibus provision, enacted first by Parliament and then by Congress to prohibit carriers from doing any act which unduly or unreasonably puts one shipper or description of traffic up in the scale of favor or puts another shipper or description of traffic down to his or its disadvantage or wrong. But when the Act to Regulate Commerce was passed Congress not only adopted that clause but saw fit to go further and specify that certain charges by the

carrier would in themselves constitute wrong. The second and fourth sections of the Act—that is, the unjust discrimination and long and short haul clauses—are provisions of this character. Under these sections the carrier must not charge more for like service nor more for less service rendered in the transportation of a like kind of traffic under substantially similar circumstances and conditions. These provisions describe the offense and limit the circumstances and conditions to be considered to those under which the transportation is conducted. The undue preference clause of the English statute, which was copied into the third section of our law, contains no such description or limitation, nor do the words, "substantially similar circumstances and conditions," or any of them, appear therein.

Considerable variation in language is also found in comparing the English equality clause of 1845 with the second or unjust discrimination clause of our law. That the latter covers much more ground must be apparent to the casual observer, and if it were not for the fact that our second section contains the phrase "substantially similar circumstances and conditions" and the English equality clause in its proviso has the words "under the same circumstances" no reference or comparison would be deemed necessary.

The frequent citation of English decisions in cases affecting interstate transportation with manifest disregard of vast differences in facts, time, extent of country, methods of trade and transportation and great dissimilarity in statutory provisions, is ample warrant for the above somewhat extended comparison and for the following examination of some English cases which have been quoted for the purpose of influencing decisions in this country.

The case of *Attorney General v. Birmingham & Derby Junction R. Co.* (2 Ry. & Can. Cas. 124), was recently cited in a case brought under the second section of the Act to Regulate Commerce. The English case was decided in August, 1840. The American case was tried in 1890, fifty years later. The railway in the English case was operated under a special act which contained an equality clause similar to the proviso of section 90 of the English Act of 1845, above quoted. A passenger journeying to London over connecting railways was charged by the first railway for the carriage between two points on its line less than it charged to another passenger who only traveled between the two points on the first carrier's line, but the through charge to London was not less than the charge for the local or intermediate journey. The case was dismissed because prejudice to the latter class of passengers was not shown, and for the further reason that the higher rate charged was not in itself unreasonable. In that case the differ-

ence in destination made out the difference in circumstances which the special act required should be "the same." To charge less per mile for greater distances is a common rule of transportation and its legality is well settled.

The case in which the foregoing was cited related to charging a party of ten or more persons less *per capita* than was charged to single passengers, the journeys of the party and of the single passenger being between the same points, and in the same train; it was brought under a provision of our law which merely specified that the circumstances and conditions should be *substantially similar*, and not the same, and its phraseology is entirely different from that of the English Equality Clause of 1845. The fact that charges are not unreasonable *per se* does not prevent their being relatively unreasonable or constituting unjust discrimination under our second section by reason of being unequal. If the circumstances and conditions are substantially similar for like service, the discrimination is declared in the law to be unjust, but the English Statute required the circumstances to be the same.

The case of *Hozier v. Caledonian R. Co.* 1 Nev. & McN. 80, was also cited in the same case as showing that the parties must be shown to be competitors. So, also, in like manner were *Jones v. Eastern Counties R. Co.* 1 Nev. & McN. 45; *Painter v. London, B. & S. C. R. Co.* 3 C. B. N. S. 702, and *Infracombe T. C. Co. v. London S. W. R. Co.* W. N. 289, referred to. All these cases were tried with reference to undue preference or prejudice, which had to be shown to exist before the defendants could be held guilty of unlawful action. But in the case they were cited to influence no such showing was called for. Can it be said that the cases thus cited might not have been differently decided if tried under a provision of law like our second section, which not only forbids but defines the thing forbidden? The English statutes do not show any such definitive rule as is contained in the second and fourth sections of the Act to Regulate Commerce. Section 90 of the 1845 statute, in its proviso required equality when the carriage is over the *same portion of the line* under the same circumstances. Section 2 of our Act only requires the traffic to be like, the service to be like and contemporaneous, and the transportation under *substantially similar* circumstances and conditions. The provisions are so different in terms that the same set of facts might constitute immunity under the English provision and guilt under our law. Indeed, the Supreme Court of the United States tersely says of the English acts: "These traffic acts do not appear to be as comprehensive as our own and may justify contracts which, with us, would be obnoxious to the long and short haul clause of the Act, or would be open

to the charge of unjust discrimination." *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 98. Take the case of *Hozier v. Caledonian R. Co.*, above mentioned. This was a long and short haul case. The decision was under the undue preference clause and to the effect that there must be competition of interest, or the complainant must show personal disadvantage, before he has title to complain, the fact that the complainant had frequent occasion to travel not being sufficient. Would this decision be possible under our fourth section?

The case of *Jones v. Eastern Counties R. Co.* 1 Nev. & McN. 45 is another passenger case where more was charged from one station than from another station situate a further distance on the same line. The rule was refused because *undue preference* was not shown. The mere suggestion of undue preference was held to be insufficient. Under the fourth section of the Act to Regulate Commerce, proof of the greater charge for the shorter distance would have been sufficient, for there was nothing whatever in the case upon which the defendant could base justification under our long and short haul clause. In a brief for defendants in these cases of the Georgia Railroad Commission this case of *Jones v. Eastern Counties R. Co.* is cited to show that through and local traffic constitutes such difference that the greater charge does not unduly prejudice the shorter distance points, and also that when active competition exists at the longer distance point it affords a good reason for making the lower charge. If our long and short haul clause did not exist and the case were brought under the undue preference provision the through and local traffic defense might possibly have some weight, but in the face of the mandate contained in the fourth section the claim of justification on the ground that one traffic is local and the other through is absurd. To allow such claim would be to defeat the object of the section. The rate on through traffic to the longer distance point may be proportionately less than the rate on local traffic to the intermediate point, but under the fourth section it cannot be less in the aggregate. As to competition, the position of the Commission has hitherto been well defined. Some competition does afford justification and some does not, and this matter we expect to treat extensively further on in this report. But the Jones case had in it no element of competition. Whatever was said there in relation to through and local traffic and competition was spoken by the judges at the trial. The decision was that the mere suggestion of preference because of the greater charge for the shorter distance was insufficient.

The same brief cites *Strick v. Swansea Canal Co.* 16 C. B. N. S. 245, decided in 1864. A pro-

viseo in a canal act was similar to the proviso in section 90 of the 1845 statute. It was held competent for the company to carry at a lower rate for a particular individual in consideration of a large guaranteed minimum toll in order to enable them (the company) to enter into competition with a rival line of railway. We think other English decisions in similar cases have a different conclusion, but whether this is true or not it is too manifest for discussion that our second section would forbid the ruling here (*Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 368, 1 I. C. C. Rep. 107), and moreover, that such a contract would in this country be held in contravention of the common law. *Hays v. Pennsylvania Co.* 12 Fed. Rep. 809.

In a case lately decided by the English Commission entitled *Liverpool Corn Trade Assn. v. London & N. W. R. Co.* L. R. 1 Q. B. Div. 120, 45 Am. & Eng. R. Cas. 216, the conflict of English decisions was commented upon as follows:

"The question had several times been mooted whether a rate so low as, when compared with another, to amount *prima facie* to an undue preference, could be justified on the ground that it was rendered necessary by the existence of competitive modes of carriage, whether by land or water. The state of the authorities upon the matter was far from satisfactory. The dicta in *Harris v. Cockermouth R. Co.* 3 C. B. (N. S.) 693, at p. 718; *per Cockburn, L. C. J.*, and in *Ransome v. Eastern Counties R. Co.* 4 C. B. (N. S.) 185, at p. 177, *per Crowder, J.*, are I think, very difficult to reconcile with the decision in *Budd v. London & N. W. R. Co.* 4 R. & C. T. Cas. 893, n.; 36 L. T. (N. S.) 802. The manner in which the question how far the necessities of competition will justify preferential charges was touched upon in *Garton v. Bristol & Exeter R. Co.* 6 C. B. N. S. 639, throws no additional light upon the subject. *Budd's case*, 4 R. & C. T. Cases, 393 n., 36 L. T. (N. S.) 802, is open to the further observation (for which I am indebted to *Sir F. Peel*) that it is in conflict with the subsequent Scotch case of *Murray v. Glasgow & S. W. R. Co.* 4 R. & C. T. Cas. 456, 11 Court Sess. Cas. 4th Series, 205, in the court of session, and the case of *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* 14 Q. B. Div. 209, 11 App. Cas. 97, 26 Am. & Eng. R. Cas. 93, in the English court of appeals, where it was laid down that an action will not lie to recover overcharges made in violation of the provisions of the Act of 1854, against undue preferences. When the *Denaby Main case*, 14 Q. B. Div. 209, 11 App. Cas. 97, 26 Am. & Eng. R. Cas. 93, was in the House of Lords the question was not decided, and the state of the authorities has been discussed by *Cave, J.*, in his judgment in *Lancashire & Y. R. Co. v.*

Greenwood, 21 Q. B. Div. 215, 35 Am. & Eng. R. Cas. 587."

In a still more recent case decided in the English Court of Appeal, the above mentioned cases of *Harris v. Cockermouth*, *Denaby Main Colliery Co. Ransome v. Eastern Counties R. Co.* and also *Evershed's Case*, L. R. 3 App. Cas. 1029, were discussed; and the case of *Budd* was held to be no longer law.

The ruling on the main question presented by the appeal was that the railway commissioners or the court may take into consideration the existence of a competing route between the same points in considering a case of alleged undue preference.

Phipps v. London & N. W. R. Co. [1892] 2 Q. B. 229.

In that opinion *Lord Herschell* said of the Equality and Undue Preference clauses:

"Where there is a breach of the equality clause, no doubt you may sue to recover the difference on the basis that you can compel the railway company to pay you back anything which you have paid over what, for precisely the same service, they have charged to another. But under the Railway and Canal Traffic Act, as was pointed out in the House of Lords, the company have their option. They may put up one charge, they may put down the other. It is not an equality clause; it is only a clause relating to undue preference or advantage."

"The words of the equality clause have no elasticity at all; there are no outside circumstances to be taken into consideration, and it is not a question of regarding the position of the one trader as compared with the other, and then saying whether there is any undue preference. It is an absolute rigid equality which is demanded by the statute."

These words of the learned English judge clearly illustrate what we have said in relation to our own second and fourth sections as compared with the undue preference section which was copied from the English statute into our law.

It is unnecessary to continue this examination. In a case purely of alleged undue preference or prejudice the English cases have direct application. Even in cases under our second and fourth sections, English cases brought under the undue preference clause in which the decision has held undue preference to exist, have value as showing how strictly the English Commission or Court has applied the broad language of the clause to a particular set of facts, but when English decisions under the undue preference clause are cited by a carrier in justification of its action under the strict language of our second and fourth sections, the citations have greatly diminished force. These sections apply only against rates in specific cases, but the undue preference clause or third section is inclusive; it applies both to rates and facilities, and says generally to the carrier, you shall not in any manner un-

duly prefer one person or kind of traffic over another, and leaves it to the Commission or the Court to say when the undue preference is given. In the second and fourth sections what is unlawful is clearly defined, the circumstances and conditions of the transportation being similar in substance. We think, therefore, that while English cases are valuable as defining undue preference or prejudice their value is greatly limited in cases where the statute itself describes the offense it declares unlawful.

In regard to such elements of transportation as through and local traffic and cost of service we cannot do better than reiterate what was held by the Commission in *Re Louisville & Nashville R. Co.*:

"The Commission further decides that when a greater charge in the aggregate is made for the transportation of passengers or the like kind of property for a shorter than a longer distance over the same line in the same direction, the shorter being included in the longer distance, it is not sufficient justification therefore, that the traffic which is subjected to such greater charge is way or local traffic, and that which is given the more favorable rates is not.

"Nor is it sufficient justification for such greater charge that the short haul traffic is more expensive to the carrier, unless when the circumstances are such as to make it exceptionally expensive, or the long haul traffic exceptionally inexpensive, the difference being extraordinary and susceptible of definite proof."

Disproportionate expenses of carriage and great variation in the volume of traffic to various points are ever present in railroad service, were within the knowledge of Congress when the section was framed, and must of necessity have been considered as not constituting substantially dissimilar circumstances and conditions, in other than extraordinary cases, for under the contrary view it is manifest that in a large majority of cases the design of the section would be defeated. As above stated, a defense of the higher rate for the shorter haul which is based upon cost must amount to a practical demonstration that the short haul traffic is exceptionally expensive or the cost of the long haul transportation exceptionally low.

It is unnecessary to go over ground which was so carefully covered by the Commission in the Louisville & Nashville opinion, and we will at once proceed to the main question: What are the circumstances and conditions which a carrier may in the first instance take into account in fixing rates for longer and shorter distances over its line?

Under necessary and well settled rules of railroad transportation essentially different circumstances and conditions constantly arise. The section says, "The transportation of a like kind of property under substantially sim-

ilar circumstances and conditions." A barrel of flour is a like kind of property with a carload of flour, but they are different units of quantity, and the transportation of a carload is not under substantially similar circumstances and conditions with those which apply to the shipment of a barrel, or, under present rules of transportation, any number of barrels less than a carload. Other examples would be one horse and a carload of horses, furniture knocked down or set up, small lots of grain in sacks or loose in carloads, and so on through the great variety of articles of commerce which seek carriage in different quantities and forms.

It is proper also to recognize the right of a carrier to charge different but duly published rates according as its liability is diminished by proper conditions stated upon the bill of lading accepted by the shipper or upon the ticket accepted by the passenger whereby the carrier, under such special contract, secures to itself some lawful pecuniary or economic advantage. These and other transportation methods not necessary or possible to specify constitute many kinds of essentially dissimilar circumstances and conditions arising upon its own line by which a carrier may rightfully be governed.

Circumstances and conditions affecting transportation also arise through competition with other carriers for business; that is, circumstances and conditions which do not wholly arise upon the carrier's own line.

The necessity for a construction of the fourth section of the Act became apparent almost immediately after the organization of the Commission. A large number of applications for relief were then filed by roads operating in all sections of the country. Investigations were held in many places and on June 7, 1887, the applications were disposed of in the opinion above quoted from, the Louisville & Nashville case, and it was intended that the construction there laid down should be sufficient for all cases based on similar grounds which might thereafter arise under the fourth section; but the construction put upon the statute at that time seems to have been misapprehended in some essential particulars by carriers.

The Commission held in that case that the phrase "under substantially similar circumstances and conditions" in the fourth section is used in the same sense as in the second section; and under the qualified form of prohibition in the fourth section carriers are required to judge in the first instance with regard to the similarity or dissimilarity of the circumstances and conditions that forbid or permit a greater charge for the shorter distance. The Commission said in regard to the employment of the same qualifying phrase in both sections 2 and

4: "It will be observed that the phrase is precisely the same; and there can be no doubt that the words were carefully chosen, probably because they were believed to express more accurately and precisely than would any others the exact thought which was in the legislative mind. And in this section (2) as well as in section 4, the phrase is employed to mark the limit of the carrier's privilege; its privilege, too, in respect to the very subject matter with which section 4, where it is employed, has to do, namely, the charges for transportation service."

In all cases under the second section the actual facts are of necessity entirely within the carrier's knowledge. The qualifying phrase, under substantially similar circumstances and conditions, used in the same sense in the second and fourth sections, has no greater force or different meaning in the one than in the other.

In reviewing what was held in the Louisville & Nashville case the precise wording of the statute must not be overlooked. The first part of the section forbids carriers to charge more for the shorter than for the longer haul when the transportation is under substantially similar circumstances and conditions. The other portion of the section, that which relates to a relieving order by the Commission, permits such an order only for the purpose of a lesser charge for the longer haul, but the discretion of the Commission is not limited, except that the case must be special—must present a question requiring authoritative action. The Commission said in that case that if the section had passed as it once stood without containing the qualifying phrase "under substantially similar circumstances and conditions" the Commission might have exercised its discretion in all cases where the circumstances and conditions appeared to be different, and it would have entered upon its duties "with a distinct understanding of the task imposed, even though its adequate performance might have been out of the question, but modified as it now stands the necessity for a relieving order is greatly narrowed, it being obvious that no order is needed to relieve against the operation of the statute when nothing is done or proposed which it makes unlawful."

But the Commission clearly foresaw at that time that a construction of the statute which would deliver even questions purely of fact unto the carrier's judgment in the first instance, must be accompanied by a statement of principles on which such judgment must be based or the greatest confusion and litigation would follow, and thereupon proceeded to lay down for the guidance of carriers rules which would not warrant them in making charges greater for shorter distances than those established for longer hauls.

4 INTER 8.

The rules limiting the judgment of the carrier in respect to greater charges for shorter hauls were briefly stated as follows:

"Sixth: The Commission further decides that when a greater charge in the aggregate is made for the transportation of passengers or the like kind of property for a shorter than for a longer distance over the same line in the same direction the shorter being included in the longer distance it is not sufficient justification therefor that the traffic which is subjected to such greater charge is way or local traffic, and that which is given the more favorable rates is not.

"Nor is it sufficient justification for such greater charge that the short haul traffic is more expensive to the carrier, unless when the circumstances are such as to make it exceptionally expensive, or the long haul traffic exceptionally inexpensive, the difference being extraordinary and susceptible of definite proof.

"Nor that the lesser charge on the longer haul has for its motive the encouragement of manufacturers or some other branch of industry.

"Nor that it is designed to build up business or trade centers.

"Nor that the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centers or industrial establishments have been built up.

"The fact that long haul traffic will only bear certain rates is no reason for carrying it for less than cost at the expense of other traffic."

The Commission might have stopped there and directed the carriers to withdraw their applications, leaving further construction of the section to come up in cases of complaint or subsequent application for relief. But before laying down any principles except the construction as to the carrier's right of primary determination it said:

"It is manifestly important to the public interest, as well as to that of the railroads themselves, that mistakes shall as far as possible be avoided. It is also important that the general rule laid down by the statute be strictly complied with whenever compliance appears to be fairly practicable, and that carriers direct their attention more to the feasibility of coming into conformity with it than to the possibility of finding reasons upon which to ground exceptions. They are therefore entitled to the benefit of such conclusions as we have already reached upon the general merits of their applications that they may be guided thereby in the preparation of their tariffs respectively. In giving these conclusions we limit ourselves strictly to the cases presented and leave out of view such other grounds of relief, if any, as are not yet formally brought forward."

The Commission then proceeded to discuss and lay down the rules above set forth. It being apparent that competition of various kinds would constitute a main subject for consideration in cases of long and short hauls the Commission discussed the force and effect of the competition of carriers not subject to the law, and also that of carriers subject to its provisions, for the purpose of arriving at such

general conclusions in regard thereto as would properly direct carriers in establishing rates for longer and shorter hauls.

The Commission said generally on the subject of competition as creating dissimilarity in circumstances and conditions that Congress in rejecting the fourth section as introduced in both of its branches, and insisted upon in the bill passed by the House, "understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and among others in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was to continue; and water competition was beyond doubt especially in view."

But the Commission immediately said in that connection that Congress must be supposed to have allowed this because the public interest required it, and "that only legitimate open and fair competition was meant, not everything that has been done under the name of competition and which in many cases has been equally destructive of public and private right. Among common abuses have been the granting of special favor in exceptional rates, rebates, drawbacks, etc., all of which are now expressly prohibited by law when they assume the form of unjust discrimination. There has also been favoritism between places and communities, as a result of competition; but this is no longer permissible." It was also expressly stated in the opinion that the prohibitions against unjust and unreasonable rates and unjust discriminations apply as well to cases under section 4 as in other cases.

In taking this view of the meaning of the statute the Commission undoubtedly relieved itself of many onerous duties in the consideration of cases arising on applications for orders granting leave to charge less for the longer distance on the score of competition; and the difficulty of discharging these duties was clearly set forth in the beginning of the opinion. By defining the kinds of competition which might entitle the carrier to make less charges for the longer distances and thereby justify consequent greater charges on its line for shorter hauls the Commission has recognized that competition of that character constitutes a state of facts of which the carriers could judge in the first instance without giving color of right to any charges on the competing line.

Now what kind of competition did the Commission hold might, by warranting a lesser long haul charge, justify carriers in establishing greater charges for shorter hauls? The answer is: Competition with water carriers. 4 INTER 8.;

Competition with foreign railroads. Competition with railroad lines wholly in a single state. Such carriers are not subject to the law. They are independent of all regulation by the Federal authority, and consequently the carrier, subject to such regulation, in first determining for itself to charge less for the longer distance because of such competition, does not by meeting the competitive rates give color of right to rates on the other competing lines, for the law does not regulate such rates.

The Commission described one other kind of competition which might entitle a carrier to charge less for a longer haul and thereby justify short haul charges. This was in "rare and peculiar" cases of competition with a railroad subject to the Act where a strict application of the general rule of the statute would be destructive of legitimate competition. This class of cases was illustrated by two instances of very circuitous routes; one being where the competing lines run from the point of shipment, one in a direct line to the longer distance point while the other runs in the opposite direction and its traffic reaches the longer distance point by taking a wide circuit. This was the Pittsburgh or Youngstown case. The other illustration was that of roads running north and south delivering to connections at terminals or intermediate junctions, and competing to and from a common market with direct east and west roads which by reason of greatly less distance make the rates to the longer distance point.

The belief was indulged in that the carriers by strictly observing the limitations put upon their judgment in that opinion, and at the same time obeying the other provisions of the statute, would find little necessity for applying to the Commission for relief; that the operation of the law upon two carriers subject to its provisions would render competition between them an infrequent cause for seeking aid in an order relaxing the rule. But from the outset the Commission realized that the provision for relief in the fourth section would promote the interests of interstate commerce and uphold the rights of carriers by preserving competition between carriers subject to the Act which the Commission should ascertain to be legitimate. The opening part of the opinion under consideration states the view of construction which was thereafter discussed and approved: That "the order for relief would be needful only when the case was not one of plainly dissimilar circumstances and conditions, but in which, nevertheless, there might be reasons and equities that would sanction such greater charge."

Further on the Commission said:

"The later clause in the same section which empowers the Commission to make orders for relief in its discretion does not in doing so re

strict it to a finding of circumstances and conditions strictly dissimilar but seems intended to give a discretionary authority for cases that *could not well be indicated in advance by general designation*, while the cases which upon their facts should be acted upon (by the carriers) as *clearly exceptional* would be left for adjudication when the action of the carrier was challenged. The statute becomes on this construction practical and this section may be enforced without serious embarrassment."

It would be impossible to "indicate in advance by general designation" all cases of competition between carriers subject to the Act that should or should not come under the general rule. Competition between carriers subject to the Act does not constitute plainly dissimilar circumstances and conditions, for reasons which we shall now proceed to state, and the duty of primarily determining the question is laid upon the Commission by the fourth section of the statute.

The necessity for supplemental construction at this time arises from the fact that carriers in the operation of their lines have not held strictly to the principles laid down in the Louisville & Nashville opinion, under a possible misapprehension of the scope of that decision.

In stating in that opinion what kinds of competition might entitle the carrier to make lesser long-haul charges, or that create dissimilar circumstances and conditions under which it would be justified in charging more for shorter hauls, we now think, in the light of more than five years operation of the statute, that the Commission should not have included in such statement, "rare and peculiar cases of competition between railroads subject to the Act where a strict application of the general rule of the statute would be destructive of legitimate competition," if this language in the opinion was fairly susceptible of the interpretation which the carriers have put upon it. As an exception it was not consistent with the otherwise harmonious theory on which the whole opinion was based.

It constituted an exception to the clear reservation for the primary action of the Commission in cases involving competition between carriers subject to the Act which is implied in the fourth section. Because the instances of such "rare and peculiar" cases cited in the opinion are such as indicate a hardship that the Commission would not fail to recognize and by an order under the provisory clause relieve, if applied for, was no good ground for permitting the carriers to determine for themselves what cases of such competition are *rare and peculiar* or when any cases of strife for traffic between carriers subject to the law will, if the strict rule of the fourth section is applied, be "destructive of legitimate competition." From the fact that many carriers have, as was natural, expanded the permission restricted to

"rare and peculiar cases" into a privilege to presume that whenever they engage in competition with other carriers subject to the Act the case becomes "rare and peculiar," the exceptional ruling has become inoperative, delusive, and opened the door to many evasions of the statute. We think there is nothing in the statute which warranted the exception.

The prohibitory part of the fourth section of the statute is followed by this proviso:

"That upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for transportation of passengers or property; and the Commission may from time to time prescribe the extent to which said designated common carrier may be relieved from the operation of this section of this Act."

Force must be given to this part of the section as well as the other.

In the framing of the fourth section it appears that a proviso of this character was made a part of it before the words "under substantially similar circumstances and conditions," were inserted in the preceding general rule. The debate indicates that the then object of the proviso was to give the Commission substantially discretionary power to relieve carriers from the operation of the general rule. The subsequent incorporation of the clause, "substantially similar circumstances and conditions" in the prohibitory part of the section, the same phrase being already in the second section, could only have been intended to provide for a class of cases where the carrier is capable of determining for itself whether the transportation conditions are similar, and this it can easily do when the competition is with carriers not subject to regulation under the Act. If it had been intended by that phrase to cover all cases of dissimilar circumstances and conditions apparent and actual, regardless of whether fairness and justice to carriers, shippers and localities demanded the exceptional charge, then the proviso would have been stricken out when the similarity clause was inserted. But the debates indicate that both the proviso and the clause were regarded as necessary, and that the proviso would apply to a class of cases not intended to be covered by the similarity clause.

In the absence of anything in the phraseology of the statute which clearly indicates to what class of cases these two provisions respectively apply, it becomes necessary to seek for an interpretation that is reasonable and will give effect to both clauses. A statute must, if possible, be so construed as to give effect to all its provisions.

The competition of carriers subject to the Act with carriers not amenable to its provisions plainly constitutes dissimilar circumstances

and conditions which justify a reasonable departure from the rule of the fourth section if the competition be actual and controlling in respect to traffic important in amount. This includes the competition of independent water lines, independent state railroads, and foreign railroads, where they have not so connected themselves with the carriage of interstate traffic as to thereby become subject to the Act.

Of the similarity or dissimilarity in the circumstances and conditions which originate in real and tangible competition with lines not subject to the Federal authority the carrier is obviously well qualified to judge and determine for itself in the first instance. Such circumstances and conditions have direct bearing upon traffic over the line and are not subject to qualification by a multitude of other facts pertaining to lines of other carriers subject to Federal regulation. For instance, the competition between rail carriers both subject to the Federal law for business between two points does not *because it exists* constitute circumstances and conditions of transportation which one carrier is competent to say will warrant exceptional rates on its road, even though the other may have the shorter line. Such a case presents questions that can only be properly determined by the regulating authority created by the law. Rates on the competing line may or may not be lawfully adjusted, and the low rates to the competitive point may be remunerative on the shorter line but unreasonably low and unprofitable over the longer line. This is a case for investigation by the Commission, not only with reference to the long line but it also involves a scrutiny of the rates of the competing road and the reasons which cause the low rates to be charged. Another consideration is that the carriers if left to themselves are likely to force the already low rate lower and lower, whether it originally paid both carriers or not, until finally a point is reached where other traffic on both lines is burdened with part of the cost which properly belongs to the business competed for; charges to many points on both lines are thrown out of just relation, and, what is still worse, the competition which has become illegitimate is likely to have so affected rates of roads not interested in the original strife, but which have felt obliged to give relatively lower rates to competitive points on their lines in the same territory, that they too stand in unlawful light. This is illustrated to a considerable extent in the territory now under consideration. Competition unrestrained will naturally develop into reckless warfare, or, through that combination which is the logical result of destructive or ruinous competition, perpetuate a system of rates which is burdensome to many communities while it unduly favors a few, and yet brings no additional returns to the carriers

concerned. The law-making power never intended that competition should have such unrestrained and disastrous sway before the remedy of regulation should be invoked and applied.

But competition between carriers subject to the Act to Regulate Commerce *may* furnish grounds for disproportionate rates on the line of one of the carriers, and when such a railroad company meets a stronger competitor in the strife for business between the same points, such a case should, if the weaker line will gain some profit from the competitive rate, be brought to the attention of the Commission as a *special case* for relief under the proviso of the fourth section. The Commission will investigate the matter, and having in view the rights of both carriers and their duties to the persons and communities they serve, equitably determine the questions involved.

The regulation provided by the Act to Regulate Commerce is not intended to limit or restrict, but rather to preserve and encourage legitimate competition between carriers subject to its jurisdiction: but the legality of such competition should in no case be arbitrarily determined by the competitors themselves. Those who are subject to the law can never find excuse for disobedience in the disobedience of another and neither should be allowed to judge of what constitutes obedience on the part of another. Competition between carriers subject to the Act, to be legitimate, must be based upon actual compliance with the provisions of that law. When the competing carrier is not subject to the Act that fact alone may constitute a substantial dissimilarity in circumstances and conditions, because the rates of the competing carrier are not subject to regulation under the statute, so that there is no room for presumption or doubt in such a case.

In such a case it is easy to see that it was wise for Congress to allow the carrier to act independently of the regulating body in deviating from the general rule, but in a case where both carriers are subject to the statute there can be no presumption of the existence of facts that would warrant a departure from that rule, and the question whether they do exist or not must necessarily be a mixed question of fact and law depending on various considerations, as hereinbefore shown, which the regulating body must pass upon; and complicated as such a question is herein shown to be it would be contrary to all analogy to allow one of the parties in interest to determine for itself. It would be a novelty in the drafting of statutes to charge a person who is made subject to the law with the solution of such difficult and intricate problems as must arise under the fourth section of this statute on the claim of a right, arising from competition with

another carrier also subject to that law, to disregard its general provision, and which Congress foresaw could only receive just solution by wholly disinterested minds. The protection of the law extends equally to carriers and the public, and no other interpretation of its provisions than that which awards even handed justice to both is admissible.

The line between the right of a carrier to conclude for itself in the first instance and the necessity of applying to the Commission for relief we think is sharply drawn at the point where the carrier is manifestly unable to rightfully decide.

We think that in no case is there any presumption of dissimilarity of circumstances and conditions where the competing lines are both subject to the Act, and there being no such presumption neither road can deviate from the general rule on its own motion, but must apply for relief under the proviso clause of the section, and the burden will rest upon the road seeking such relief.

Under that proviso there seems to be no limitation upon the power of the Commission to grant relief when, upon consideration of all the facts the Commission is satisfied "that the interests of the commerce of the country and common fairness to the common carriers require that an exception should be made."

It is difficult to see why this proviso is not broad enough to enable the Commission to relieve all cases of hardship under the fourth section arising from competition between carriers subject to the Act, including many of the embarrassments now felt by American carriers in competition with Canadian carriers which may be subject to the Act in respect to the traffic competed for.

The foregoing has been especially directed to the competition of carriers subject to the Act between the same points.

The same course should be taken when carriers meet the competition of other lines which carry traffic to the same point but from different points of origin. The strife for trade between different markets seeking transportation for like commodities to the same locality is undoubtedly one of the most potent commercial forces of our time. But a common carrier cannot rightfully assume that this or that market upon its line is entitled as a matter of right, in shipments to a given point, to rates which another carrier sees fit to give from a market on its line to the same point. It does not follow that markets competing for trade in the same territory must enjoy similar rates in order to compete with each other; and the carrier which serves one market has no right to assume that substantially equal rates must be given. Market competition does not create circumstances and conditions which the carriers can take into account in determining for

themselves in the first instance whether they are justified under the 4th section in charging more for a shorter than for a longer distance over their lines. To determine the force and effect of such competition involves commercial considerations peculiar to the business of shippers, such as advantage of business location, comparative economy of production, comparative quality and market value of commodities, all of which are entirely disconnected from circumstances and conditions under which transportation by the carrier is conducted. Carriers cannot create abnormal situations by making rates which equalize advantages and disadvantages of competing localities and thereupon claim justification for greater charges on shorter hauls on the ground that the lesser long haul charges which accomplish such equalization are necessary to secure increase in traffic over their lines. Under the 4th section where doubt exists as to the existence of facts which would legitimately force a lower rate for the longer haul, and we think doubt must always exist where the competing carriers run from different markets, the carrier cannot assume to solve it. The propriety of applying to the Commission for relief in such a case is apparent.

To repeat the idea above discussed, the competition of carriers subject to the law between the points mutually served, or competition between different markets to the point where competing lines join, does not merely because it exists make out the dissimilar circumstances and conditions upon which a carrier may on its own motion base a lower rate for one point, while it keeps in effect a higher rate for a shorter distance over its line. They are not presumptively dissimilar. Investigation by the Commission may, with no wrong to the carrier, but with permanent benefit to the places they serve, result in bringing charges to all points in the immediate territory into closer conformity with the law, and render a lower rate for the longer distance unnecessary, or else furnish sound reasons for its being sanctioned. Regulation having been provided by Congress, its application is not only constant, but the machinery of the law is at all times available by the carriers governed, as well as by the public which the carriers serve.

The special cases referred to in the proviso of the fourth section, in which the Commission is empowered to make investigation and grant relief from the requirements of the general rule, include all cases that primarily involve questions of regulation over the respective competing lines. The line which forces the lower rate may itself be guilty of disproportionate rates. Such disparity may not be so great as to have caused a complaint to the Commission by the patrons of the line, notwithstanding the burdens imposed may be

manifest, but when rates so adjusted are made the basis of another line's departure from the rule of equitable charges, the situation imperatively calls for the intervention of the regulating authority, both in the interests of the connecting roads and of their patrons.

A construction of the law which allows a carrier to determine for itself in every instance whether the lower rate for the longer distance is warranted, is liable, when such lower rate is adopted by it, to cause another carrier serving the same territory to feel justified in establishing a lower rate for the longer distance on its line to the same point or to a different point appearing to require relatively favorable rates; and is also liable to cause other carriers in the same section to take similar action; thus creating an artificial or abnormal situation which constantly provokes belief and claim of unjust discrimination and endless controversies between shippers and carriers. Such a situation, left unchanged, presents a railroad problem most difficult of solution. But a construction of the law which will compel a carrier, before putting in a lower rate for the longer distance, to seek relief by a method which will involve a careful examination of the traffic conditions as to all the lines competing for carriage in the same territory, would tend to promote a solution more beneficial for all parties.

A concise statement of this construction of the fourth section on the point above discussed is: The carrier has a right to judge in the first instance whether it is justified in making the *greater charge for the shorter distance* under the fourth section in all cases where the circumstances and conditions arise *wholly upon its own line* or through competition for the same traffic with carriers not subject to regulation under the Act to Regulate Commerce. In other cases under the fourth section the circumstances and conditions are not presumptively dissimilar, and carriers must not charge *less for the longer distance* except upon the order of this Commission.

Aside from overruling the "rare and peculiar cases" exception, this construction is no departure from previous rulings and is not new. Soon after the Louisville & Nashville opinion was promulgated by the Commission, Judge Pardee of the United States Circuit Court approved this construction in *Missouri Pac. R. Co. v. Texas & P. R. Co.* 31 Fed. Rep. 527. Upon *ex parte* application of the receivers of the defendant for advice in relation to the construction of the fourth section of the Act to Regulate Commerce, the court held:

Under section 4 of the Interstate Commerce Law, relating to the charges for the long and short haul, it seems that where the circumstances and conditions are dissimilar there is no prohibition; where the circumstances and conditions are similar the prohibition attaches; and that where it is difficult to point out clearly

the circumstances or conditions which produce dissimilarity, the doubt should go in favor of the object of the law, and the circumstances and conditions should be taken as substantially similar. Where the circumstances and conditions are similar, or substantially similar and the result to the carrier is injurious, relief can be had only through the commission.

Neither is our view in serious conflict with the opinion expressed by Judge Deady in *Ex parte Koehler*, 1 Inters. Com. Rep. 817. The *Ex parte Koehler* cases all involved water lines and the rulings were made with especial reference to the influence of competition by that mode of carriage; and the language of the judge in the course of discussion must be construed with like reference.

The case of the *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 50 Fed. Rep. 295, was brought to enforce an order of the Commission issued against the defendants in a proceeding brought before it by the San Bernardino Board of Trade. In the case before the court the defendants took a great deal of additional evidence upon the subject of water transportation at the longer distance point. The court discussed the evidence at considerable length and held that such means of transportation actually exists, is actually and actively seeking the traffic, and that shipments by water are increasing. The decision turned upon this showing, and the language of the court in the course of the discussion must be held to have been made with reference to the facts therein set forth. The principle stated by the court that to render lawful a greater charge for a shorter than for a longer haul, under section four of the Act, it is not necessary to first obtain authority of the Commission; that such charge is lawful if the circumstances and conditions are not in fact substantially similar and the carrier may determine for himself, subject to a liability for violating the Act, if, on investigation, the fact be found against him, is clearly in line with our view as to competition by water lines, or the competition of foreign railroads, or the competition of independent state railroads. The decision was not rendered upon any controlling considerations of competition between carriers subject to the law.

In the case of *Osborne v. Chicago & N. W. R. Co.*, 48 Fed. Rep. 49, Judge Shiras in charging the jury, said:

"Whether the railway company was justified by a cut rate, making what was called in argument 'illegitimate competition,' and circumstances of that kind which grow out of the handling and management of the railroad business of the country, by other competing lines, and its effect upon the business of the defendant company, in the judgment of the court, is a question that cannot be submitted to you. Questions of that kind are for the

judgment and determination of the board of commissioners appointed under this Act, and the courts and juries, when they are called to act upon particular cases arising under this Act, where it is denied that the law has been violated, are only authorized to determine the question whether in the service rendered, the character of the property, its conveyance, and other facts which inhere in the carrying of freight upon the particular line which is charged with wrong doing, there existed dissimilar circumstances and conditions relieving this company from the charge of collecting a larger rate for the shorter haul over the same line, in the same direction, and under otherwise substantially similar circumstances and conditions."

This decision distinctly follows the construction that where doubt exists, the circumstances and conditions should be taken as substantially similar. Doubt always exists as to the legitimate force of the competition between carriers subject to the law which one of them claims to compel the making of exceptional charges over its line. The law restrains both alike and the true presumption is that they have equal advantage under the law. But if hardship is encountered then relief, temporary and continuing, may on proper showing be obtained under the proviso of the fourth section.

In a case where the competition of a state railroad which in no way made it subject to the Act, was alleged to justify the lower rate this Commission sustained the defendant and laid down the following principle:

"The words 'substantially similar circumstances and conditions' as found in the second and fourth sections of the Act to Regulate Commerce in certain important particulars define the rights and duties of carriers and the rights of shippers as well. For example, if the carrier claims to act under the compulsion of circumstances and conditions of his own creation or connivance in the making of an exceptional rate, then these will not avail him; or if the carrier claims to act under a compulsion of circumstances and conditions in the making of an exceptional rate which he could obviate by reasonably fair and just exertion on his part, then they will not avail him. But if the carrier is in good faith acting under a compulsion of circumstances and conditions beyond his control, not of his own connivance, and which he could not obviate by any reasonably fair and just effort on his part, and to avoid large loss adopts exceptional rates on a portion of his line, not unreasonable in themselves, and forced upon him by the action of an independent state railroad, which is not subject to the Act to Regulate Commerce, and which is operating a slightly shorter and competing line with his own, these are circumstances and conditions under the operation of the statute which justify him in adopting such exceptional rates thus forced upon him on this portion of his line." *Business Men's Assn. v. Chicago, & P. M. & O. R. Co.* 2 Inters. Com. Rep. 41, 2 I. C. C. Rep. 52.

4 INTER S.

This ruling excludes the competition of carriers subject to the Act from the carriers' judgment.

The distinction herein made between the competition of carriers' subject to the Act, and the competition of such a carrier with those not subject to the Act, is also applicable to competition alleged in cases under the second and third sections, and the Commission so considered in *Harwell v. Columbus & W. R. Co.*, 1 Inters. Com. Rep. 631, 1 I. C. C. Rep. 237.

In a case where railroad competition was alleged by the respondent to justify the exceptionally lower rate, which came before the Commission for investigation in July, 1888, it appeared that the lower rate was caused by what the respondent termed unfair competition by the competing line, and the evidence tended strongly to show that the long haul rate was unreasonably low. *Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 187, 2 I. C. C. Rep. 231. In its annual report to Congress for that year the Commission said of its decision in that case:

"The reasoning seemed strong and was certainly plausible. But the question involved was a question of the construction of the Act; its answer was to be arrived at on consideration of what was probably the legislative intent. It was seen that the circumstances and conditions relied upon as entitling the carrier to make the exceptional rates were not circumstances growing out of natural causes; they were not the outcome of competition by water routes; there was no peculiarity of the line which would make the rates at the termini and at other stations relatively just; the only dissimilarity in the circumstances and conditions which attended the making of the rates at the different points was that at the termini there was sharp railroad competition and at the intermediate stations there was not.

"But this was a state of things that, at the pleasure of the railroad companies acting generally, or even of single companies disposed to act in hostility, might be made to exist at any point of railroad connection in the country; and if the greater charge on the shorter haul was admissible in the case under investigation the rule of the fourth section would be of no practical value whatever. Any railroad company might by its action absolve a competitor from its obligation, and be itself absolved in return. The legislature never intended this consequence. It did not intend, as the Commission believed, that the carriers subject to the law should at pleasure thus make the rule of the statute ineffectual.

"The carrier under investigation conformed to this conclusion and graded its rates accordingly, and the objectionable rates made by the carrier complained of were also soon discontinued."

It may not be out of place here to refer to a late English construction of the law of undue preference contained in the Act of 1888 as applied to a case where competition with other railways between the same points and also

water transportation was relied upon to justify a lower charge for a longer distance, but the shorter was not included within the longer distance.

A clause in the statute relating to the public interest and interests of the railways is carefully construed. As to the public interest it was held that the fact that it is seldom not in the interest of the public to have a choice of competing routes does not decide the question. "*It is clear that the Act contemplates the possible existence of competition which may not be in the interests of the public although it be effectual to secure traffic.*"

After considering the words "public interests" the following rules are stated in the English opinion: "It is however, as a general rule, against the public interests that uncertainty should be introduced into trade by frequent or violent or *arbitrary* changes of the circumstances under which people engaged in business have to carry it on and to make their living. It is, as a broad general rule, *against the public interests that artificial circumstances, which at the will or caprice or for the self interest of any man, or body of men, may be swept out of existence as lightly as they were perhaps created, should be permitted to interfere with the natural course of trade.* *Liverpool Corn Trade Asso. v. London & N. W. R. Co. L. R. 1 Q. B. Div. 120, 45 Am. & Eng. R. Cas. 216.*

This English case clearly illustrates our construction of the law that the existence of competition between carriers subject to the Act does not justify them in the first instance in charging a lower rate for the longer distance. We do not think that case a proper one to cite as a precedent in a long and short haul case under our statute, for the circumstances of carriage are very different. It was purely a case of relative rates of undue preference between markets, but it shows how strictly the English authorities interpret the broad language of their law in accordance with the evident intent of the law-making power.

A proceeding known as the "Import Rate Case," and instituted by this Commission to enforce its order restraining carriers from charging less for services rendered in carrying import traffic from American seaports, when shipped from foreign ports under through bills, than they charge for carrying domestic shipments of like kind of traffic between the same points was decided in the United States Circuit Court, Southern District of New York, on October 5 of the present year. The long and short haul question was also to some extent involved. Wallace, J., writing the opinion, which sustains the ruling of the Commission, in conclusion said:

"The Interstate Commerce Act would be emasculated in its remedial efficacy, if not 4 INTER S.

practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that unless it is given the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them unless given exceptional rates to justify that one in making the discrimination in his favor on the ground of the necessity of the situation."

We also refer to the decision of the Commission in the case of *James & Mayer Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 682, 4 I. C. C. Rep. 744. In that case the defendants sought to justify the greater charge for the shorter haul on the ground of the competition of water carriers in connection with delivering rail lines from a different market. On this point the Commission held that—

"Water competition to *justify* the greater charge for the shorter distance must be competition in transportation to the longer-distance point and as to freight which, if not carried over the line on which it is located, would reach such destination by water transportation."

The case was brought by complaint. There was no appearance at the hearing first assigned. The defendants subsequently, upon the order of the Commission that the burden was upon them took a little testimony by deposition, and the case was submitted with little or no argument on either side. The ruling and the order to cease and desist from charging more for the shorter than for the longer distance was in accordance with the spirit of the Commission's previous decisions and the only logical outcome of the case. The defendants attempted to justify the greater charge for the shorter distance on the ground of substantially dissimilar circumstances and conditions, but they were not plainly dissimilar, under the construction of the section as laid down by the Commission and approved by the courts. The competition relied upon to constitute the dissimilarity in circumstances and conditions was not only from a different point of shipment but it was the competition by carriers over through routes subject to the Act. What was said in that decision with reference to the competition of markets we now re-affirm. (686, 687). The competitors stood presumably with equal advantage under the law and the exceptional rate could only be sanctioned by an order granted upon investigation which should sustain the carrier's application for relief.

The language of the fourth section presents one very important consideration which should always be kept in view, namely: that which will not amount to a *justification* of the greater charge for the shorter haul under the prohibitory rule of the section may nevertheless *warrant* the Commission in granting a relieving order upon an application for relief under the proviso clause of the section. To stand

upon one's right under the law is one thing, and to obtain relief by process of law is another. Ordinarily the Commission should not alter the standing of parties in proceedings before it. When upon complaint under the 13th section of charges alleged unlawful under the rule of the fourth section, the carrier avers substantial dissimilarity in circumstances and conditions as justifying the greater charge for the shorter distance, it is concluded by its pleading and must affirmatively show that the circumstances and conditions of which it is entitled to judge in the first instance are in fact substantially dissimilar. But upon an application under the fourth section proviso the carrier is the petitioner, not the respondent; it is not limited by the terms of the rule and may present to the consideration of the Commission every material reason for an order in its favor. And upon investigation of the matter the Commission is not confined to issues made by pleadings, but may, among other things, examine into the legality of rates on competing lines. The Commission may for cause shown on such an application institute on its own motion a collateral proceeding for the purpose of correcting apparently unlawful rates on the competing line, and pending the proceeding grant temporary relief to the petitioning carrier.

But it must not be inferred by this that the Commission will entertain applications for relief based on frivolous grounds. The petition or application must make out in statement a *prima facie* case of hardship under the rule, and when the competition of another carrier is the cause of an application to charge less for the longer distance, it must appear therein that traffic considerable in amount will be lost to the petitioning carrier if through action of the Commission its situation in regard to such longer distance rate shall not be relieved.

We must dispose of these cases under the above construction of the law. Taking up the cases in the order in which they are treated in the findings the Chattanooga-Atlanta fall-rail route, Case No. 817, comes first. In this case where all the competing lines are subject to the Act to Regulate Commerce and the jurisdiction of this Commission as to through shipments from Cincinnati, New York, Philadelphia, Boston and Baltimore, or from any Ohio river or Mississippi river point or any Atlantic port north of Charleston, the defendants had no right to put in the higher rates for the shorter distance upon their own motion, but should have made application to the Commission for relief under the proviso clause of the fourth section, and are technically not now entitled to make defense to this complaint. But a considerable portion of the evidence was devoted to this route and we ought to give the

parties the benefit of our comment and conclusions as the facts now stand.

A schedule of rates from Cincinnati to Atlanta which affords a rate per ton per mile varying on the different classes from 1.18 to 4.51 cents cannot be considered too low; on the contrary, if such a rate sheet were challenged it would take strong evidence to overcome the presumption that such rates per ton per mile are unreasonably high. But the unreasonableness of Atlanta rates is not questioned here, these rates being the lower charges for the longer distance with which rates complained of are compared. The distance from Cincinnati to Chattanooga is 886 miles, the first class rate is 76 cents and the rate per ton per mile is about 4½ cents. The distance from Cincinnati to Atlanta is 474 miles, the first class rate is \$1.07 and the rate per ton per mile is also about 4½ cents. But the rate per ton per mile from Cincinnati to Marietta, a distance of only 451 miles, is over 5 cents and 6 mills. Marietta takes a first class rate of \$1.27 from Cincinnati, being the Chattanooga 76 cent rate and the Western & Atlanta 51 cent local to Marietta. The rate per ton per mile Chattanooga to Marietta is over 8 cents and 7 mills for carrying about 117 miles, over one third the mileage Cincinnati to Chattanooga and nearly one fourth of the total distance from Cincinnati to Marietta. The per ton per mile rate to Marietta is for a fourth part of the carriage nearly double the rate per ton per mile for the other three fourths. There is 81 cents difference between the rates on first class traffic from Cincinnati to Chattanooga and from Cincinnati to Atlanta. On through business from Cincinnati 81 cents would seem to afford a sufficient margin for carrying between Chattanooga and any point on the Western & Atlantic Railroad.

Considering the relative amounts of through and local tonnage of the Western & Atlantic road, it is apparent that the reduction of rates to intermediate points to those in effect at Atlanta would result in but small loss of revenue from traffic shipped at present rates and this would very likely be more than made up by consequent increase in traffic to those points.

Carterville, Kingston and Marietta are reached by other lines than the Western and Atlantic but these lines make no competition with the Western & Atlantic in rates on traffic to these points.

In view of these facts and others shown in the statement of findings we hold that the defendants are not upon the evidence justified in making the greater charges complained of in this case. But this being the first case since the Louisville and Nashville decision in which the Commission has been called upon to specifically hold that relieving orders must be ap-

plied for in this class of cases, we think the carriers should have an opportunity in this case of applying for relief under the proviso of the 4th section, and, if possible, of bringing forward voluntarily as applicants, instead of defendants, additional evidence that may be admissible under such a proceeding, as indicated in this opinion. The order will therefore be that the defendants in this case cease and desist, within 20 days after receiving a copy thereof, from charging or receiving any greater compensation in the aggregate for the transportation of a like kind of property from Cincinnati or other points called and known as Ohio river points for the shorter distance to Calhoun, Adairsville, Kingston, Cartersville, Acworth or Marietta than for the longer distance over the same line in the same direction to Atlanta, the shorter being included within the longer distance, or, that the defendants, make and file with the Commission within the time above specified an application or applications as the case may require, as provided in the proviso of the fourth section of the Act to Regulate Commerce, for relief from the operation of that section in respect to the prohibition therein contained against charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from Cincinnati and other Ohio river points to the shorter distance points above mentioned than for such transportation over the same line in the same direction for the longer distance to Atlanta, and show cause within 60 days after service of the order why such application for relief should be granted; and upon such application the evidence already taken in this case may be used. In case the application for relief shall be denied the order to cease and desist shall stand, and compliance therewith will be required within twenty days after service of the order denying the application.

The next case is the Augusta-Atlanta part water route, case No. 314. Atlanta is the longer distance point in this case as in the case just decided, and the competing lines for through transportation from New York, Philadelphia, Boston, Baltimore, Cincinnati, etc., are also the same as in that case. This route is through Charleston and there is a competing route by the Ocean Steamship Company and Central Railroad of Georgia through Savannah and Macon to Atlanta; the distance being for all practical purposes about the same over either route. The transportation by the route through Savannah is composed of a water line and a line of railroad wholly in Georgia, but we shall not now undertake to discuss what effect an attempt of the water and state lines to make low individual rates and act independently of each other as to billing and shipment or carriage, might have upon traffic routed

through Charleston. We are dealing with existing facts, and transportation over both routes is now through, and as to such transportation the carriers over both routes are subject to the Act. The East Tennessee and the Savannah, Florida & Western connecting at Jessup, Ga., also run from Savannah, Ga., through Macon, and the East Tennessee has its own line from Brunswick to Atlanta. High per ton per mile rates are produced by the locals of the Georgia Railroad and these rates, by being made part of through charges between interstate points, cause very considerable increase in rates per ton per mile for the whole route to intermediate points as compared with the rate per ton per mile produced by agreed through rates to the terminals. We are led to believe and hold upon the facts now before us that through charges over the route to the intermediate or shorter distance points are unlawful. For the reasons expressed in regard to the preceding case we shall direct the defendants to charge no more to the shorter distance points than to Atlanta, the longer distance station, or apply for relief and show cause thereon in the manner and within the time stated in the foregoing order in case No. 317. Before closing the discussion as to this case we desire to call attention to an admission by the defense in this case, namely, that Madison one of the shorter distance points would under the present method of defendants in fixing rates soon be likely to receive considerably reduced rates on account of the competition to that point through Macon situate on the Savannah route. A line extends from Macon up through Madison to Lula on the Richmond & Danville line. Madison and Social Circle both shorter distance points on the Georgia road are but 16 miles apart, and the present rates to Madison and Social Circle over this route are substantially the same. Social Circle is also connected with the Richmond & Danville road by a line to Gainesville. The apparently favorable situation of these two places in respect to transportation facilities is worthy of note.

The case numbered 325, and called the Atlanta & West Point all-rail route from Cincinnati and other Ohio river points is next in order. We do not think this case comes within the rule of the fourth section. It is conceded by the complaint and the fact appears in evidence that water competition exists to Montgomery by the Alabama river. Opelika the other longer distance point is benefited by rates lower than it would receive were it not for the influence of competition at Montgomery; and West Point is also favored thereby though in less degree. But the inherent defect in the complaint is that the transportation is not over the same line in the same direction to both the shorter and longer distance points.

The shorter is not included within the longer distance. Traffic for Montgomery and Opelika and even West Point routed by the Louisville & Nashville, one of the initial defendants, goes over a wholly different route, and as to the Cincinnati, New Orleans & Texas Pacific, another initial defendant, while the evidence is not clear upon the point, still the length of its line leads us to believe that in handling Cincinnati traffic for Montgomery and Opelika, it carries such traffic first to Birmingham and forwards to Montgomery and Opelika by connecting lines from that point. Freight from Ohio river points below Henderson may possibly go through Atlanta, but the principal point of shipment to which our attention was directed by the evidence is Cincinnati. The complaint in this case must be dismissed.

In Case No. 315, the Macon-Georgetown-Columbus Part Water Route, the lines are the Ocean Steamship Co. and the Central Railroad of Georgia, which transport the traffic from New York and other north Atlantic ports through the port of Savannah to Columbus, a longer distance point, and Everett, Butler, Geneva and Schatula, shorter distance points on the same line, and also to Georgetown, a longer distance point, and Smithville, Dawson and Cuthbert, shorter distance points on the same line. These destination points are on the southwestern division of the Central system, beginning at Macon and ending by one branch at Columbus and by another at Georgetown or Eufaula on the opposite bank of the Chattahoochee river. Columbus is also on that river. The defense claims that water competition exists at Columbus and Georgetown, the latter being about a mile east of the river, by a route which is water New York to Jacksonville, rail from Jacksonville to Chattahoochee River Junction, and steamboat up that river to Columbus and Georgetown, but admits that under present rates the Chattahoochee competition is not an element to be feared. It is also in evidence that the channel of the Chattahoochee would need to be improved before it could be extensively employed for vessels of considerable draught; but how much improvement would be necessary was not shown. This route controls the rates to the points mentioned except as they may be influenced by the river line.

There is much less disparity in rates to the shorter and longer distance points upon this route than those in effect to such points on any of the other routes named in these complaints. The highest first class rate is \$1.31 and the lowest is \$1.14, making 17 cents difference between the first class rates to Columbus or to any shorter distance station. The rates to each point are straight rates and not the addition of rates to and from a basing point. It is apparent to us that an intelligent effort has been made to keep the disproportion in long and

short haul rates down to a low degree, and upon a plan of making rates direct to the point of destination, and it is possible if not probable that the application of proper regulation to other lines in this territory may enable the carriers upon this route to strictly comply with the general rule, or at least further reduce the difference between charges for the longer and shorter distances.

But we are not assured by the evidence that water competition by the Chattahoochee river is a seriously threatening and potential factor in rate making at this time, or that if in effect it would not be over a route wholly or partially subject to our jurisdiction, and as competition with other lines subject to the Act is also in this case we think the proper and consistent course is found in the issuance of an alternative order like the one directed in cases 317 and 314, and such an order will be prepared.

The next case in order is the Atlanta-Macon all-rail route from Cincinnati. Here the Central of Georgia is again the terminal road. Macon is the longer distance point and Jonesboro, Hampton, Griffin, Barnesville and Forsyth are the shorter distance points. Macon and Atlanta, the two terminals of this the Atlanta division of the Central system, take substantially the same rates from Cincinnati. The rates to the intermediate stations are highest to the points about equi-distant between the terminals and rates on the higher classes are based on the terminal which gives the most favorable combination rate; but the lower class rates are as a rule not arrived at by adding established locals to basing point charges. The rate per ton per mile Cincinnati to Griffin, one of the shorter distance points, is 5½ cents on the first class rate of \$1.39, and the rate per ton per mile on the class D rate of 32 cents, the lowest class, is 1 cent and 2 mills. The Macon first class rate of \$1.07 is about 3 cents and 6 mills per ton per mile and the class D rate of 29 cents is about 1 cent per ton per mile. We do not hesitate to say, as a general proposition that a rate per ton per mile of 5½ cents on any class of goods for a distance of over 500 miles, as is in effect to Griffin, is apparently unreasonable; neither is a rate per ton per mile of 3 cents and 6 mills for nearly 600 miles, such as Macon has, apparently too low. We think the latter rate is in itself evidence of being profitable, and that the amount of the former leads directly towards a belief in its being extortionate. But rates generally in southeastern territory range higher than in other sections of the country, the evidence adduced at the hearing on the question of reasonableness was meagre, and we are no more prepared to say in this than in the other cases that the defendants are unable to rebut the presumption of unreasonableness which is raised by an examination of the rates alone. On this route from

Cincinnati to Atlanta the East Tennessee carries only between Chattanooga and Atlanta, but the East Tennessee runs on through Atlanta to and beyond Macon to the sea at Brunswick. It also connects at Jessup with the Savannah, Florida & Western for Savannah. The distance from Cincinnati to Macon by the East Tennessee route is 576 miles as compared with the distance by the route in this case of 591 miles, but the short route Cincinnati to Macon is formed by the Cincinnati, New Orleans & Texas Pacific to Chattanooga; the Western & Atlantic to Atlanta, and East Tennessee to Macon; distance 562 miles. The mileage from the sea to Macon is 192 miles by the Central of Georgia from Savannah, and about 200 miles by the Savannah & Western and East Tennessee from Savannah. The distance by the East Tennessee from Brunswick to Macon is about 190 miles. So that the mileage between Macon and the sea at the two ports named is about the same by either of the roads. The rates to Macon from New York or Baltimore, water and rail, and from Cincinnati, all rail, have but little variation. Macon rates, all rail or water and rail appear to meet on a nearly common basis. The Atlanta rates have been herein referred to and commented upon in other cases. Traffic to both the shorter and longer distance points in this case is only carried over lines which are subject to regulation at our hands. We therefore direct that the like order be issued in this case as was directed to be entered in the Chattanooga-Atlanta case No. 317.

We next consider case number 326, the Atlanta & West Point, part water route through Charleston from New York and other northern ports to Newnan, Grantville, Hogansville, La Grange and West Point, shorter distance points, and Opelika, the longer distance point. All of these stations are located on the Atlanta & West Point road except Opelika which is upon the Western of Alabama line. As shown by the findings applicable to this route, water and rail lines through Savannah and Brunswick can reach all the shorter distance points through Opelika, the longer distance point, except Newnan, over a shorter rail mileage than by this route from Charleston. The water lines to Savannah and Brunswick do not touch at Charleston and the difference in distance by water from New York and other points to Charleston, Savannah or Brunswick is in view of the low cost of water carriage too inconsiderable to affect the merits of the case. The actual routing of the freight over these competing routes, which also reach Atlanta, and, one of them, Newnan, by direct lines from the seaboard, is not shown, they not being parties to the case. We assume that it would be for the advantage of the Central road taking freight from steamer at Savannah

for West Point or even La Grange to route it through Opelika the longer distance point in this case, for its carrying distance would be longer than by delivering at Atlanta or Newnan. But traffic to the shorter and longer distance points does go over the route in this case, the Charleston route, and it is therefore within the rule of the fourth section and different from case 325 which we have dismissed. All the competing lines are subject to the provisions of the Act to Regulate Commerce and while under present rates of shorter lines to Opelika, West Point, etc., there may and doubtless do appear to the carriers composing the route under consideration reasons which they as carriers can but regard as forceful and controlling as to traffic and revenue, yet an application for relief by the carriers interested in present rates on traffic over this route, supported by such evidence and argument as the carriers' interest will lead them to present, and coupled with like investigation of the rates on the competing lines, may change the whole situation by bringing or retaining proper rates into effect and at the same time preserving all the just rights of each carrier and insuring equity and justice to the shippers and localities concerned. An alternative order as above outlined will likewise be entered in this case.

The Atlanta & West Point Fertilizer Route from Charleston, Case No. 324, is over the same railroads that form part of the last mentioned route from New York, to Newnan and other points. The fertilizer rates from Charleston are made in competition with rates from Savannah, and to the shorter distance points set forth in the complaint and findings the transportation from Savannah may be wholly within the state of Georgia. The rail lines from Savannah and Brunswick can also reach the shorter distance points through Opelika with fertilizers as they do with class freights mentioned under the Atlanta & West Point Part-Water Route. Fertilizers are low grade freight brought mostly, it is believed, in cheap bottoms to Atlantic ports. Rates on shipments of fertilizers from Savannah to Newnan, Grantsville, Hogansville, La Grange and West Point are exclusively subject to regulation by the complaining Georgia Commission, when the transportation is all in Georgia, and the Charleston dealer in fertilizers must meet the Savannah man by reducing prices if he cannot obtain from the Charleston route rates equally as low as those fixed by the Georgia Commission from Savannah. It seems to us that the remedy for the correction of rates on shorter hauls when competing rail shipments originate at seaports, one in and the other out of Georgia, is with the Commission of that state which is also the complainant herein. We might shut our eyes to this fact by holding that the competition is not from the same

point of departure, but considering the power and office of the complainant, we believe such a ruling would be founded more on sentiment than fact, and not be warranted by the slight evidence in this case.

This case does not fall because of the competition of the Savannah and Charleston fertilizer markets for trade at the destination points named in the complaint. If free market competition were the only factor in the case, we should decide adversely to the defendant's claim of justification. But the rates from Savannah to all the shorter distance points are not only not subject to investigation by this Commission, but are subject to the authority vested by the state of Georgia in the Railroad Commission of that state, the complainant in this case, and such complainant has, as shown in the 33d finding, made a general ruling, the stated intention of which is to give the railroads in Georgia "the largest liberty in fostering the industries of the state" in or-

der "that our own roads and seaports may be able to compete with roads and seaports without the state." We have here the anomalous case of a state board authorizing a carrier subject to its supervision to enter unrestrainedly into competition as to rates from a seaport in Georgia with interstate carriers from a neighboring seaport without the state of Georgia, and yet complaining against the interstate carriers that they violate the same long and short haul principle which it authorizes the state carriers to disregard. While the rule and explanation set forth in the 33d finding are kept in effect by the Georgia Railroad Commission, we do not think a complaint by it of rates from a southeastern seaport outside of Georgia to points in Georgia, reached also by rail lines from a seaport in that state, should be sustained.

Orders in the several cases will be made in accordance with the conclusions above stated. In this report and opinion all the Commissioners concur.

NOTE.—Since this opinion was written, the Osborne case, cited upon page 81, has been reviewed in the Circuit Court of Appeals, and the judgment of the court below was reversed, but there is nothing in the opinion of Mr. Justice Brewer which disapproves the principles laid down by Judge

Shiras in his charge to the jury, so far as quoted in this opinion; nor was anything said in the opinion of the appellate court in the Osborne case, necessary to the decision therein, in conflict with any views above expressed.

IN RE Alleged Unlawful Charges for the Transportation of Coal by THE LOUISVILLE & NASHVILLE RAILROAD CO.

Upon investigation had in a proceeding instituted by the Commission on its own motion, it appeared that the respondent had in force over its line to Nashville a special rate on coal when used for manufacturing purposes by persons named upon the manufacturers' lists prepared by the railroad company. These lists were furnished to dealers who, on selling coal to such manufacturers, issued certificates which entitled them to obtain a refund from the railroad company amounting to the difference between the regular and special rates. Pending investigation the respondent discontinued the "manufacturers rate" and put in force a new coal tariff to Nashville whereby coal, "run of mines, nut and slack," is given a rate of \$1.00 per ton the year round, and "screened" coal a rate of \$1.15 per ton. April to September, and for the remainder of the year a rate of \$1.40 per ton. The rate from the same mines to Memphis, a point affected by water competition for coal traffic, is \$1.40 per ton on all coal the year round, and respondent buys

coal at the mines and sells it in the Memphis market, *Held*,

1. That the practice abandoned by the respondent common carrier of arbitrarily determining what persons should receive the so-called "manufacturers rate" was a clear violation of the Act to Regulate Commerce.
2. That the rate of \$1.00 per ton charged by respondent upon coal, "run of mines, nut and slack," is not unreasonably low, nor disproportionate to the rate of \$1.40 per ton to Memphis; neither, in view of circumstances affecting coal traffic at Memphis, is a rate of \$1.15 on screened coal to Nashville relatively unreasonable as compared with the Memphis rate, but so long as the Memphis rate does not exceed \$1.40, rates on said kinds of coal from the mines to Nashville should not during any portion of the year exceed \$1.00 or \$1.15, respectively, and any reduction in the Memphis rate should be accompanied by proportionate reductions in rates on said different kinds of coal to Nashville.

Order served July 16, 1891.—Answer filed August 14, 1891.—Depositions filed December 21, 1891.—Hearing had March 30, 1892.—Briefs filed April 12 to 16, 1892.—Decided November 17, 1892.

SEE COMPLAINT and Order, 3 Inters. Com. Rep. 609. Answer, 3 Inters. Com. Rep. 610

Ed. Baxter, for Louisville & Nashville R. Co.
J. P. Bradford, for United Electric Railway.
George H. Armstead, for Nashville Commercial Club.

REPORT AND OPINION OF THE COMMISSION.

McDill, Commissioner :

This proceeding had its inception in a letter addressed by the United States District Attorney for the Middle District of Tennessee, to the Attorney General of the United States, which letter was referred by the Attorney General to the Interstate Commerce Commission for its attention. The Commission, shortly after receiving this letter, issued a notice and order, reciting that informal complaints had been made against the Louisville & Nashville Railroad Company, of unjust and unreasonable discrimination in charges for the transportation of coal, as follows: First, from different points of production, to Nashville, Tenn., as compared with the charges made for the transportation of the same commodity from the same place to Memphis, Tenn., and particularly that the rates from Earlington, Ky. to Nashville were unjustly discriminating, as compared with the rates from the same place to Memphis.

Second, that unjust discrimination was effected by the said company through the medium of rebates, between its various patrons in the city of Nashville, consisting particularly in this, that said railroad company allowed such rebates to some manufacturers and to persons engaged in running steamboats which were not allowed to the Electric Street Railroad Company of Nashville, and to other patrons of the Louisville & Nashville Railroad.

The notice further recited that the Interstate Commerce Commission had decided, on its own motion, to investigate these complaints, and it was thereupon ordered that the Louisville & Nashville Railroad Company answer the complaints above specified, and particularly state:

"First, what rates does it now charge, and what rates had it charged during the twelve months last past, for the transportation of coal from Earlington and other mines in the state of Kentucky, Jellico and other mines in the state of Tennessee, to Nashville and Memphis in the state of Tennessee.

"Second, under what circumstances, if any, and for what reasons, does the Louisville & Nashville Railroad Company pay rebates to

any person or persons at Nashville or Memphis aforesaid, on account of shipments of coal from any of the Kentucky and Tennessee mines, to this city; and if any rebates have been paid on that account during the twelve months last past, when, to whom, and in what amounts."

To this notice and formulation of complaints a paper in the nature of an answer, was filed by S. R. Knott, Traffic Manager of the Louisville & Nashville Railroad Company dated August 1st, 1891. In this paper it is admitted that the rates which that company was then charging, and had for the last twelve months charged, for transportation from the coal districts on the Owensboro Division and the Henderson Division of the Louisville & Nashville R. R. Co., were from April 1st to July 1st, one dollar per ton; and then an increase of ten cents per ton during each month (commencing with July) until November 1st, when the rates per ton reached a dollar and a half, at which figure they remained until April 1st, following.

From the mines on the Knoxville Division, embracing Jellico, the rates were all the time ninety cents higher than those above mentioned.

But the above rates were the general tariff rates; and it was admitted and explained by Mr. Knott, that on manufacturer's coal, so-called, from the Henderson and Owensboro divisions, the rate the year round, was five cents a hundred, or a dollar per ton. The rates to Memphis from points on the Henderson and Owensboro divisions, Mr. Knott stated to be one dollar and twenty cents per ton; from the Knoxville Division to Memphis, they were, as stated by him, two dollars and forty cents per ton, as of July 1st, 1890, and two dollars and sixty cents per ton, as of August 7th, 1890. Mr. Knott also stated that prior to June 5th, 1890, the rates from mines on the Henderson and Owensboro divisions to Memphis were one dollar and forty cents per ton for a time, and still prior to that time they were one dollar and sixty cents per ton.

This answer also admits that the average distance from the coal mines on the Henderson Division to Nashville is about one hundred

miles, Earlington, the principal shipping point, being one hundred and five miles from Nashville. The average distance of the same mines from Memphis is about two hundred and sixty miles. On the Owensboro Division the average distance of the mines from Nashville is about one hundred and seven miles, and from Memphis about two hundred and fifty miles. The distance from Jellico *via* Louisville & Nashville lines to Nashville, is three hundred and twenty-five miles, and to Memphis five hundred and seventeen miles. There are no special rates given to manufacturers, or on manufacturers coal at Memphis.

This answer sets up the competition at Memphis of coal brought by the river from Pittsburgh, in explanation of the low rate made by the Louisville & Nashville road on coal over its various divisions to that city, and states that the rate of one dollar and twenty cents was reluctantly agreed to by the lines hauling coal from Kentucky to Memphis, as a matter of necessity, and not as a remunerative rate, but to aid the operators to continue their coal in that market if practicable.

The answer offers the following explanation of the uniform one dollar per ton rate allowed on steam coal from mines on the Henderson Division and Owensboro Division to Nashville.

"As above shown, the L. & N. has a rate on coal to Nashville from these districts, when used for production of steam for manufacturing purposes, of 5c per hundred pounds, or one dollar per ton. The L. & N. Co. pays no rebates to any party at Nashville on account of shipments of coal from any of its mines in Kentucky. It does, however, refund the overcharges accruing between the rate on domestic coal effective from time to time, and the rate on steam coal, when such coal is used for manufacturing purposes. Owing to the manner in which coal on the Nashville market is handled by the several operators, through their agents, no other method of protecting the agreed legal rates issued from time to time on coal, whether for manufacturing or other purposes has been considered as more effective than the rules under which we are now operating. We find that it imposes much labor upon our accounting departments which we would, under ordinary circumstances gladly be rid of. At Nashville the coal is largely, in fact, almost entirely, consigned by the operator to his agent at that point. There is no specific or exclusive grade of coal used for manufacturing purposes but the several grades of coal are used equally for manufacturing or other purposes, and frequently, for their own convenience, agents deliver part of a carload to a domestic consumer and a part of the same carload to a manufacturer. While the rate on domestic coal to Nashville, considering the

value of that article at the mines and the price for which it is sold, as now fixed, is believed to be entirely reasonable, the railroad companies hauling the coal to Nashville were willing and anxious to co-operate with the manufacturers and the coal operators in furnishing that market with a good class of steam coal for manufacturing purposes at low prices, so long as it could be done without a reduction of revenues on other traffic which the transportation lines were carrying at just and reasonable rates. With this object in view and also in view of the circumstances under which coal is shipped to Nashville as above mentioned, the present plan of making and protecting rates on coal for manufacturing purposes has been allowed for several years, and I think to the satisfaction of all manufacturers at that point and in no way tending to increase the price or cost of fuel for any other purposes. It has been an advantage to the manufacturers as well as to the producer.

"The overcharges are settled on statements submitted by the several agents handling coal on the Nashville market. The Nashville manufacturer, who has used the fuel makes a certificate to that effect."

The names of a number of parties who, as manufacturers, have received this advantage are set forth in the answer, and in reference to the Street Railroad Company it is then stated:

"We have declined to extend the manufacturers' rate to the United Electric Street Railway Company of Nashville. Our rates to that point are well known. The rules governing the manufacturers rate and the reason for such rate are equally well known. They have been a matter of discussion in the public print and before committees of commercial and legislative bodies.

"We do not extend this company the benefit of the manufacturers rate because we do not recognize it as a manufacturer. We do not believe that the circumstances governing the conduct of its business at Nashville, are such as to require or even permit of our making a special concession in favor of that company, not made to other consumers at that point, and we have declined therefore, from time to time, to concede the request for such special concession in its fuel rates which the United Electric Railway Company at Nashville has made upon us from time to time, even when coupled with threats of attack through courts, the legislature and the public prints, as they have been. We do not believe that our rates on coal to Nashville, whether for manufacturing or other purposes constituted any unjust or illegal discrimination against that point or against any consumer there, but, on the other hand, that they are only fair and reasonable compensation for the service performed."

A large amount of testimony was taken in the case which establishes the following

Facts.

The Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company are the only railroad companies by which the coal in question is brought into Nashville. The coal is brought over the Louisville & Nashville, from points north of Nashville in Kentucky, and from points south of Nashville in Alabama. The coal is brought over the Nashville, Chattanooga & St. Louis from points southeast of Nashville, but in the same state—Tennessee.

The Louisville & Nashville owns a controlling interest in the stock of the Nashville, Chattanooga & St. Louis, and the coal rates over both lines into Nashville are made and maintained by agreement or "understanding" between the traffic officers of the two companies. There is no competition between railroad companies in the transportation of coal to Nashville. The Louisville & Nashville and the Nashville, Chattanooga & St. Louis also worked in harmony under an understanding to the following effect: from the coal mines in western Kentucky, on the Louisville & Nashville lines, and from the mines in Tennessee on the Nashville, Chattanooga & St. Louis lines, a rate was made to general consumers of coal in Nashville carrying according to the season of the year from \$1.00 to \$1.50 per ton; but to "Manufacturers," the minimum rate of \$1.00 per ton was accorded the year round.

Who the "manufacturers" were, who should be given this specially advantageous rate, was a matter determined entirely and exclusively by the railroad companies. The companies were in the habit of issuing lists of persons entitled to manufacturers' rates, and of changing the lists at their pleasure by either adding names of new parties or striking off names which had previously been placed there. And it very clearly appears that in some instances business men, firms or companies were refused the special rate, whose occupation would seem to be much more properly termed "manufacturing" than that of other parties to whom the special rate was given.

The "manufacturers' rate" so called was not established by a direct contract or agreement between the railroad companies and the "manufacturer," but was applied in manner following.

Consumers of coal at Nashville whether for domestic or manufacturing purposes, make their purchases from coal dealers in the city. The dealers were furnished by the railroad company with a "manufacturers' list" made up by the Company. Shipments were made to the dealers and the regular domestic coal rate was charged them, on all shipments. But

on receiving from the dealers a certificate that certain quantities of coal had been sold by them to parties on the "manufacturers' list," the railroad companies would refund, the difference between the rate paid, and the lower "manufacturers' rate."

The dealers did not however get any personal advantage from this refunding. The benefit thereof went entirely to the consumer—"manufacturer"—in the reduced price made to him by the dealer.

From Earlington, Kentucky, and other Kentucky mines on the Henderson, and the Owensboro divisions of the Louisville & Nashville Road to Nashville, the manufacturers' rate, on coal the year round was 5 cts. per 100 lbs. or \$1.00 per ton, the benefit thereof being given according to the direction of the railroad company, in the manner above described.

From the same mines to Nashville, the rate made, to all other persons, was \$1.00 per ton during April, May and June, \$1.10 per ton during July, \$1.20 per ton during August, \$1.30 per ton during September, \$1.40 per ton during October, and \$1.50 per ton from the 1st of November to the last of March.

The rate from the same mines to Memphis is now and since September 1st, 1891, has been \$1.40 per ton. This rate has remained the same during all seasons of the year and is made on all coal whether to be used for domestic or manufacturing purposes.

The mines on the Henderson division of the Louisville & Nashville road in Kentucky, are grouped along the road some twenty miles, and are from 90 to 110 miles from Nashville,—Earlington the largest shipping point on that division is 105 miles from Nashville. The mines on the Owensboro division are located along some 15 miles of the road and are from 103 to 118 miles from Nashville.

From the various mines on the Henderson division to Memphis the distance is from 250 to 270 miles, and from the mines on the Owensboro division to Memphis the distance is from 245 to 260 miles.

The Louisville & Nashville itself buys coal at these mines to sell in the Memphis market where it has an agency for the purpose. Of the total shipments of coal during the four years prior to Nov. 1st, 1891, over the Louisville & Nashville road to Memphis,—amounting to about 193,000 tons, that company through its coal agency sold about 88,000 tons.

The Louisville & Nashville, so far as appears from the testimony, has no coal agency in Nashville, and sells no coal there.

Pending the investigation in this case, the Louisville & Nashville Railroad Company has put in a new coal tariff from the western Kentucky mines to Nashville, taking effect April 1st, 1892. By this the "manufacturers' rate,"

has been abolished, and the company has relinquished the custom of arbitrarily deciding who are "manufacturers" entitled to the rate. The rates are now fixed according to the character of the coal transported, not according to the business or occupation of the person by whom it may be used. At present there is a uniform rate from the western Kentucky mines to Nashville of \$1.00 per ton to all persons, on the kinds of coal known as "run of mines, nut and slack," and this rate does not vary with the season. On "screened coal" the rate is \$1.15 per ton during the period from April 1st to Sept. 1st, while for the remainder of the year, viz: from Sept. 1st to April 1st, it has been fixed at \$1.40 per ton.

As above noted there is an unvarying rate on all coal at all seasons of \$1.40 from the same mines to Memphis.

It is the custom with some, but not all of the southern railroads, to classify coal for transportation about as the Louisville & Nashville has done by the new arrangement above referred to, and to charge a somewhat higher rate on "screened coal" than on "run of mines, nut and slack."

Among the lines which do this are the Norfolk & Western, the East Tennessee, Virginia & Georgia, the Georgia Pacific and the New-Port News and Mississippi Valley.

Among the lines which make no difference in the classification and rate, are the Cincinnati, New Orleans & Texas Pacific, and the Chesapeake & Ohio.

The Louisville & Nashville, not only makes this difference in classification between "screened coal" and the other kinds, but on the "screened coal" it makes the rates vary with the season,—that is from April to August inclusive the rate is \$1.15 and from September to March inclusive the rate is \$1.40,—while on other varieties it is \$1.00 the year round. This varying of rates with the seasons is not generally customary on other roads, and on the Louisville & Nashville it applies only on the rates to Nashville.

Concerning the practice formerly prevailing at Nashville, where the railroad company exercised the exclusive power of determining upon the persons to whom the so-called "manufacturers' rate" should be given, it need only now be said that it seems to have been a clear violation of the Act, and would have been forbidden by the Commission, had not the carrier abandoned it.

But the question still remains whether the present adjustment of rates, is a violation of law, as operating either an unjust discrimination, between Memphis and Nashville, or an unjust discrimination between different consumers in Nashville; or as establishing an unreasonably high rate on "screened coal" to

Nashville,—especially during the winter season.

The Commercial Club of Nashville, in a memorial addressed to the Commission, most earnestly protests that the new arrangement of the coal rates to that city has not really removed the discrimination complained of, and that no substantial benefit will result to the city therefrom.

The question of the probable effect of the change on the general interests of the citizens and consumers of Nashville, has been argued on the other side, by the Louisville & Nashville R. Co. in a reply to the memorial above referred to, and the claim is therein made with great earnestness and some degree of plausibility that upon the showing in the memorial and upon figures given therein a very considerable saving would result to the consumers of coal at Nashville by the new arrangement. In the record however there is no sufficient evidence as to the quantity and kinds of coal used at Nashville nor any proof of specific facts to justify a conclusion as to this matter, but upon the estimates given by the disputants it seems probable that considerable saving would result to the consumer by the new rates.

And there is this great improvement in the present adjustment over the old, that the present does not involve the arbitrary discrimination between different customers in the city, that the former adjustment did.

As between Memphis and Nashville, considering the respective distances of those cities from the mines in western Kentucky, the rate of \$1.00 per ton to Nashville, does not seem to be low compared with the \$1.40 rate to Memphis. And notwithstanding the argument that the rates to Memphis are forced down to that figure by water competition, this significant fact cannot be ignored: that the L. & N. railroad has for a number of years past been, and still is, buying coal at the western Kentucky mines, hauling it to Memphis and selling it there. There must be profit to the railroad company somewhere in the transaction and from the statements made as to the very low price of coal in Memphis as compared with the price (or cost of production) at the mines, it would seem that the profit is in the transportation.

It thus appears that the rate to Memphis is a remunerative rate to the carrier and that it is not an unreasonably low rate.

This being the case, the rate of \$1.00 per ton from the same mines to Nashville would seem to be not at all unreasonably low to the carrier. It is an average rate of about one cent per ton per mile, as against a rate of a little over one half a cent per ton per mile to Memphis.

The circumstances at Memphis may, perhaps, make it difficult to make a difference between the charges for hauling "screened coal" and "run of mines, nut and slack" to that place. And in view of the incidental testimony in this case as to the value of the different kind of coal, and of the custom prevalent among some roads of classifying "screened coal" higher than the other kind, and charging more for hauling it, it cannot with confidence be said that a difference in the rate to Nashville on the different kinds is not justified.

The amount of the difference made at different seasons of the year cannot, however, be justified either by the evidence in this case or by the custom of other roads. Indeed, the practice of making such a difference is confined on the L. & N. road to Nashville alone, and there seems no good reason why the practice should longer exist.

A difference of 15 cents per ton between the rate on "screened coal" and that on other kinds would seem to be sufficient at any season of the year. A greater difference than that is unreasonable.

The rate should be so arranged that while Memphis is getting a rate as low as \$1.40, Nashville should have a rate from the same mines of not more than \$1.00 on "run of mines, nut and slack," and not more than \$1.15 on "screened coal" at any season.

It is, therefore, ordered that from and after this date, so long as the rate charged by the Louisville & Nashville Railroad Co. for the

transportation of coal of any kind or class, from the mines on its Henderson and Owensboro divisions, in the state of Kentucky, to Memphis, shall not exceed the amount of \$1.40 per ton, the rate charged by the said company for the transportation from said mines to Nashville, of coal classed as "run of mines, nut and slack," shall not at any time, exceed the amount of \$1.00 per ton, and the rate charged by said company for the transportation from said mines to Nashville of coal classed as "screened coal" shall not at any time, exceed the amount of \$1.15 per ton. And any reduction made by the Louisville & Nashville Railroad Co., in the rate for the transportation of coal of any kind or class from said mines to Memphis, shall be accompanied by a proportionate reduction in the rates charged for the transportation of "run of mines, nut and slack" coal and of "screened coal" respectively from said mines to Nashville.

And the Louisville & Nashville Railroad Co. is hereby ordered to conform its schedules of rates, fares and charges to this order, as required by law, and is ordered to cease and desist from publishing, posting, or putting into effect or from charging, demanding, collecting or receiving for the transportation of coal from the mines on its Henderson and Owensboro divisions, in the state of Kentucky to Nashville, any greater rates than those hereby allowed and provided for.

THE INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, PENNSYLVANIA,
and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PENNSYLVANIA,

v.

THE WESTERN NEW YORK & PENNSYLVANIA R. CO., THE NEW YORK, LAKE
ERIE & WESTERN RAILROAD COMPANY; THE DELAWARE & HUDSON CANAL COMPANY;
THE FITCHBURG RAILROAD COMPANY; and THE BOSTON & MAINE RAILROAD COMPANY.

SAME

v.

THE WESTERN NEW YORK & PENNSYLVANIA R. CO., THE NEW YORK, LAKE
ERIE & WESTERN RAILROAD COMPANY; and THE LEHIGH VALLEY RAILROAD COM-
PANY.

SAME

v.

THE PENNSYLVANIA R. CO., and THE WESTERN NEW YORK & PENNSYLVANIA
RAILROAD COMPANY.

[Nos. 153, 154, 163.]

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| <p>1. It is the duty of the carrier to equip its road with the means of transportation, and, in the absence of exceptional conditions, those means must be open impartially to all shippers of like traffic.</p> | <p>2. Ownership of a car rented to a carrier and for the use of which the carrier pays a full consideration, does not of itself entitle the owner to the exclusive use of such car, and, if the owner may in the contract of hire to</p> |
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the carrier stipulate for the exclusive use of the car, it must be upon such terms as shall not constitute an unjust discrimination against shippers of like traffic in cars owned by the carrier and who are excluded from the use of the car so hired.

3. Where oil is transported by the carrier both in barrels and tank cars and the use of the tank cars is not open to shippers impartially but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipment and des-

tinuation than to the tank shipper, is a discrimination against the former in favor of the latter, for which no legal justification has been shown in these cases.

4. The oil rates from Oil City and Titusville, Penn. to New York and New York harbor points and Boston and Boston points, exclusive of the charge for the barrel package in barrel shipments, are not shown to be either unreasonable in themselves, or relatively unreasonable as between those points.
5. An agreement for the pooling of traffic between a carrier by rail subject to the Act to Regulate Commerce and a carrier by pipe line does not fall within the description of contracts prohibited by section 5 of that Act.

Complaints filed in first two cases, Dec. 4, 1888, and in third case, Jan. 30, 1889.—Answers filed, Dec. 26, 1888, to Feb. 28, 1889.—Heard at Titusville, Pennsylvania, May 15, 1889.—Briefs filed Feb. 11, 1890, to Sept. 23, 1891.—Decided November 14, 1892.

RATES on tank and barrel shipments of petroleum. See complaints, 2 Inters. Com. Rep 294, 296, 317. Answer, 2 Inters. Com. Rep. 451.

*Franklin B. Gowen and M. J. Heywang, for Complainants.
James D. Hancock, for Western New York & Pennsylvania R. Co.
Francis I. Gowen, for Lehigh Valley R. Co.
James A. Buchanan, for The New York, Lake Erie & Western R. Co.
James A. Logan, for The Pennsylvania R. Co.
P. H. Janvier, for The Lehigh Valley R. Co.*

REPORT AND OPINION OF THE COMMISSION.

McDill, Commissioner:

These three cases were heard together and may be disposed of at the same time.

The Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, the complainants in each case, are composed of separate and distinct companies engaged in the manufacture and sale of refined petroleum and products of petroleum at works owned and operated by them in the oil regions of Pennsylvania at or near said cities of Titusville and Oil City.

The complaint in the first case is against the Western New York & Pennsylvania Railroad Company, the New York, Lake Erie & Western Railroad Company, the Delaware & Hudson Canal Company, the Fitchburg Railroad Company and the Boston & Maine Railroad Company, and it is alleged therein in substance that complainants as refiners and sellers of petroleum products ship from their works over the railroads of defendants "large quantities of petroleum to Boston, Mass., and intermediate points, and to Portland, Maine, and various points in the New England states, for sale in the markets of said places," and that the said five railroad companies, defendants, as common carriers engaged in interstate transportation, connect with each other, and by and under contracts between themselves and

various traffic arrangements form and operate a continuous through route for the transportation of petroleum products, at through joint rates of freight divided among themselves, from the oil refineries of complainants situated as aforesaid, through or partly through the states of Pennsylvania, New York, Massachusetts, Maine and other New England states. The complaint then charges:

1. That defendants, "for the transportation of the manufactured products of petroleum in barrels in carload lots from Titusville and Oil City, to Boston and other points in the New England states on the line of the Fitchburg Railroad Company and Boston & Maine Railroad Company, called "Boston points," have established and published a schedule of joint through rates, under which they charge and receive "25 cents per hundred pounds, making the rate per barrel \$1.00, the weight of the package being included and charged for therein," and that said rates are excessive, unjust and unreasonable, in violation of the Interstate Commerce Law.

2. The said rates "subject complainants and their traffic and the said localities to which their petroleum products are carried to an undue and unreasonable prejudice and disadvantage," because, (1), among other things, said rates are "practically prohibitory upon the traffic of complainants to said localities,

and under average circumstances and conditions sufficient to nearly absorb the profit of complainants in their trade to said localities, and, under conditions as they exist during some periods of each year and under competition, will entirely absorb all profit in the business of complainants to said localities, and if continued, will compel them to abandon their trade in that region of country:" and because, (2), said rates "are disproportionate as compared with the rates for the like service in the like traffic under substantially similar circumstances and conditions from Titusville and Oil City to New York and New York points, which rate is now 66 cents per barrel." It is here averred that there is "competition in said traffic by ocean transportation from New York City to Boston points, and any unjust or unreasonable difference in rates to said points as compared with New York points is injurious to complainants' business and discriminates against their traffic and said Boston points."

3. That complainants are subjected to undue and unreasonable prejudice and disadvantage in their said business and undue and unreasonable preference and advantage is given, in relation "to the traffic and transportation of refined petroleum," over the lines of defendants, "to an organization known as the Standard Oil Trust," which it is alleged "is formed by a combination of numerous firms, associations, and corporations engaged in the business of refining, buying and selling petroleum and its products for home trade and for export, and is also engaged in the business of storing crude petroleum in iron tanks, gathering the same from wells in the oil region of Pennsylvania and transporting it as a common carrier by means of pipe lines to the seaboard, at or near Philadelphia, Baltimore and New York, and to Buffalo, N. Y., and Cleveland, O., the charge to the seaboard through said pipe lines being the same as that made by the railroad companies known as the Trunk Lines." In connection with this allegation, it is further charged on information and belief, "that the defendants, either directly or indirectly, act under contracts, agreements and arrangements made by the said Standard Oil Trust or some of the pipe line common carriers allied with and forming a part of said Standard Oil Trust, to wit, The National Transit Company, with other common carriers by rail engaged in interstate transportation of petroleum, for the pooling of freights of different competing common carriers and for dividing between them some part of the net proceeds of the earnings of said common carriers from petroleum interstate traffic or of said traffic in specie, by means of which such net earnings are divided, in violation of section 5 of the Act to Regulate Commerce;" and that

the rates herein complained of are fixed by said combination under said pooling contracts or agreements, "and all connecting roads, including the initial railroad, The Western New York & Pennsylvania, which complainants must use and from which they must and do obtain their rates of through freight, are obliged to accept and charge the rate so fixed, and that said rate is made in the interest of said Standard Oil Trust and its allied companies, and with the intent, *inter alia*, of giving said Standard Oil Trust an advantage over complainants in the manufacture, transportation and sale of their products."

4. That the said rates of 25 cents per hundred pounds and \$1.00 per barrel were by a notice dated Oct. 25, 1888, effective, Nov. 6, 1888, abrogated and withdrawn as to Manchester in the state of New Hampshire, Salem in the state of Massachusetts, Portland in the state of Maine, and about one hundred and fifty other points in said states reached by the Boston & Maine Railroad Company; that said notice was not communicated to complainants, and public notice was not given thereof, and the same was not posted for public inspection in the depots or stations of the initial road, The Western New York & Pennsylvania Railroad Company, until Nov. 2, 1888; that the defendants, since said rates to said points were so abrogated, have not established and published any rates for said service to said points, although often requested by complainants so to do, and, while the defendants do not refuse to carry complainants' traffic for said points yet they will not state what the charges will be and give complainants to understand that an arbitrary addition will be made to the said already unreasonable and excessive rates of 25 cents per hundred pounds and \$1.00 per barrel (established Sept. 3, 1888) and, that, because of these things complainants are unable to ship their products to said points.

The second case is against the said Western New York & Pennsylvania and New York, Lake Erie & Western Railroad Companies, defendants in the first case and also the Lehigh Valley Railroad Company, and the complaint relates to the business of the complainants in shipping oil from their refineries at Titusville, and Oil City, over the railroads of the three defendants to the Atlantic seaboard at or near Perth Amboy, New Jersey. It is alleged that Perth Amboy is "commercially a New York harbor point," and that "the greater portion of petroleum products shipped by complainants to New York harbor points, is a very low priced refined oil, designed for export and which has no other market." The rate complained of is that fixed by the defendants for the transportation of petroleum products from said refineries over their line

through the states of Pennsylvania, New York and New Jersey. The said rate so fixed is stated to be 16½ cents per hundred pounds, or 66 cents per barrel, the weight of the package being included and charged for therein, and then follow the same averments as those in the first case as to the unreasonableness of said rate in itself, its discriminatory character as against the complainants and the alleged pooling contracts or arrangements with the Standard Oil Trust or National Transit Company.

The defendants in the third case are the Western New York & Pennsylvania Railroad Company, a party defendant in the first two cases, and the Pennsylvania Railroad Company. The complaint in this case relates to the through rate on petroleum and its products of the lines formed by defendants' roads from Titusville and Oil City *via* Irvineton and Corry, Pennsylvania, respectively; to tide-water in New York harbor in the state of New Jersey. It is alleged :

1. That the members of the complainants' associations and other refiners of petroleum, and, also, various persons, firms, corporations and associations affiliated to the Standard Oil Trust, ship petroleum and its products over said lines of the defendants between said points, and that the shippers affiliated to complainants ship principally in wooden barrels or gondola, box, cattle, or other cars, and those affiliated to the Standard Oil Trust ship principally in bulk in tank cars.

2. That a corporation, known as the "National Transit Company," controlled by the Standard Oil Trust owns a pipe line or lines from said oil regions to tide-water in New York harbor, through which oil is transported, and in consequence of the low cost of such transportation, the refining business of those affiliated to the Standard Oil Trust has increased and become very remunerative and prosperous at the Atlantic seaboard; and that within a few years, and partly due to the concentration of the refining business at the Atlantic seaboard by those affiliated to the Standard Oil Trust, there has grown into existence a large refining business in the oil regions of Pennsylvania, principally owned by the refiners forming complainants' associations.

3. That "in consequence of an advantage possessed by the refiners forming complainants' associations over the seaboard refiners, for the local and domestic markets of their vicinity and of the west, they have been enabled to maintain and increase their business," but they are subjected to great disadvantage, as compared with the refiners affiliated with the Standard Oil Trust, in respect to tide water shipments, and in the business of refining petroleum there is about forty per cent of the product which cannot readily be sold in the United States and must be shipped to the Atlantic

seaboard for transshipment to the foreign market, and without this export trade "the business of refining petroleum cannot be carried on with any profit."

4. That the National Transit Company is a common carrier of oil by pipe lines from the oil regions to New York harbor and "for the purpose of enabling it to charge and maintain a high price for the transportation of oil, so as to secure a large profit and maintain an advantage for the Standard Oil Company, and its affiliated industries, now controlled by the Standard Oil Trust, over all competitors," it has entered into a contract with the Pennsylvania Railroad Company for the pooling or division of the traffic on oil by railroad and by pipe line, one consideration of which was the maintenance of the same rates by pipe and rail line and by which the former guarantees the latter twenty-six per cent of the entire oil traffic between said points, and since the making of such contract, they have maintained the same rate of charges by rail and pipe line on such traffic.

5. That for some years the rate by defendants' lines from the oil regions to New York harbor had been 52 cents per barrel irrespective of whether the oil was shipped in bulk in tank cars or in wooden barrel packages, and under this rate, notwithstanding the disadvantage in rates (estimated at about 48 cents per barrel to which they were subjected in their export trade in competition with their rivals affiliated to the Standard Oil Trust, they were enabled by *their advantages in the local markets to maintain and even increase their business*; but that about September 13, 1888, the defendants, in common with all other railroad companies having lines leading from the oil regions of Pennsylvania to New York harbor, advanced their charges on oil shipped in wooden barrels over such lines from 52 cents to 66 cents per barrel, an advance of 14 cents per barrel, while the rate on oil shipped in bulk in tank cars remained as before 52 cents per barrel; and that the effect of this advance is to prevent the refiners affiliated with complainants from competing with those affiliated with the Standard Oil Trust for the export trade and "must result in the still further aggrandizement of the monopoly of the petroleum industry of the country already held by the Standard Oil Trust." It is charged that the rate of 66 cents per barrel is unreasonable and excessive, that it is discriminatory, that it gives the Standard Oil Trust and affiliated firms and shippers of oil in bulk in tank cars an undue and unjust preference and advantage over complainants' Associations and shippers of oil in barrel packages and subjects the latter to an undue and unjust prejudice and disadvantage.

The prayer in each of the complaints is in substance, that the defendant railroads be or-

dered, to "cease and desist from" the alleged unlawful acts complained of, to adopt reasonable and just rates for the service of transportation of petroleum and its products over their respective lines between points named, to make reparation to complainants for their alleged injuries, and for general relief.

The railroad companies made parties defendant in the three complaints have filed answers. All the allegations of acts or conduct on the part of the defendants in contravention of any of the provisions of the Interstate Commerce Law are put in issue, and the reasonableness of the rates complained of and justice of the course pursued by the defendants in respect to the traffic which is the subject-matter of the controversy, are affirmed. To avoid unnecessary repetition, the specific denials, admissions, and explanatory and argumentative statements of the several answers, will not be set forth here, but, so far as deemed material, will be referred to and considered further on in the discussion of the questions of fact and law involved in these cases.

It is suggested in the answers of the Western New York & Pennsylvania Railroad Company and also set forth in a memorandum filed by the complainants, that there are other lines of railroads besides those made parties defendant to these complaints, which carry on joint through rates petroleum products from the Western Pennsylvania oil regions eastward for the inland and for the export trade, and that these routes, including those complained against, form two classes, one carrying for the New England trade or Boston points and the other for New York points, each of said classes having the same rates for itself, and that the railroads forming these different routes are interested in the question of the reasonableness of the through rates complained of in these cases. The complainants state that they desire the general rates to be investigated rather than the special features of any particular rate, and have filed the following schedule of such lines or routes:

1. Western New York & Penna. R. R., West Shore R. R., Boston & Maine R. R., Fitchburg R. R., and several other smaller roads in the New England states to Boston points.

2. Western New York & Penna. R. R., New York Central & Hudson R. R., and Boston & Albany R. R., to Boston.

3. Western New York & Penna. R. R., Delaware, Lackawanna & Western R. R., Delaware & Hudson Canal Company's R. R., Fitchburg R. R., to Boston.

4. Western New York & Penna. R. R., New York Central & Hudson R. R. R., to New York City.

5. Western New York & Penna. R. R., West Shore R. R., to New York.

6. Dunkirk, Allegheny Valley & Pittsburgh R. R., Lake Shore & Michigan Southern R. R.,

4 INTER 8.

New York Central & Hudson R. R. R., Boston & Albany R. R., to Boston.

7. Dunkirk, Allegheny Valley & Pittsburgh R. R., New York, Lake Erie & Western R. R., Delaware & Hudson Canal Company, Boston & Albany R. R., to Boston.

8. Dunkirk, Allegheny Valley & Pittsburgh R. R., Lake Shore & Michigan Southern R. R., New York Central & Hudson R. R. R., to New York, etc.

9. Dunkirk, Allegheny Valley & Pittsburgh R. R., New York, Lake Erie & Western R. R., Lehigh Valley R. R., to Perth Amboy, etc.

10. Western New York & Penna. R. R., Philadelphia & Erie R. R., Delaware, Lackawanna & Western R. R., Delaware & Hudson Canal Company's R. R., Fitchburg R. R. to Boston.

11. Western New York & Penna. R. R., Philadelphia & Erie R. R., Pennsylvania R. R., to Communipaw, N. J., etc., New York delivery.

12. Dunkirk, Allegheny Valley & Pittsburgh R. R., Lake Shore & Michigan Southern R. R., West Shore R. R., Fitchburg R. R., to Boston.

13. Dunkirk, Allegheny Valley & Pittsburgh R. R., Lake Shore & Michigan Southern R. R., West Shore R. R., Boston & Albany R. R., to Boston.

14. Dunkirk, Allegheny Valley & Pittsburgh R. R., New York, Lake Erie & Western R. R., New York & New England R. R., to Boston.

15. Western New York & Penna. R. R., New York, Lake Erie & Western R. R., to New York.

16. And same connecting at Newburg, N. Y., with New York & New England R. R., to Boston.

Also the two routes mentioned in complaints filed.

Other points and routes incidentally interested.

A. Western New York & Penna. R. R., Philadelphia & Erie R. R., Pennsylvania R. R., "Green Line," to Philadelphia.

B. Western New York & Penna. R. R., Philadelphia & Erie R. R., Northern Central R. R., "Green Line," to Baltimore, Md.

On the filing of the memorandum of complainants and the above schedule, this Commission ordered that the various carriers composing said routes be furnished with copies of the complaints, answers and orders in these cases and allowed to intervene as parties by filing notices to that effect.

The following are the carriers named in said schedule other than those originally complained against:

1. West Shore Railroad Company.

2. New York Central & Hudson River Railroad Company.

3. Boston & Albany Railroad Company.

4. Delaware, Lackawanna & Western Railroad Company.

5. Dunkirk, Allegheny Valley & Pittsburgh Railroad Company.

6. Lake Shore & Michigan Southern Railroad Company.

7. Philadelphia & Erie Railroad Company.
8. New York & New England Railroad Company.
9. Northern Central Railroad Company.

The provisions of the order of the Commission were subsequently extended so as to embrace the Philadelphia & Reading Railroad Company and the Fall Brook Coal Company, and they, together with the above named carriers, were served with copies of the pleadings and orders in the several cases and allowed to intervene pursuant to the order of the Commission. No answers to the charges in the complaints have been filed by any of these carriers, but the Lake Shore & Michigan Southern Railroad Company enters an appearance and asks notice of hearings and other proceedings, and the New York Central & Hudson River Railroad Company "gives notice of a desire to intervene as a party defendant in said causes and to appear and be heard therein."

The Pennsylvania Railroad Company in the case against it and the Western New York & Pennsylvania Railroad Company, on June 20, 1891, filed an application to take additional testimony. The complainants in their answer resisting this application, make certain admissions as to the facts offered to be proven by the Pennsylvania Company, and that company in its reply to the answer of complainants claims that said answer "at least impliedly, admits the fact to establish which this respondent in its application asked leave to offer testimony." The application to reopen the case for the submission of additional testimony is made a year and eight months after the last testimony in the case had been taken, and over a year and four months after the case had been submitted on oral argument. There is no claim that the evidence offered has been newly discovered and no excuse whatever is presented for not producing it at the hearings where the Pennsylvania Company was represented by counsel and a large number of the officials of the Pennsylvania Company who had knowledge of the alleged facts, if they existed, were examined as witnesses. In view of the admissions of the complainants in their answers to the application, which the applicant in its reply to said answers treats as substantially conceding the facts offered to be proven (and which admissions and reply will be duly considered so far as relevant and material in our disposition of the case), and of the further fact that no additional delay should be had in these proceedings except in a clear case of necessity, the application must be and is denied.

FACTS AND CONCLUSIONS.

The leading questions raised by the pleadings in these cases relate, (1), to the lawfulness of the charge for the barrel package under the circumstances and conditions disclosed by the evidence; (2), to the reasonableness in them-

selves of the rates in question; and (3), to the relative reasonableness of the rates to Boston and New England points as compared with those to New York and New York harbor points.

1. The lawfulness of the charge for the barrel package was for the first time distinctly presented for decision and passed upon by this Commission in the case of *Rice v. Western New York & P. R. Co.* 8 Inters. Com. Rep. 162, 4 I. C. C. Rep. 181. That case was originally decided adversely to the complainants therein, 2 Inters. Com. Rep. 298, 2 I. C. C. Rep. 389, but the complaints in the present cases having been filed about that time and it appearing that a much fuller investigation of the general subject of oil transportation would be made, this Commission on motion of said complainants, April 15, 1889, issued an order opening said case for further hearing and providing that the testimony taken in the present cases should apply to said case, so far as it might be relevant. It is stated in the final decision in the case, that "as at first presented it rested mainly upon a comparison of the existing rate with a former rate of 25 cents a barrel from Titusville to Buffalo and with the proportion received by the respondent of a joint through rate from Titusville to the seaboard *via* Buffalo, but that the additional facts elicited at the hearings in the cases now under consideration introduced other and more important elements tending to show unjust discrimination between shippers of oil in tanks and in barrels, and in other particulars," and it was held in substance that the charge for the barrel package when no charge is made for the package when tanks are used, both modes of transportation being employed by the carriers, was an unjust discrimination against the shipper in barrels in favor of the shipper in tanks, and that the correction of this discrimination required "that in the transportation of oil in carloads, barrels as well as tanks, shall be regarded as only a means of carriage of the commodity, and as in case of transportation in tanks, the rate shall be charged only for the weight or quantity of the oil carried, exclusive of the weight of the barrel, and be the same for like weight or quantity carried in tanks."

The Western New York & Pennsylvania Railroad (which is a party defendant in each of the present cases, being the initial carrier in all the lines complained against) was the sole party defendant in the case of *Rice, Robinson & Witherop*, but the charge in that case was not only against the rate by that road from Titusville to Buffalo, but also involved a consideration of the proportion received by it of the through rate from Titusville *via* Buffalo to the seaboard at Perth Amboy, and the facts pertinent to the question of the lawfulness of the charge for the barrel package applicable to that case were substantially the same as

those bearing upon that question in the present cases.

The defendants transport oil in bulk in tank cars and in wooden barrels in box and rack cars. Prior to Sept. 3, 1888, the rates over the lines of the defendants on shipments of oil both in tanks and barrels had been the same for a like quantity of that commodity exclusive of any charge for the weight of the barrel in barrel shipments, but about that time, the rates on barrel shipments were increased 14 cents to New York points and more to Boston points, this additional charge being for the weight of the barrel, and as the rates on tank shipments, not including the weight of the tank or package, were not advanced but allowed to remain as they were, the result was a discrimination in favor of the tank as against the barrel shipper. The question is whether that discrimination is in the language of the statute an "unjust discrimination."

The defendants set up several matters in excuse or justification of their action in this matter. They claimed in the first place that in originally making the additional charge for the barrel package, they did so in compliance with what they conceived to be the ruling of this Commission in reference thereto in the case of *Rice v. Louisville & N. R. Co.* 1 Inters. Com. Rep. 722, 1 I. C. C. Rep. 508. This point is fully discussed in the case of *Rice, Robinson & Witherop* and it is made clear that not only no warrant for the action of the carriers proceeded against in the present cases is found in any ruling of this Commission, but also that said action is in disregard of the "principle plainly and emphatically laid down by the Commission," in said case of *Rice* and also in the subsequent case of *Scofield v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 67, 2 I. C. C. Rep. 80. If it be conceded that in the language used by the Commission in said cases there was some color for the original institution of the discrimination arising from the charge from the weight of the barrel, yet no authority for the continuance of that discrimination can be predicated of such language since the issuance by the Commission and communication to the carriers of the memorandum entitled, "*Re Relative Tank and Barrel Rates on Oil*," 2 Inters. Com. Rep. 245, 2 I. C. C. Rep. 365, in which it was declared that the action of the carriers in this particular was unwarranted by the decisions in said cases.

Having instituted the discrimination in order, as they allege, to bring their practice into conformity with what they understood to be the rulings of this Commission, the carriers now seek to justify and maintain this departure from their former custom of long standing on other grounds.

It is claimed that in case of special facilities at loading and unloading points, the tank cars

are handled more rapidly than cars carrying oil in barrels. This may be true, but the testimony is that the railroads do not provide these facilities and there are none at the seaboard of which the complainants can avail themselves. When special facilities for loading and unloading tank cars are not available, greater delay occurs than in loading and unloading barrel cars.

It is further set up by the carriers in justification of the charge by the barrel package, that the barrel belongs to the shipper and is an article of merchandise, and when shipped from the oil region to the seaboard sells for an advance over cost in the oil region equal to the freight paid on the barrel. They estimate the cost of the barrel in the oil region without manufacturer's profit at from \$1.11 to \$1.16 and the selling price in New York at from \$1.80 to \$1.82½ per barrel, which would be a profit somewhat greater than the amount of the freight charge of 14 cents. This estimate, however, only includes the cost of the barrel as received from the barrel maker and ignores the further cost incurred by the refiner in preparing the barrel as a receptacle of oil. After the barrel is received from the manufacturer, the refiner has to paint it on the outside, coat it with glue within, put in a bung hole and provide a bung, plug worm holes, recooper the barrel and see that it is perfectly tight. The proof shows that the cost of the labor and material for this preparation of the barrel is from 16 cents to 17 cents per barrel, and that this added to the original cost as received from the manufacturer makes the total cost per barrel to the refiner from \$1.80 to \$1.82½, the selling price in New York.

The total cost of the barrel and its preparation to the refiner at Titusville and Oil City is shown by the following itemized statements, the first being made at Oil City and the second at Titusville:

I.

New Barrels with heavy iron for export.....	1.16
Labor in coopering, gluing, painting, and loading on cars per barrel.....	.065
Glue per bbl.....	.065
Paint, Rosin, Naptha, &c., per bbl.....	.020
Bungs, Stencils, Brushes, Repairs to machinery and buildings, Steam Rc.....	.025
Total per bbl.....	\$1.825

II.

New Barrels, heavy hoops, average price.....	1.13
Total labor.....	Per bbl..... .06
Glue.....	"..... .06
Paint, Rosin, Naptha.....	"..... .02
Bungs, Rivets, Iron, Plugs.....	"..... .005
Stencils, Brands, Brushes, Brooms, etc., per bbl.....	.005
Tools, Utensils, fillers, hose and machinery..	.02
Total per barrel.....	\$1.30

If sold in New York or paid for as part of the consignment, the barrel does not bring more than its cost to the shipper and when returned empty it is at the shipper's expense. Moreover, as is said in the *Rice, Robinson &*

Witherop case, "in the carriage of oil the barrel is not shipped as merchandise but as a package or means of transportation of the oil." 3 Inters. Com. Rep. 162, 4 I. C. C. Rep. 152.

It is also maintained that the transportation in tanks yields the carrier a larger revenue above the cost of service than that in barrels. In support of this contention, tables showing dead and paying weight hauled in tank cars carrying oil in bulk and in box cars carrying oil in barrels, respectively, were introduced in evidence on the part of the defendants and it appears therefrom that the amount of paying freight hauled in the average tank car is greater than that in the average car loaded with barrels, and that in consequence the revenue to the carrier is somewhat greater in the former case than in the latter, even when the barrel package is charged for and is of course still greater where no charge is made for the barrel package. It is estimated by one of the witnesses that at the present rate of 16½ cents per 100 lbs. to New York points, the carrier would receive on an average train load, the barrel package being charged for, \$35.76 more for the transportation of oil in tanks than in barrels, and excluding the charge for the barrel package, \$237.20 more. Without affirming the strict accuracy of these tables and estimates, it may be conceded the evidence shows the amount of paying freight to be materially greater in tank shipments than in barrel shipments. In the case of *Scofield v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 67, 2 I. C. C. Rep. 90, it was found that "the tank car taking the gross weight of the car and oil, pays slightly more to the carrier per ton than the stock car with the full load." 2 Inters. Com. Rep. 71, 2 I. C. C. Rep. 108.

This plea that the transportation in tanks is the more profitable to the carrier in yielding a larger revenue above the expense of service was presented in the case of *Rice, Robinson & Witherop* and was in effect held to be no justification of the discrimination between tank and barrel shippers *under the circumstances and conditions regulating the use of the two modes of transportation*. These circumstances and conditions do not present a case of two modes of transportation open indiscriminately to shippers in general, the one at a higher rate than the other, and as to which the shipper may take his choice and pay accordingly, but a case where the *cheaper-rated* and, as is claimed by the defendants, the *better*, mode of transportation is available practically to only a particular class of shippers. The railroads do not to any material extent own tank cars or furnish facilities for loading and unloading them, but they are owned almost entirely by the shippers and *limited in their use to such owners*. It is claimed by the railroads that it is impracticable for them to own a sufficient

supply of tank cars and construct the terminal facilities for the receipt and delivery of oil necessary to their profitable employment and that the cars should be owned and these facilities be constructed by the shipper. In reference to this state of facts the following language is used in the case of *Rice, Robinson & Witherop*: "It is not the business of the shipper to furnish the vehicle of transportation. That is the duty of the carrier. Under its franchise the carrier must do more than construct his roadway. He must equip it with the means of transportation, and these means, of whatever style or pattern, must be open *impartially to all shippers of like traffic*. If the carrier hire or arrange in any manner for the use of vehicles he does not own, he has one of two things to do: he must either furnish like vehicles to all competitors in the traffic, or must be careful to make no unjust discrimination and give no undue preference in his rates. For all transportation purposes, so far as the public is concerned, a carrier makes every vehicle his own that he uses upon his road, no matter how acquired. His responsibility to the public is the same in respect to rates and other transportation duties whether he owns or hires his vehicle. When, therefore, he accepts tank cars owned by shippers who can afford to build and furnish them, and has none of his own to furnish to other shippers, but can supply only box cars in which barrels must be used for oil, he is bound to see that he gives no preference in rates to the tank shipper, and that he subjects the barrel shipper to no disadvantage. It is at this point that the duty of the carrier to the public is rigorous, and where no plea of inability to furnish tanks, or other excuse, is admissible."

It is contended by counsel for the Western New York & Pennsylvania Railroad Co., that the Commission erred in holding it to be the duty of the carrier to furnish the vehicle of transportation. On this point it is said in the case of *Scofield*, that while the statute does not clothe the Commission with power to determine what kind or number of cars the carrier shall place upon its line for transportation purposes, yet "the duty of the . . . carrier is none the less obligatory at common law and by its charter to furnish an adequate and proper car equipment for all the business . . . it undertakes and advertises in its tariffs it will do." 2 Inters. Com. Rep. 76, 2 I. C. C. Rep. 117. In *Rice v. Louisville & N. R. Co.* 1 Inters. Com. Rep. 722, 1 I. C. C. Rep. 547, the Commission says, "it is properly the business of railroad companies to supply to their customers suitable vehicles of transportation and then to offer their use to everybody impartially"—citing *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 183, 22 L. ed. 827, 830. There is no obligation upon any one to enter

into the business of common carriage, but having undertaken and advertised to conduct such business, it seems clear that the duty of furnishing vehicles of transportation is incurred. *Chicago & A. R. Co. v. Dawson*, 79 Mo. 296, 18 Am. & Eng. R. Cas. 521; *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372, 380, 5 Am. St. Rep. 226; *Smith v. New Haven & N. R. Co.* 12 Allen, 531; *St. Louis & S. E. R. Co. v. Dorman*, 72 Ill. 506.

If it be not the duty of the common carrier to furnish the vehicle of transportation, then his only legal obligation is to transport over his road-bed such vehicles when furnished by others. He could not be compelled to do more, and if he chose to pursue such a course, the privilege of transportation of both person and property over his line might be denied to the great mass of the public and limited to the few who were able and found it to their advantage to invest in cars for their own use. It is manifest that in such transportation there would be but a small, if any, element of common carriage; it would be a prostitution of the franchise received from the state and call for its forfeiture.

In fact and in law, however, the carrier furnishes the tank as well as the barrel car. The shipper in tank cars (who is also the owner) is only the source of supply. He does not, strictly speaking, furnish the tank car, but lets it to the carrier, charging and receiving the customary mileage both ways, and the carrier, the hirer furnishes it. If there were nothing more in the transaction than this, it could not be successfully contended that it is not the duty of the carrier to offer the use of the tank car to shippers indiscriminately. But it may be said that the owner of the tank car has acquired these cars for the purpose of having his own products transported therein, and that in the contract of hire to the carrier he may stipulate for their exclusive use. Conceding that this may be done, it must be upon such terms as shall not constitute an unjust discrimination against shippers of like traffic in cars owned by the carrier.

In the Rice case, it is said, "The carrier has no right to hire rolling stock and then allow it to be used exclusively by one class of persons on such terms as will drive out of business those who are compelled to use its own rolling stock in a competitive traffic. This, however, is precisely what takes place in this traffic, if the rates for the transportation in barrels are considerably in excess of those which are charged for the transportation in tanks. The tank cars, . . . whether the use is paid for or not, ought properly to be held for the use of all; but if this is found impracticable, it is very certain and very obvious that proprietorship of the car for the use of which the carrier pays . . . can fairly entitle the

owner to no special consideration in the making of rates." *Rice v. Louisville & N. R. Co.* 1 Inters. Com. Rep. 722, 1 I. C. C. Rep. 548. If the carrier should rent from a car-furnishing company, who are not shippers, cars better adapted to a particular traffic than its own, and should limit their use to one class of its customers and at a cheaper rate than is charged to its other customers for the use of its own cars, no one could question the injustice of such discrimination. In principle the case is the same, whether the shipper or some outside party is the source of supply.

The tank of the tank car performs the function of a package in tank shipments, as the barrel does in barrel shipments. The carrier, in renting and paying mileage for the tank car, furnishes the tank shipper a package and free transportation thereof; the barrel shipper furnishes his own package and is charged for its transportation. At 14 cents a barrel on the minimum carload of 60 barrels, the discrimination against the barrel shipper amounts to \$8.40, equivalent to freight at tank rates on over 16 barrels of oil. The average distance from Oil City and Titusville to New York harbor points by the railway lines between those points is over 500 miles. The mileage paid per car for round trip at 4 cents per mile amounts to over \$7.50. The tank shipper, therefore, receives about \$7.50 per round trip for the use of his car including a package for his oil, while the barrel shipper pays \$8.40 per car for the transportation of his packages one way.

The cost of the tank car is from \$600.00 to \$634.00; it requires special facilities for loading and unloading, has to be cleaned out after use to render it fit for carriage of different qualities of oils, and carries no return loads from the east. Barreled oil is transported in box and rack cars; the box cars generally used for that purpose are old and inferior, unfit for the transportation of merchandise in general, and new box cars are seldom so used, as the leakage and odor of the oil are calculated to render them unsuitable for the carriage of freight liable to be damaged thereby. The box car costs about \$450.00. It is estimated and the evidence tends to show that from five to ten per cent of the cars used in carrying oil in barrels return loaded.

A statement introduced in evidence, dated Oct. 1, 1889, shows that the total tank car equipment of the United States so far as then known was 7864 cars, owned and operated as follows:

Owned by railroads.....	1242
Owned by companies and individuals not connected with the Standard Oil Company (approximately).....	1844
Leased by Standard Oil Co. to outside parties.....	300
Total operated by parties not connected with Standard Oil Co. (approximately).....	8486

Owned by Standard Oil Company.....	4497
Less leased to others.....	300
Total operated by Standard Oil Company.....	4197
Owned in part by Standard Oil Company.....	181
	4378
Total tank car equipment.....	7864

From this it will be seen that the Standard Oil Company owns and operates over half of the total tank car equipment of the United States. The complainants manufacture refined petroleum and its products at or near Oil City and Titusville and sell the same in the domestic markets and at the Atlantic seaboard for export. They do this business in competition with the Standard Oil Co., and others. The capacity of the refineries of complainants is about two millions barrels per annum, and their actual shipments for the year 1888, were about a million and a half barrels of petroleum products. The shipments were entirely by rail and for the most part in barrels.

The counsel for the Western New York & Pennsylvania R. Co. admits that the method of making rates by weight including the barrel package "might lead to injurious effects to those who shipped their oil exclusively, or the greater portion of their oil, in barrels," but contends that it would be difficult to decide that this method of making rates was a discrimination in favor of the Standard Oil Co., in view of the testimony introduced which shows that the shipments for that company over the Green Line (which is a department of the Pennsylvania R. R. having charge of all the eastbound transportation of oil in car-loads over that road) for the six months ending Dec. 31, 1888, were, in barrels, 354,793, and in bulk, 808,899 barrels, and over the New York, Lake Erie & Western R. R. in barrels, 117,993, and in bulk, 92,730 barrels. These figures show that for the period named, the Standard Oil Co., and its "affiliated industries" shipped more oil by rail in barrels than in tanks to the east over said lines. During about two months and a half of that period, to wit, from July 1, to Sept. 13, 1888, the charge on the barrels package was not in force, and in the itemized statement introduced in evidence showing shipments by months, the shipments for the last of the six months (December) were less in barrels than in bulk, being by the Green Line in barrels, 35,098, and in bulk, 43,645, and by the New York, Lake Erie & Western R. R., in barrels, 19,126, and in bulk, 25,588. The aggregate shipments, however, for the portion of the six months during which the charge for the barrel package was in force, were greater in barrels, than in bulk. The witness by whom this proof was made was in the employ of the Standard Oil Co. as assistant manager of the Union Tank Line, and he does not testify positively, but that "he thinks" the same proportion as to barrel and tank shipments prevailed for a like period before and since the period

stated. The evidence would have been more satisfactory if some period covered entirely by the barrel package charge had been selected and the witness had given the figures, presumably accessible to him, showing the shipments during the like periods before and since the institution of the charge for the barrel package. The witness could not state the amount of the Standard Oil Company's shipments by pipe lines or the proportion of such shipments to its shipments by rail. The rate by the pipe lines to the public is the same as the tank rate by rail. The shipments shown by the above figures, moreover, were from Rochester, Buffalo, Pittsburgh, Cleveland, and other points besides Oil City and Titusville, and in the shipments from the latter points the bulk shipments largely exceeded the barrel shipments, being by the Green Line from Oil City, 156,597 in bulk and 91,089 in barrels, and from Titusville 63,101 in bulk and none in barrels, and by the New York, Lake Erie & Western R. R., from Oil City, 7,510 in bulk and none in barrels, and from Titusville 981 in bulk and none in barrels. The ultimate question, however, in these cases relates to an unjust discrimination not as between particular parties, but as between two classes of shippers, the barrel shipper and the tank shipper. The fact that the Standard Oil Company owns and operates more than half of the total tank car equipment of the United States, would seem to justify the inference that its gain is largely greater than its loss by the discrimination in favor of tank shipments.

In the statement above of the total tank car equipment of the United States, 1842 is the number given as owned by railroad companies. Of these 1130 belong to the Pennsylvania R. Co., leaving 212 as the number owned by all other railroads in this country. Practically, then, with the exception of the Pennsylvania R. Co., the defendants carry oil in tank cars for such shippers only as own the cars and supply them to the roads. The application of that company to take additional testimony heretofore referred to was, so far as deemed material and as stated therein, for the purpose of showing that it is the owner of 1100 oil tank cars, of which about 450 cars or so many of them as from time to time are necessary to meet the demands therefor, are furnished indiscriminately to all parties desiring shipments of refined oil to points upon its own or affiliated lines of railroads, including the seaboard points on the New York harbor, at Philadelphia and Baltimore, and "that with few exceptions occurring occasionally during the period of heaviest shipments . . . these cars have been equal to, and often in excess of, the demands upon them by shippers." The complainants answering admit that said railroad company "is the owner of about 1100 tank cars of which

about 450 are devoted to the carrying of refined oil and offered indiscriminately to the shippers of that product;" but allege that "if the demand for these cars is no greater than is stated, it is because the Pennsylvania R. Co. will not permit them to go to any other place on the seaboard at New York harbor, than Communipaw, and only there at the docks of the National Storage Co., which is allied to the Standard Oil Trust," and that it "refuses to permit its cars to go to Perth Amboy, the export station to which the Independent Refiners" (complainants) "ship most largely." In reply, the railroad company construes the answer of complainants as "at least impliedly admitting the said facts to establish which the application was made," and itself admits that "it transports oil going over its lines to the New York seaboard to Communipaw and not to Perth Amboy," assigning as reasons that oil is a traffic dangerous to other merchandise and that has to be handled at a separate point of delivery, and that Communipaw is only a mile and a half from its regular deliveries in Jersey City and the most convenient point for oil delivery by its road, while Perth Amboy is distant about nineteen miles and one of the terminal stations of an active competitor, the Lehigh Valley R. Co. It also alleges that the individual shipper can obtain at Communipaw equal facilities at equal rates with those obtainable at Perth Amboy. The allegation of complainants that the road will only deliver at the docks of the National Storage Co. at Communipaw and that that company is allied to the Standard Trust is not denied. The evidence shows that the National Storage Company advertises itself as the agent of the Green Line and Pennsylvania R. Co., and has charge of that Company's terminals at Communipaw and that the tank cars of that line and company are allowed to run only to the National Storage Company's docks. This Storage Company has facilities at Communipaw for unloading tank cars into bulk steamers or vessels but these facilities are not open to complainants, and a witness (Confer) testified that in order to get oil shipped in bulk from Communipaw, the Independent refiner has to sell it to the Standard Oil Company. From this state of facts it appears that while about 450 tank cars of the Pennsylvania R. Co. may be "open to shippers indiscriminately," it is only upon the conditions of shipment to Communipaw for delivery there to the National Storage Company and that the facilities owned by this Storage Company for bulk shipment are not available to shippers in general. The fact testified to, that the facilities of the National Storage Company at Communipaw for bulk shipment are not open to outside shippers and that in order to have oil shipped in bulk from that point it has to be

sold to the Standard Oil Company, tends to sustain the allegation of complainants that the storage Company is an ally of the Standard Oil Trust. The Pennsylvania R. has a connection with the Lehigh Valley road seven or eight miles from Perth Amboy and there is no physical obstruction to prevent the cars of the former road running through to Perth Amboy. The agent in charge of the Green Line at the time of the hearing (Motheral) stated that the tank cars of the Pennsylvania road were not permitted to run to Perth Amboy because of a contract of the road with the National Storage Company to deliver to their yard. The Green Line, as before stated, is the oil transportation department of the Pennsylvania R. Co., and this agent testified, that the Green Line could not meet the demand of the business of the Standard Oil Company for tank cars on its line and had to use sometimes as many as 600 cars of the Union Tank Line, a department of the Standard Oil Co., in the Standard Oil business.

After full investigation and mature consideration, our conclusion in reference to the charge for the barrel package is in line with that in the case of Rice, Robinson & Witherop and with the principles pertinent to the question laid down in that case and in the cases of Rice and Schofield, and we hold, that where both modes of transportation are employed by the carrier and the use of one, the tank car, is not open to shippers impartially but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination, subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers.

At the institution of these cases, the defendants were making what is termed an "outage" allowance for alleged waste in transportation, of 62 gallons from the full capacity of the tank, with no corresponding deduction on barrel shipments. Notwithstanding this allowance, the shippers received pay for the full capacity of the tank. The testimony tends to show that the Union Tank Line, a department of the Standard Oil Company, was originally the only beneficiary of this practice, but the matter having become known to the other tank shippers, it was then extended to them. After the commencement of these proceedings, the allowance was reduced to 42 gallons. This practice was condemned by this Commission

as an unlawful discrimination in favor of the tank as against the barrel shipper, in the case of Rice, Robinson & Witherop and, also, the recent case of *Rice v. Cincinnati, W. & B. R. Co.* 8 Inters. Com. Rep. 841, 5 I. C. C. Rep. 193. Since the promulgation of the decision in the latter case, the Western New York & Penn. R. Co. has issued supplements to all its oil tariffs, effective Sept. 1, 1892, providing, among other things, that "the minimum carloads of tank cars will be the full capacity of the tanks," and the "wastage" allowance has thus been wholly discontinued over the lines of defendants.

II.

The question of the reasonableness in themselves of the rates now in force, exclusive of the charge for the barrel package in barrel shipments, will be next considered.

The defendants in the case against The Western New York & Pennsylvania R. Co., The New York, Lake Erie & Western R. Co., The Delaware & Hudson Canal Co., The Fitchburg R. Co., and the Boston & Maine R. Co., form a route over which petroleum products are transported in carloads from the Pennsylvania Oil regions to Boston and New England points; the defendants in the case against the Western New York & Pennsylvania R. Co., The New York, Lake Erie & Western R. Co., and the Lehigh Valley R. Co., form a route over which such transportation is conducted from such oil regions to New York harbor points; and the defendants in the case against The Western New York & Pennsylvania R. Co., and the Pennsylvania R. Co., form what is known as the "Green

Line" route from said oil regions to New York harbor. The "Green Line" as before stated, is a department of the Pennsylvania R. Co., having charge of and conducting the oil transportation over said route. These railroad companies are common carriers engaged in interstate transportation of petroleum from the Western Pennsylvania Oil regions eastward for the inland and export trade and this transportation is conducted on joint through rates except as to the Boston & Maine road, on which through rates are made only to certain junction points. In addition to the roads against which the complaints are filed there are also so engaged the several roads heretofore named to whom leave was given to intervene and be heard as parties defendant. These last mentioned carriers are parts of many different routes (see statement *supra* filed by complainants) by which petroleum products are or can be carried between the points named. In many instances the same railroad forms a link in several routes. The Western New York & Pennsylvania R. R. is the initial carrier in each of the three routes formed by the roads complained against and is also the initial carrier in most of said other routes. All these routes form two classes; one composed of those carrying for the New England trade or Boston points, and the other, of those carrying for New York harbor and vicinity, mainly for export. Each class, respectively, maintains the same rates. Those rates, so far as shown by tariffs on file with this Commission up to date, have been as follows:

TO NEW YORK & NEW YORK HARBOR POINTS.

Tariffs issued by W. N. Y. & Pennsylvania R. R. Joint with follow- ing lines.		To New York Harbor points.							
		To New York From Tit- usville & Oil City.		To Jersey City From Titusville & Oil City.		To Perth Am- boy From Titusville & Oil City.		To Communi- paw From Titusville & Oil City.	
		In Bbl.	In T. Car.	In Bbl.	In T. Cars.	In Bbl.	In T. Car.	In Bbl.	In T. Cars.
New York, Lake Erie & Western R. R. Nov. 10, 1887. March 3, 1888.	Per Bbl.			58) 52)	(From Titusville.) 16½			52	(From Titusville.)
Sept. 3, 1888. Oct. 17, 1889.	Per 100 lbs.	18½	18½	16½					
West Shore R. R. April 23, 1887. July	Per Bbl.	58		58				52	
Sept. 3, 1888. Feb. 10, 1892	Per 100 lbs.	18½	18½						52
D. L. & W. & Delaware & H. Ca- nal Co.'s R. R. Dec. 15, 1888. Note.—Rates withdrawn Oct. 24, 1891.	Per 100 lbs.	18½	18½						
Lehigh Valley R. R. Sept. 3, 1888. Note.—Rates to New York with- drawn Oct. 20, 1891.	Per 100 lbs.	18½	18½	18½	18½	16½	16½		
Issued by Pennsylvania R. R. (Green Line.) April 8, 1887. Feby. 20, 1888. Sept. 3, 1888.	Per Bbl.			52 52	52 52	52 52	52 52	52 52	52 52

TO BOSTON POINTS.

Tariffs issued by Western New York & Pennsylvania R. R. Joint with the following lines: New York, Lake Erie Western R. Nov. 10, 1887. (Note. This rate with- drawn by rates shown on Fitch- burg R. R.) Fitchburg R. R. Sept. 8, 1888. Dec. 15, " West Shore R. R. April 23, 1887. July Sept. 3, 1888. Dec. 15, " D. L. & W. D. & H. Canal Co's R. R. Sept. 8, 1888. Dec. 15, " Issued by Pennsyl- vania R. R. (Green Line.) Feb. 20, 1888. Oct. 3, " Jan. 1, 1889.	To Boston and Boston points. From Titusville and Oil City. In bbls. In T. Cars.	Per Bbl. (From Tit- usville.)	78	
		Per 100 lbs.	25	25
		" " "	23½	23½
		Per Bbl.	78	
		Per 100 lbs.	25	25
		" " "	23½	23½
		" " "	25	25
		" " "	23½	23½
		Per Bbl.	78	78
		" " "	100	78
		" " "	94	74

As to rates prior to those shown in the above tables, the evidence tends to show that from Oil City and Titusville to New York harbor, over the Pennsylvania R. Co's Green Line, the open rate was 48 cents per barrel from about July, 1882, to Feb., 1884, and from the latter date to January, 1885, 52 cents per barrel. From both these rates a rebate of 18 cents was allowed, leaving the net rates for said periods, respectively, 35 cents and 39 cents. Beginning at January, 1885, the open rate of 52 cents was paid without any rebate and from January, 1886, to Sept. 8, 1888, the rate by all lines to New York was generally 52 cents per barrel, but there is evidence tending to show that in 1886 there was a rate of 60 cents to Jersey City.

About 1881, two pipe lines for conveying crude oil from the Pennsylvania Oil regions to the seaboard were completed, the Tide Water Pipe Line and that of the National Transit Company. The Tide Water Pipe Line was first constructed. Both these pipe lines are carriers of crude oil between the points named and originally were in competition with each other and with the rail lines. The low rates prevailing by rail from about 1881 to about January, 1885, are, it is claimed, attributable to this competition. Under this competition the rates reached a very low, if not unremunerative, figure, both by pipe and rail, and about December, 1888, the pipe lines with a view of getting better rates adjusted their differences and the competition between them ceased. The pipe line business appears then to have passed into the control of the National Transit Company. The Pennsylvania R. Co. about 1885 entered into the contract with the National Transit Company, which, as set forth in the complaint against the Pennsylvania Company and the Western New York & Pennsylvania Company, is a contract "for the pooling or division of the traffic on oil between the Pennsyl-

vania Company and the National Transit Company, one consideration of which contract was the maintenance of the same rates on oil by the railroad and by pipe line and under and by virtue of which the said National Transit Company guarantees to the Pennsylvania R. Co., twenty-six per cent of the entire oil traffic from the Pennsylvania Oil Regions to tide-water." The Pennsylvania R. Co. admits the contract substantially as stated by the complainants, but avers "that the sole purpose of it was to secure and maintain a reasonable and compensatory rate to itself for the service to be rendered; that the rates now charged are only reasonable and just and that it would be impossible to carry said traffic at a lower rate without entailing upon itself unreasonable loss." The evidence tends to show that under this contract the rate of 52 cents per barrel for tank and barrel shipments was put in force both by the pipe lines and by the Pennsylvania Company and was thereupon adopted by all the class of lines to New York harbor points. September 8, 1888, notice was given of an advance of 14 cents per barrel for the weight of the barrel on barrel shipments to become effective Sept. 18, 1888, making the rate on such shipments 66 cents per barrel.

On the basis of the estimated or constructive weights placed by the carriers on oil by the gallon in tank shipments and on the barrel and its contents in barrel shipments (which weights will be considered further on), both the 52 cts. rate and 66 cents rate amounted (when they were adopted) to 16½ cents per hundred pounds of oil transported.

The evidence is to the effect that from 1882 to about March, 1883, the rate to Boston was 65 cents per barrel on both barrel and tank shipments out of which 5 cents was refunded for cartage; that at the latter date, the rate was advanced to 80 cents, with the same reduction for cartage; and that from 1884 to July, 1885, there was what is termed an "export rate" to Boston of 80 cents, with a rebate of 26 cents, making a net "export rate" of 54 cents. The rates of 94 cents per barrel in barrel shipments and 74 cents per barrel in tank shipments (shown in the table of rates to date heretofore given) were estimated to amount to 23½ cents per hundred pounds of oil transported.

The following tables introduced in evidence on the part of the defendants show the rate, to within a small fraction, per ton per mile under present through rates, exclusive of the charge for the barrel package, from Oil City over the routes named to New York, to New York harbor and to Boston:

OIL CITY TO NEW YORK.

18½c. per 100—\$3.70 per ton.

Rate per ton per mile via different routes.
Via W. N. Y. & P. and P. R. R. 526 miles—
7 mills.

Via W. N. Y. & P. and West Shore, 566 miles— $6\frac{1}{2}$ mills.

Via W. N. Y. & P. and N. Y., L. E. & W., 520 miles— $7\frac{1}{2}$ mills.

Via W. N. Y. & P. and N. Y. C. & H. R. R., 582 miles— $6\frac{1}{2}$ mills.

Via W. N. Y. & P. and D., L. & W. R. R., 547 miles— $6\frac{1}{2}$ mills.

Via N. Y., P. & O. and N. Y., L. E. & W., 551 miles— $6\frac{1}{2}$ mills.

Via L. S. & M. S. and N. Y. C. & H. R. R., 659 miles— $5\frac{1}{2}$ mills.

NOTE.—In the above rate to New York City is included a lighterage charge making it 2 cts. higher than the rate to New York harbor points—the present rate is $19\frac{1}{2}$ cts. per cwt.

OIL CITY TO NEW YORK HARBOR:—

16½c. per 100—\$3.30 per ton.

Rate per ton per mile *via* different roads.

Via W. N. Y. & P. and Lehigh Valley, 538 miles—6 mills.

Via W. N. Y. & P. and P. R. R., 526 miles— $6\frac{1}{2}$ mills.

Via N. Y., P. & O. and N. Y., L. E. & W., 551 miles—6 mills.

OIL CITY TO BOSTON:—

23½ per 100—\$4.70 per ton.

Rate per ton per mile *via* different roads.

Via W. N. Y. & P. and P. R. R.—“Wilkesbarre Route” 747 miles— $6\frac{1}{2}$ mills.

Via W. N. Y. & P., West Shore and N. Y. & N. E. R. R., 788 miles— $6\frac{1}{2}$ mills.

Via W. N. Y. & P., N. Y. L. E. & W. and Fitchburg, 641 miles— $7\frac{1}{2}$ mills.

Via W. N. Y. & P., N. Y. C. & H. R. R. and B. & A. R. Rds. 636 miles— $7\frac{1}{2}$ mills.

Via W. N. Y. & P., West Shore and Fitchburg, 638 miles— $7\frac{1}{2}$ mills.

Via W. N. Y. & P., D. L. & W., D. & H. C. Co. and Fitchburg, 676 miles— $6\frac{1}{2}$ mills.

Via N. Y., P. & O., N. Y. L. E. & W. and Fitchburg, 669 miles—7 mills.

Via L. S. & M. S., N. Y. C. and B. & A. R. R., 718 miles— $6\frac{1}{2}$ mills.

The average receipts per ton per mile and estimated cost of carrying a ton a mile for the year ending June 30, 1888, 1889 and 1890, as appears from the reports of the roads named on file with this Commission, are shown in the following table:

AVERAGE RECEIPTS PER TON PER MILE AND ESTIMATED COST OF CARRYING ONE TON ONE MILE FOR THE YEARS ENDING JUNE 30, 1890, 1889 AND 1888.

NAME OF ROAD.	Average receipts per ton per mile.			Estimated cost of carrying one ton one mile.		
	1890.	1889.	1888.	1890.	1889.	1888.
	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.
Boston & Albany R. R.	1.106	1.030	1.099	.791	.758	.819
Boston & Maine R. R.	1.706	1.883	2.130	1.090	1.207	1.381
Delaware & Hudson Canal Co.	1.156	1.237	1.229	.523	.529	.511
Delaware, Lackawanna & Western R. R.	.948	.963	1.070	.550	.561	.552
Fitchburg Railroad	.966	1.015	1.116	.738	.777	.840
Lake Shore & Michigan Southern Ry.	.644	.632	.673	.458	.452	.411
Lehigh Valley R. R.	.855	.942	1.089	.809	.591	.841
New York & New England R. R.	1.220	1.344	1.192	.829	.932	1.154
New York Central & Hudson River R. R.	.730	.712	.758	.512	.549	.567
Dunkirk, Allegheny Valley & Pittsburgh R. R.	1.543	1.497	1.496	1.300	1.291	1.311
West Shore R. R. (3)						
New York, Lake Erie & Western R. R. (1)	.665	.672	.599	.419	.407	.408
Philadelphia & Erie R. R. (2)	.572	.563	.716	.406	.437	.599
Pennsylvania R. R.	.661	.685	.778	.457	.486	.581
Philadelphia & Erie R. R. (4) Northern Central	.606	.629	.649	.431	.456	.499
Western New York & Pennsylvania R. R.	.576	.600	.650	.424	.451	.460

(1) Line east of Salamanca, N. Y.

(2) Line west of Salamanca, N. Y.

(3) Included in New York Central & Hudson River R. R.

(4) Included in Pennsylvania R. R.

By a comparison of the foregoing tables it will be seen that the rates per ton per mile under the rates per hundred pounds now in force, exclusive of the charge for the barrel package, as shown by the first three tables, are less on several of the roads than the reported estimate in the last table of the cost of carrying a ton of general freight a mile, and are less than the reported average receipts per ton per mile on a majority of said roads.

Evidence was introduced tending to show a lower rate per ton per mile on refined oil between other points and on other lines than the rate per ton per mile under the rates and on the lines involved in these cases, and among others,

that in 1886 the rates from Titusville to Indianapolis, Indiana and other named western points, ranged from 40 cts per barrel of refined oil to Indianapolis, Indiana to 90 cts. per barrel to Omaha, Neb. and Minneapolis, Minn. and that these rates amounted to from 4 mills to 48.7 mills per ton per mile; also, that the rate from Lima, Ohio, to New York on fuel oil in 1888 was 19 cts. per hundred weight and 4.9 mills per ton per mile, and from New York to Chicago, on lubricating oil, 25 cts. per hundred weight and 5.87 mills per ton per mile. While these rates amount to a less rate per ton per mile than the rates now under consideration, this is in many instances due to the greater mileage and it does

not appear that the circumstances and condition of the transportation in the two cases are substantially similar. Something more is required than the mere comparison of rates between different localities on different lines in order to establish the unreasonableness of a rate complained of.

Oil is transported over the lines of defendants under what is known as a commodity tariff and there is no regular classification of it in the Official Classification. The rate on oil is higher than the sixth class rate under the Official Classification. The sixth class rate from Titusville and Oil City to New York City was given as 15 cts. per hundred pounds, less 3 cts. light-erage, and to Boston as 18 cts. It is contended by complainants that a comparison of the "nature and value" of the commodities classified and rated as sixth class with oil, shows that the latter should receive a rate even lower than the sixth class rate. As oil shipped in tanks and in barrels must have the same rate, the fact should be duly weighed that in cases of tank shipments to the east there are no return loads and in barrel shipments but a small percent—the oil in the latter case rendering the cars unfit for the transportation of general merchandise. The evidence shows that, while the loss from fire is very small, if not insignificant, to the shipper, it has been at times very heavy to the roads—one fire alone from oil destroying about a half a million dollars worth of property. These and perhaps other considerations are ignored by complainants in the views they present on the question of oil rates and classification. There is evidence that on the Boston & Maine system and some other New England roads oil is carried as a sixth class commodity and that in the first part of 1887 it was carried from the Pennsylvania Oil regions to New York by some of the respondents as sixth class. The object of classification is to furnish a basis for rate charges, but an incorrect classification would neither authorize an unjust rate nor render unlawful a just rate. The question is not one of classification, but as to the reasonableness of the rate under consideration. *Murphy v. Wabash R. Co.* 8 Inters. Com. Rep. 725, 5 I. C. C. Rep. 122. The fact, if shown, that oil is charged a higher rate than other commodities of like nature and value would be a circumstance to be considered for what it was worth in connection with the other evidence bearing directly upon the reasonableness of the respective rates. Oil may be of like or less value than some articles of the sixth class, but it is different from most, if not all of them, in nature, and we are not prepared to hold under the proof that its transportation is conducted under substantially similar circumstances and conditions.

There is a net work of local pipe lines in the oil regions which convey the oil to the local

refineries and to the railroads for shipment, and the charge for this service by these lines is 20 cts. per barrel irrespective of distance. These local pipe lines by which complainants' refineries are served are operated for the most part, if not entirely, by the National Transit Company, which, there is evidence tending to show, is controlled by the Standard Oil Company. The oil regions are divided into three or four "oil fields." One of these is known as the "Bradford Field," and the price of oil quoted on the New York market is the price of the oil of this field. The complainants are in another field and get their oil from the district immediately surrounding them. The oil from this district being fresher is somewhat better than that from the Bradford district and there was about two years before the hearing a premium on it of 8 cts. per barrel. The evidence tends to show that this premium represented about the excess in value of the oil in complainants' district and used by them over that in the Bradford district. This premium was, however, raised to 18 cts. per barrel and about August 18, 1888, a short while before the 14 cts. charge for the barrel package was placed on barrel shipments, it was raised to 20 cts. per barrel. The complainants have to pay, therefore, 20 cts. more for the oil used by them than the price of the Bradford oil, which is the New York market price, and this 20 cts., according to the weight of the evidence, is 12 cts. more than the difference in quality of the two classes of oil would justify. The evidence tends to show that complainants get their oil from the National Transit Company, and there is also evidence that the local pipe lines in order to secure the patronage of the producer bid against each other for the oil and that the advance in the premium is due in part at least to this competition.

The complainants have introduced in evidence two statements of the results of refining 1,000 barrels of crude oil at Titusville and Oil City, respectively, the one showing a loss in refining of \$282.98 and the other, a loss of \$278.45. In the cost are included among other items, the above mentioned premium of 20 cts. per barrel and the pipeage to the railroad of 20 cts. per barrel. These statements are dated, respectively, May 14 and May 15, 1889. The witness who made out one of these statements (Burwald) testified that the loss in refining had only been since January, 1889, and had gradually increased during February, March, April, and May, 1889. He further stated that this was the dull season of the year in the oil business and that the greater part of the refining business is done from June to January. No item of transportation charges is embraced in these statements except the change of 20 cts. per barrel for the service of the local pipe lines, and the losses shown are the results of the re-

fining up to the time of shipment on the railroad. The business of the refineries in the oil regions appears to have been generally unprofitable at the date of the hearings and several of them had partially or entirely ceased operations. About 40 per cent of the products of the crude oil is an inferior oil, which is for the most part exported and known as "export oil." In the export business, the refiners whose refineries are located in the oil regions are placed at a disadvantage with those of the Standard Oil Company and its allies at the seaboard near New York. The latter own or control the pipe lines to the seaboard, and also the facilities for transfer of the oil out of pipes and tank cars into bulk steamers or vessels. This, together with the fluctuating market prices of petroleum products and other matters hereafter referred to besides the cost of rail transportation, have probably contributed to depress the business of the local refineries.

The complainants and their witnesses testify that the business of the local refineries cannot be conducted profitably, if at all, under the present rates. On the other hand, the officials and employes of the defendant railroads state that these rates barely afford a reasonable compensation and that any reduction will be ruinous to their business. In the case of complainants and their witness reference is had for the most part to the advanced rate on barrel shipments for the barrel package, resulting in a through rate to New York points of 66 cts. per barrel and to Boston points of 94 cts. per barrel. The charges in the complaints are against these rates as being excessive and unreasonable, and in the case against the Pennsylvania Railroad Company and the Western New York & Pennsylvania Railroad Company, the complainants set forth, that notwithstanding they were subjected to disadvantages by the rates prior to the institution of the barrel package charge in their "*export trade* in competition with their rivals affiliated to the Standard Oil Trust," still "they were enabled by their advantages in the *local markets* to maintain and even increase their business." It would appear from this statement and the facts elsewhere set forth as to the transportation and other facilities possessed by the seaboard refineries, that the complainants, or local refineries in the oil regions, had the advantage in the *local markets* and the seaboard refiners had the advantage in the *export trade*, and that the former so far counterbalanced or offset the latter, that under the rate existing at the time the charge for the package was placed on barrel shipments, the local refiners were able to maintain and increase their business. In regard to the position of the defendants towards the old rates, as before stated in the discussion of the question of discrimination as between tank and barrel shipments, the charge for the

barrel package was not originally made by the roads on the ground that it was necessary in order to yield them a fair remuneration for the service of transportation, but only, as claimed by them, for the purpose of conforming to what they understood to be the ruling of this Commission. Two of the roads against whom complaint is filed, the Fitchburg Railroad Company and the Delaware & Hudson Canal Company, in their answers express willingness for a reduction of the rates. On this point the Fitchburg Company says, that "it has no voice or control in the fixing of the rates and charges complained of, the same being made by the trunk lines," and "that it has no objection to the granting of complainants' petition so far as the same relates to the reduction of rates and is willing to take its proportion of the through rates should they be reduced as prayed for," and the Delaware & Hudson Canal Company, "That any rates which have been established for such freight, were established by the initial road without its knowledge and consent, and it is willing to accept any rates for such freight that may be adopted and established by the other roads in interest." In the original printed argument filed Feb. 24, 1890, by counsel for the Pennsylvania Railroad Company, it is only contended "that the present rates charged, *aside from the additional rate charged on the package*, are just and reasonable." Referring to the testimony on this question, the counsel says, "that there is a consensus of opinion of the experts placed upon the stand, that the present rates *independent of the question of charge for the barrel package*, are just and reasonable" and "that complainants' as well as defendants' witnesses agree upon this point." This statement is correct as to at least two of complainants' leading witnesses, namely, A. D. Deming, President of the Independent Refiners' Association of Oil City (one of the complainants), and Louis L. Walt, of the Penn Refining Company. They stated in substance that, if the rates had remained as they were before the charge for the barrel package, they would have been satisfactory and no complaint would have been made.

The 52 cts. per barrel rate to New York points had been in force for a considerable period before the additional charge for the barrel package was instituted and no complaint is shown to have been made. Under this rate the complainants state they maintained and increased their business. The prior materially lower rates to New York points appear to have been the result of competition between two pipe lines and the railroads. The rate per ton per mile under present rates, exclusive of the charge for barrel package, are not in excess of the reported average receipts per ton per mile on about twelve out of fifteen of the roads in-

volved in these cases and interested in the question under consideration; they are much less than such average receipts on nine of them; and are less than the estimated cost of carrying a ton of general freight a mile on four of them. (See table p. 175.) While this rate is fully as high as it should be in view of the nature of the traffic and the conditions surrounding it and might possibly be made less without depriving the carriers of a fair remuneration for their service, we do not feel authorized under all the facts and circumstances disclosed by the record and evidence in these cases, to order a reduction in addition to the exclusion of the charge for the barrel package, and our conclusion is that the rate to New York points should be not more than 18½ cts. per hundred pounds, both in tank and barrel shipments, to be charged in both cases only for the weight or quantity of oil carried, exclusive of any charge for the package.

III.

The reasonableness of the oil rate from Oil City and Titusville to Boston and Boston points remains to be inquired into and in that connection the charge made by complainants against the roads forming lines between said points, that said rate is "disproportionate as compared with the rates for the like service on the like traffic under substantially similar circumstances and conditions from Oil City and Titusville to New York and New York points. The roads involved in this charge allege that the differential rates demanded and collected on the oil traffic to Boston and Boston points are just and reasonable, and in due proportion to those to New York and New York points. The present rates to Boston of 94 cents per barrel on barrel shipments and 74 cents per barrel in tank shipments were, as before stated, estimated to amount to 23½ cts. per hundred pounds of oil transported. The 74 cent rate in tank shipments, which is on the oil alone, is 22 cts. in excess of the 52 cents rate to New York points. It will be observed that in the table heretofore given of existing rates, the rate to New York City was when these complaints were filed 18½ cts. per hundred pounds of oil, being 2 cents, more than that to New York harbor points. The rate now by the West Shore line (it has been discontinued by the others), is 19½ cts. per 100 lbs., or 3 cts. more than the New York harbor rate. This difference is made on account of the lighterage charge paid by the roads where the shipment is to New York City. The rate of 19½ cts. per hundred pounds of oil according to the estimated weight of the contents of a barrel amounted to about 61½ cts. per barrel. The rate to Boston, then, of 74 cents per barrel of oil is 12½ cents more than the rate to New York City, and, as above

shown 22 cents, more than the rate to New York harbor points. The charge for the barrel package being held to be unlawful, our inquiry will relate to the rate of 23½ cts. per hundred pounds (estimated to be 74 cents per barrel on the contents of the barrel) common to both barrel and tank shipments to Boston. This 23½ cts. rate per 100 lbs. is 7 cents more than the New York harbor rate of 16½ cts. per 100 lbs. The difference between the barrel rate including the charge for the package to Boston and that rate to New York Harbor points is 28 cents, which is greater than the difference in the rates between said points on the contents of the barrel—the latter difference being, as appears above, 22 cents. *The complaint and most of the testimony on the subject relate to the rates including the barrel package charge and the disparity between those rates.* It will also be noted that the 74 cent rate to Boston is 4 cents less than the rate (78 cents per barrel) which had been in force about a year prior to the institution of the charge for the package in barrel shipments. As before stated, about March, 1883, a net rate of 75 cents was adopted, the rate being 80 cents, less a reduction of 5 cents for cartage and from some time in 1884 to July, 1885, there was a net "export rate" of 54 cents, which was the result of a rebate of 26 cents from the full rate of 80 cents. With the exception of this "export rate," the regular tariff rate from March, 1883, to the present time appears to have been greater than the 74 cent rate (estimated 23½ cts. per cwt.) now in force on the barrel in tank shipments. The rate per ton per mile under this through rate is from 6.3 to 7.3 mills by the different routes given in the table *supra*.

This rate per ton per mile is not only less than the average receipts per ton per mile but also than the estimated cost of carrying a ton a mile on the following roads running to Boston and to Boston or New England points, as reported by said roads and shown below:

Roads.	Average receipts per ton per mile.			Estimated cost of carrying a ton a mile.		
	1888	1889	1890	1888	1889	1890
	Cts.	Cts.	Cts.	Cts.	Cts.	Cts.
Boston & Albany R. R.	1.009	1.080	1.105	.819	.753	.791
Boston & Maine R. R.	2.180	1.888	1.706	1.331	1.207	1.090
Fitchburg R. R.	1.116	1.015	.965	.840	.777	.738
New York & New England R. R.	1.192	1.344	1.220	1.154	.962	.829

The cost of transportation on the roads running to Boston and Boston points appears to be greater than that on roads to New York and New York points. The distance by shortest route from Oil City and Titusville to Boston is over a hundred miles greater than to New

York and New York points and is still greater through Boston to Boston points. It is claimed that the volume of traffic to New York is very much larger than to Boston. There is also a terminal expense at Boston of about 1 cent per hundred pounds included in the Boston rate, which is not the case with the rate (52 cents) to New York harbor points. Moreover the roads to New York harbor are in competition as to the oil traffic, with the pipe lines. The evidence tends to show that the cost of transportation by pipe line is very much less than that by rail.

In the case of the *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754, 1 I. C. C. Rep. 486, the Commission says: "The contention of petitioners for equality of rates with New York is not supported by equality of distance, of cost of service, or by other considerations, such as volume of business, competition of rail and water ways, ocean service, terminal facilities, and storage capacity—all elements of more or less importance in the determination of rates, and some of them of controlling influence." The conclusion in that case was that the Boston Chamber of Commerce had not, "upon any legitimate grounds of rate-making, maintained their application for equality of rates with New York for eastbound local shipments to Boston." In the recent case of *Toledo Produce Exch. v. Lake Shore & M. S. R. Co.* 3 Inters. Com. Rep. 890, 5 I. C. C. Rep. 166, the propriety of higher rates to Boston than to New York from Chicago and other western points was maintained, but the methods pursued by the carriers in ascertaining the amount of the difference—that is, by a fixed arbitrary added to the New York rate—was condemned, and it was held that "the arbitrary differential between New York and Boston should be abandoned and the differential should be adjusted upon the basis of percentage." The principal fact upon which this decision rests, is, that the rate from Chicago to New York is taken as the basis for rates to Boston and other points. The system of making the rates to Boston and such other points by adding an arbitrary to the New York rate, which arbitrary remained the same notwithstanding changes or fluctuations in the New York rate, was held to be wrong in principle and calculated to work injustice. For example, the Commission say, "By the use of an arbitrary sum there is no proper proportion maintained, if the New York rate changes; thus, if the grain rate to New York were fifty cents the present arbitrary would make the Boston rate 10 per cent greater; and if the New York rate should be fifteen cents, the use of the present arbitrary would make the Boston rate 33 per cent greater." In the matter now under consideration of the oil rates from Titusville and Oil City to New York and Boston, respectively,

it does not appear that the former is the basis of the latter or that the difference between the two rates is an arbitrary fixed differential. As will be seen from the tables of rates heretofore given, the difference between the oil rates to New York and Boston has varied from time to time and the difference on the contents of the barrel is less now by four cents than it was prior to the adoption of the charge for the barrel package.

Oil is not classified but has a special commodity rate. The circumstances and conditions attending its transportation from the Western Pennsylvania Oil regions to New York and New York harbor are, as we have shown, materially variant from those which affect that transportation to Boston and New England points, and particularly, *in the matter of pipe line competition*. In view of all the foregoing facts bearing on this question, and the matters hereinafter discussed, which are not subject to regulation by this Commission, and which, independent of the rates in question, place the refiners at Oil City and Titusville at a disadvantage as to the New England trade with the seaboard refiners at New York harbor, we are not prepared to hold that the New York and Boston rates on the contents of the barrel (to which our inquiry is now limited) are unjustly discriminative or relatively unreasonable as between those cities. We are also, of the opinion that it has not been made to appear that a Boston rate of 23½ cents per hundred weight of oil transported, common to barrel and tank shipments and exclusive in both cases of any charge for the package, is in itself unjust or unreasonable. As before shown, this rate is less than the rate previously in force and against which no complaint appears to have been made. The present complaint, it is to be noted, is against the rates with the barrel package charge included.

The Western New York & Pennsylvania R. Co. issued a tariff sheet, dated April 27, 1888, giving Boston rates on eastbound shipments from Oil City and Titusville in carloads to about one hundred and forty points reached by the Boston & Maine system including Manchester, N. H., Salem, Mass., and Portland, Me. These through rates were abrogated by order dated Oct. 25, 1888, taking effect Nov. 6, 1888, and since that time through rates have been made by the Western, New York & Pennsylvania line only to its point of junction with the Boston & Maine road, from which junction points the local rates are charged to points of destination. The reason assigned for the withdrawal of the through rates to those points, is, that the proportion of the through rate demanded by the Boston & Maine road was so great that the other roads could not afford to maintain it. Only four or five days notice to shippers and the public of the abrogation of the rates was given. The notice is

dated over 10 days before it was to become effective, and the General Freight Agent of Western New York & Pennsylvania R. R. Co. testified that the 10 days' notice required by law would have been given but for the failure of the clerk to whom the matter was intrusted to follow instructions, and that the road offered to refiners to protect any shipments made by them under the canceled rates prior to the time when the regular ten days' notice would have expired. There is no other evidence on this point, and it does not appear that the failure to give the notice the required time was *willful*, or that in consequence thereof any *injury* has been sustained by any shipper or other person. *Railroad Commission of Florida v. Savannah, F. & W. R. Co.*, 8 Inters. Com. Rep. 688, 5 I. C. C. Rep. 18. The complainants in their printed brief request this Commission to order a restoration of the through rates abrogated as above stated. Joint through rates are matters of contract or agreement among carriers engaged in interstate commerce, and this Commission has no power under the statute to compel them to enter into an arrangement for such through rates. *Capehart v. Louisville & N. R. Co.*, 8 Inters. Com. Rep. 278, 4 I. C. C. Rep. 285; *Little Rock & M. R. Co. v. East Tennessee & G. R. Co.*, 2 Inters. Com. Rep. 454, 3 I. C. C. Rep. 1.

The evidence tends strongly to show that the Standard Oil Co. and its allies own or control the pipe line system to New York harbor points. Whether or not they pay the regular rates, does not appear. If they own the pipe line, the payment of freight charges would be merely going through the process of "taking money out of one pocket and putting it in another;" if they control them, they can, and probably do, dictate terms as to rates. Whether or not they own the facilities at the seaboard for transshipment of tank oil to bulk steamers or vessels, they have a monopoly of those facilities to the exclusion of complainants. The crude oil is run by them through the pipe lines to the seaboard and there refined. They then ship it by sea (a cheap mode of transportation) to points along the New England coast, where reservoirs are prepared for its reception. From those receiving stations, the oil is carried to interior New England points. By reason of their superior facilities and great advantage in the way of cheap transportation, together with the abrogation of the through rates on the Boston & Maine Railroad system, these refiners at the seaboard near New York are, as competitors of complainants, enabled to undersell them at New England points. The complainants being for the most part barrel shippers, the charge for the barrel package has, also contributed to this result. The facilities for transshipment at the seaboard do not appear to be furnished by, or to be under the control of the railroads,

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It cannot be affirmed with any degree of certainty that the disadvantageous position of the complainants with reference to the New England trade is attributable to rates, the regulation of which is within the control of this Commission under the Act to Regulate Commerce.

The fact that the 52 cent rate to New York harbor points was the result of the contract between the Pennsylvania R. Co. and the National Transit Co. even though the latter company be an ally of, or owned and controlled by, the Standard Oil Company, will not invalidate that rate. If it be in itself just and reasonable. It is contended by complainants that this contract is in violation of Section 5 of the Act to Regulate Commerce, which relates to pooling of freights and division of earnings by common carriers subject to the provisions of the Act. That section provides, "That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof." The contracts, agreements or combinations forbidden are those "for the pooling of freights of different and competing railroads," or for the division of the earnings "of such railroads." The contract under consideration is not one for the pooling of freights of different railroads, or for a division of the earnings of different railroads, but for a division of traffic between a railroad and a pipe line. A railroad is not interdicted from pooling with a competing pipe line. This contract, therefore, does not fall within the description of contracts forbidden in the Act. On this ground the Commission has in the matter of express companies expressed the opinion that such companies when in competition might pool their earnings without being guilty of a violation of the law. *Re Express Companies*, 1 Inters. Com. Rep. 677, 1 I. C. C. Rep. 368. Although transportation by express companies and pipe lines should doubtless be made subject to the provisions of the Act to Regulate Commerce, the failure to make them so can be remedied only by Congress.

When a motion was made by complainants' counsel for the production of the contract between the Pennsylvania R. Co. and the National Transit Company, it was resisted by counsel for the Pennsylvania Company on the ground, among others, that it might furnish evidence which would tend to criminate that Company. The Commission denied the motion for the reason that if put in evidence the contract would be material only for the purpose of throwing light on the question of the reasonableness of the rates complained of and

the facts which the complainants alleged would be shown by the contract had been admitted in the answer of the defendant and therefore the production of the contract itself was unnecessary. In this connection, however, it was said that it was "within the power of the parties holding this contract to remove by its production any proper legal inference that might be drawn from the facts that are admitted and that if not produced they are probably prepared to accept whatever legal consequences may follow from a refusal to produce." It is difficult to conceive of any legitimate inference consistent with absolute fair dealing to be drawn from the refusal to produce the contract and, particularly, when one of the grounds of the refusal is that above stated. The precise date of this contract is not shown but it appears to have been made in the first part of 1895. About August 18, 1888, the advance to 20 cents per barrel of the premium on oil used by complainants took place; a little over two weeks thereafter, on Sept. 3, 1888, the charge for the barrel package in barrel shipments was adopted; and on October 25, 1888, the through rates to points on the Boston & Maine railroad system were abrogated. These three events, occurring within a period of two months and a week, all prejudicial to the complainants as refiners at Oil City and Titusville and advantageous to those at the seaboard in the vicinity of New York, lend color to, if they do not substantiate, the charge made by complainants of concert of action between the roads immediately concerned and the seaboard refiners for the purpose of favoring and giving an undue advantage to such seaboard refiners to the disadvantage and at the expense of complainants. The defendants are not shown, however, to be in any way responsible for the advance in premium and it does not appear to be a matter subject to regulation by this Commission, and, as before stated, we have no power to order a restoration of the abrogated through rates.

By the supplements of the Western New York & Pennsylvania R. Co. to its oil tariffs, effective, Sept. 1, 1892, heretofore mentioned, not only was the "wastage" allowance in tank shipments discontinued, but the estimated weight of a gallon of tank oil was raised from 6.8 lbs. to 6.4 lbs. Fifty gallons being the contents of a barrel, as adopted by the roads for transportation purposes, the weight per barrel at 6.3 lbs. per gallon was 315 lbs., and, at 6.4 lbs. per gallon, it is 320 lbs.—a difference of 5 lbs. The rates per hundred pounds are unchanged. At the rate to Boston and Boston points of 23½ cts. per hundred pounds, the 5 lbs. increased weight would amount to an increase of rate on tank shipments of 11.7 mills per barrel, and at the 16¼ ct. per hundred pound, rate to New York harbor points, to 8.2 4 INTER S.

mills. This increase of rate per barrel on tank shipments is inconsiderable *in comparison* with the greater charges on barrel shipments (arising from the charge for the barrel package) than on tank shipments to those points, which are, respectively, 20 cts. and 14 cts. By the Pennsylvania R. R. (Green Line) the oil rate is by barrel alone and not by the hundred pounds. The barrel rate by that line appears to have remained unchanged. This being the case and the number of gallons per barrel remaining the same, the increase of weight per gallon can effect no change of rates as to that line. Where the rate is by the barrel and remains unchanged, an *actual* increase of the weight of the contents will effect a decrease of rate as more oil will be hauled for the same price but if there is no actual but only an estimated increase of weight of contents there will result no change of rate, as the same quantity will still be hauled for the same price. While the weight of the tank gallon was at the commencement of these proceedings and until recently (Sept. 1, 1892) placed by the carriers at 6.3 lbs., the weight of the barrel and contents in barrel shipments was placed at 400 lbs.—the contents in both cases being 50 gallons. These weights of the gallon and of the barrel and contents, are *estimated* weights and it is shown in the case of *Rice v. Cincinnati, W. & B. R. Co.* 8 Inters. Com. Rep. 841, 5 I. C. C. Rep. 198, that they vary materially from the actual average weights, and result in "a constant and appreciable advantage to the shipper in tanks." The grounds of this ruling are clearly and forcibly stated in the opinion in that case and need not be repeated here. The raise in the weight of the tank gallon was made since that decision was rendered, and, being without a corresponding raise in the weight of the barrel and contents in barrel shipments, was, doubtless, intended to do away with the discrimination in this respect against the barrel shipper. The order of the Commission in that case was that the defendants "base their charges on petroleum and its products upon the *actual weight* of shipments whether in tanks or barrels; and for all cases where actual weights cannot be ascertained without great inconvenience," that they "adopt and employ such a rule or method of estimating weights as shall practically operate to secure to the shipper in barrels, for the same aggregate sum as may be paid by the shipper in tanks in any case, the transportation between the same points of an equal amount of freight paid for." (This order, it was declared, should not "be understood as authorizing charges on barrels when tanks are carried free, that question being expressly reserved for further consideration.") The raising of the gallon tank weight from 6.3 lbs. to 6.4 lbs., the weight of barrel and contents being estimated at 400 lbs. as before, is not a compliance with

the order that "charges on petroleum and its products be based upon *actual weight* whether in tanks or barrels." Whether the condition exists on which the alternative requirement of the order is based, that "actual weights cannot be ascertained without great inconvenience," and if so, whether the raise of the tank gallon weight to 6.4 lbs. meets that requirement, we abstain from determining on the facts and evidence now before us, and these cases will be held open for further developments and investigation in reference to these matters. As to the Pennsylvania Railroad (Green Line), as we have seen, the rate being by barrel alone both in tank and barrel shipments, the increase in estimated weight of the tank gallon effects no change in the relative rates on tank and barreled oil.

The practice of making arbitrary reductions in computing freight charges from the actual amount of the commodity transported and for which the shipper receives pay, as in the case of the discontinued "wastage" allowance on tank shipments, and of *estimating* weights where it is practicable to ascertain actual weights, opens the door for preferences, discriminations and evasions of the law. The material facts as to estimated weights in tank and barrel shipments being substantially the same in the present cases as in the case of *Rice v. Cincinnati, Washington & Baltimore R. Co.*, the order above recited, issued in the latter case, is adopted in the present cases and the defendants herein are directed to comply therewith.

It is further ordered, That the defendants' cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants, and others who may apply therefor, for the purpose of loading and shipping oil therein to such New York harbor and Boston points as the shippers may direct; and that said defendants notify the public accordingly by publication in their tariffs of rates and charges, pursuant to the provisions of sections 6 of the Act to Regulate Commerce, and also file copies of said tariffs with this Commission as required by the provisions of said section. It is further ordered that the rate on shipments of oil both in tanks and in barrels over said roads shall be the same and said rate from said oil regions to New York points shall not exceed 16½ cts. per hundred pounds, and to Boston and Boston points shall not exceed 23½ cts. per hundred pounds; and the defendants are required to refund to the several parties legally entitled thereto, within 60 days after notice of this decision

and demand thereof by such parties, all sums received by them for transportation over their roads of the barrel package on shipments of oil in barrels, when the use of the tank cars has not been open to shippers impartially, and the shipper claiming reparation has been thereby deprived of their use.

Inasmuch as the amounts wrongfully received from the complainants respectively cannot be ascertained from the evidence already taken, the proceedings will be continued for such further action or inquiry in that behalf as may become necessary.

We desire to supplement our conclusions in this case with the following remarks:

In the cases at bar the principal cause of alleged unlawful discrimination is the charge for the barrel, and our attention has been particularly directed to that feature of the transportation. In order to guard against misapprehension the Commission wishes to say that these cases are decided purely upon the facts as set forth and the situation as delineated in the record and by the evidence. It is not intended to hold, nor should this report be construed to hold, that, aside from other controlling circumstances, the carrier in hauling packages is not entitled to pay according to the weight thereof. It is simply held that on account of the peculiar circumstances in these cases to charge for the weight of the barrel places barrel shippers at a disadvantage as against tank shippers, and the practice in these cases, while the circumstances and conditions remain unchanged, should be condemned.

It was stated in the *Rice* cases, 8 Inters. Com. Rep. 841, 5 I. C. C. Rep. 193, that—

"Whether the advantages which the tank shipper apparently enjoys are a mere incident of his business, for which the carrier should not be held responsible, or whether these benefits result from discriminating usages adopted by the railroads, and their failure to supply all customers with a special vehicle suited to the demands of a special traffic, must be, in any particular case, a most perplexing inquiry. To require the barrels in which this article is shipped to be carried without expense is contrary to the general and lawful custom which includes the package in the freight to be paid for; yet, in certain situations and under certain circumstances, there may be no other remedy for actual injustice, and no other effectual means by which the carrier can render equal and impartial service to every patron.

"We have already taken occasion to point out the only instance in which this precise claim has been heretofore made or allowed, and in doing so have sought to emphasize the proposition that rulings based upon special facts and local conditions are not to be regarded as formulated precepts for general observance."

These *Rice* cases cover the greater portion of the country, and the conditions of trans-

portation and of commerce vary greatly in the different sections affected by the controversies; but the cases now under consideration relate to the transportation of oil from refineries to the seaboard, and through a comparatively small territory in which the Commission has been investigating cases involving oil transportation for a number of years. Upon the facts herein we are forced to the conclusion that the only practical remedy for the unjust

discrimination now existing is to give defendants the alternative of abolishing the charge for the barrel, and in so doing we are only permitting them to return to a practice which they followed during a long period, which they only discontinued under a mistaken construction of our original Rice decision, and which they now seek to justify on wholly different grounds.

THE MERCHANTS' UNION OF SPOKANE FALLS

v.

THE NORTHERN PACIFIC R. CO. and THE UNION PACIFIC RAILWAY COMPANY.

1. Transportation by rail from eastern points to the "Pacific Coast Terminals," Portland, Tacoma and Seattle, is affected by the competition, of controlling force and in respect to traffic important in amount, of water carriers reaching the same terminals, but such competition does not affect like transportation from said points to the city of Spokane, Washington: *held*, therefore, that defendants are justified, by reason of such dissimilarity in circumstances and conditions, in maintaining higher rates on shipments of like property from said points for the shorter distance to Spokane than for the longer distance to said Pacific terminals. The competitive position and attitude of the Canadian Pacific Railway, a foreign carrier, considered in connection with existing water competition, but the separate effect of competition by the Canadian route not found or determined.
2. Class rates in effect upon the defendant lines and the lower commodity rates to their Pacific terminals examined and discussed: *held*, that the only justification for a through rate less than an intermediate rate on the same article is the compulsion of rail carriers to accept the reduced compensation or suffer ocean rivals to perform the service, and where the pressure of this alternative is not felt there is no ground upon which the lower through charge can be excused. No article should be carried to terminal points on commodity rates, which, if the class rates were imposed would still seek rail rather than water transportation, and any violation of this rule is unjust discrimination against the intermediate town compelled to pay the higher class rate on the same article.
3. In the matter of carload and mixed carload rates, minimum weight of shipments entitled to carload rates, and in all other respects, defendants are required to provide for and allow the same privileges, facilities and advantages on shipments to Spokane as are provided or allowed on like shipments to Portland or other Pacific coast terminals.
4. "Blanket" class rates applying upon the Northern Pacific road for a distance of over five hundred and eighty miles found relatively unreasonable: *also held*, that rates to Spokane, the principal distributing center to which such blanket rates apply, are unreasonable in themselves. Defendants ordered to cease and desist from charging rates on property from eastern points to Spokane which materially exceed 82 per cent of class rates now in effect both to Spokane and Pacific coast terminals. Provision made for reopening the case if necessary, and bringing in other carriers who may be affected by the order.
5. The Northern Pacific Railroad Company, notwithstanding certain provisions in its charter, is subject, like all other interstate carriers, to the authority conferred by Congress in the Act to Regulate Commerce. Citing and affirming *Raworth v. Northern Pac. R. Co.* 8 Inters. Com. Rep. 857, 5 I. C. C. Rep. 257.

[No. 189.]

Complaint filed April 2, 1889.—Answers filed April 24, 1889, and May 4, 1891.—Hearings had May 27, 28, 29 and 30, and June 4, 1891.—Briefs filed August 4, 1891, to January 11, 1892.—Decided November 23, 1892.

LOWER charges for longer hauls. Unreasonable rates for the shorter distance.
See Complaint, 2 Inters. Com. Rep. 452.

*Turner, Forster & Turner and H. E. Houghton for Complainant.
J. H. Mitchell, Jr., and James McNaught for Northern Pacific R. Co.
John M. Thurston for Union Pacific R. Co.*

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REPORT AND OPINION OF THE COMMISSION.

* *Knapp, Commissioner:*

The charges investigated in this proceeding, which are mainly directed against the Northern Pacific Railroad Company, are summarized in the brief of complainant's counsel as follows:—

First: That the rates charged on all classes of freight to Spokane Falls are unreasonable.

Second: That freight rates are so adjusted with reference to competing points, to wit: Portland, Tacoma, Seattle, Ellensburg and Missoula, as to constitute the same an unreasonable discrimination against Spokane Falls and in favor of said competing points.

Third: That a greater rate is charged to Spokane Falls for the transportation of property from eastern terminals than is charged to Portland, Tacoma and Seattle for like kinds of property under substantially similar circumstances and conditions; all the said points being on the line of the Northern Pacific Railway, Spokane being more than 550 miles east of Portland and more than 400 east of Tacoma and Seattle, and being included in the haul from eastern terminals to said Portland, Tacoma and Seattle.

In the complaint on file these general charges are set forth in numerous allegations relating to the location and commercial importance of the city of Spokane, with many illustrations of the disparity in rates on west-bound shipments between Spokane and the several towns above-mentioned, all tending to show the resulting disadvantage and injustice to the locality in whose behalf this proceeding is instituted. The relief sought by the complainant is such a reduction of the rates now exacted at Spokane as will make the same fair and reasonable; a readjustment of existing tariffs so as to prevent undue advantage to towns competing with Spokane in the territory alleged to be tributary to the latter place, and the enforcement of the prohibitory rule of the fourth section of the Act to Regulate Commerce, except so far as, in the judgment of this Commission, departure therefrom may be justified by the competition of the Canadian Pacific Railroad.

The answer of the Northern Pacific Company, so far as it need be referred to in this connection, bases resistance to this application upon two propositions. In the first place it denies that the charges now imposed upon traffic from eastern terminals to Spokane are in any respect excessive or unreasonable, and alleges that no unlawful discrimination against that town can be predicated upon the relatively lower rates accorded to Portland, Tacoma and Seattle, because the circumstances and conditions attending the transportation to those localities are greatly dissimilar. It avers, in

the second place, that these lower rates on through shipments from the east to its several terminals on the Pacific are forced upon this defendant by the competition of ocean carriers reaching the same points from various Atlantic ports, and other ports on the Pacific coast, and by the Canadian Pacific railroad, none of which are subject to the Act to Regulate Commerce. The nature and extent of this competition, and its consequent influence upon the trans-continental rates of this defendant, was a controverted question of fact to which much of the testimony was directed.

A third defense, not disclosed or suggested by the answer, is strenuously urged upon our attention in the brief filed by counsel for the Northern Pacific Company. It is insisted, in effect, that the transportation charges of this carrier are not subject to reduction or regulation by the Interstate Commerce Commission, because its charter, granted by special Act of Congress, vests in its board of directors the final and conclusive power, free from legislative control, of determining the compensation which its services shall receive, except those performed for the general government.

The facts disclosed by the investigation which are deemed material, and upon which we base the conclusions of this report, are found and stated as follows:

Findings of Fact.

1. The complainant in this proceeding represents the city of Spokane in the state of Washington. It is a voluntary association of merchants and business men organized, among other purposes, to secure equal and reasonable rates for railroad transportation to and from that city. Originally this town was known by the name of Spokane Falls, and that continued to be its designation until sometime after this complaint was filed. Prior to the hearing, however, the corporate name had been changed by dropping the word "Falls," and the name of Spokane, therefore, will be hereafter used in this report. When this proceeding was commenced, which was in March, 1889, the Northern Pacific was the only railroad reaching Spokane and, accordingly, that carrier was the sole defendant named in the petition. In October of that year the Union Pacific completed a branch road which connected Spokane with its main line at Pendleton, Oregon, a distance of 251 miles, and thereupon became a competitor for the carrying trade of Spokane. It has, however, at all times made the same rates as the Northern Pacific on Spokane traffic, and the two roads appear to be united in maintaining the rates

of which that town complains. In view of its obvious interest in the controversy arising upon this complaint, the Commission of its own motion made an order, April 21st, 1891, allowing the Union Pacific Company to intervene as a party to the proceeding. It did so within the time prescribed by adopting substantially the answer which had previously been filed by the original defendant. The hearing took place, mainly at Spokane, in May, 1891, and the case was submitted without oral argument, briefs being thereafter filed by the respective counsel. Both defendants are common carriers engaged in the transportation of interstate commerce.

2. The Northern Pacific Railroad Company was chartered by Act of Congress approved July 2d, 1864, and subsequently re-organized under the provisions of another Act approved September 29th, 1875. It owns and operates a line of railway for the transportation of freight and passengers from Ashland, Wis. to Portland, Ore. and Wallula, Wash. a distance of 2,187 miles. Its principal eastern termini are the cities of St. Paul, Minneapolis and Duluth in the state of Minnesota; and its principal western termini the city of Portland on the Willamette river in the state of Oregon, and the cities of Tacoma and Seattle on Puget sound in the state of Washington. It also owns or controls numerous tributary and branch lines, some of which are of considerable length and importance, those in the territory surrounding Spokane being the Central Washington Railroad, the Spokane & Palouse Railway, and the Spokane Falls & Idaho Railroad. The aggregate mileage operated by this company exceeds 4,600 miles. The city of Spokane is in eastern Washington, on the main line of the Northern Pacific, 1,512 miles west of St. Paul and 544 miles east of Portland. The distance from Spokane to Tacoma is about 400 miles and to Seattle 440 miles.

3. The Union Pacific Railway Company was also chartered by special Act of Congress approved July 1st, 1862, and numerous acts subsequent so that date have enlarged its corporate powers. Its main line extends from Council Bluffs, Iowa, to Ogden, Utah, a distance of 1,038 miles. At Ogden it connects with the Southern Pacific system, forming a trans-continental line to San Francisco and other points on the Pacific coast. It also controls or operates various roads extending from Ogden, and also from Granger, Wyoming, on its main line to Portland, Oregon, with branch lines diverging at different points, the whole constituting, in conjunction with the main stem and its connections, a trans-continental system of great magnitude. Among these branch lines is the one from Pendleton to Spokane above mentioned, and one from Pocatello, Idaho, to Helena, Montana, which latter

place is also on the main line of the Northern Pacific about 1,180 miles west of St. Paul. The distance from Chicago to Portland by the Union Pacific appears to be some 200 miles less than by the Northern Pacific, but the former reaches Spokane by a much more circuitous route than the latter, the Northern Pacific having the shorter line between Chicago and Spokane by more than 400 miles. The difference in distance from St. Paul to Spokane in favor of the Northern Pacific is still greater.

4. Spokane is by far the largest and most important town in eastern Washington. It is situated at the falls of the Spokane river which afford a natural water power of great volume and value. When the Northern Pacific road was completed to this point in 1881, it had but a few hundred inhabitants and a limited retail business. Its growth since that time has been so rapid and substantial as to attract widespread attention and justify expectations of great prosperity in the future. At the time of the hearing its population had increased to twenty thousand or more, and its business had expanded into large proportions. More than three and a half million of dollars were shown to be invested in the various branches of its wholesale trade, and it exhibited many indications of great activity and enterprise. Its location is fortunate and its natural advantages superior. It appears to be the commercial center of a large district into which railroads have already been constructed in several directions. It is separated from the towns with which it seeks to compete, both on the east and on the west, by mountain ranges over which railroad construction is difficult and costly, and where operating expenses must necessarily be large. Its nearest tide-water rival is four hundred miles away, and included in that distance are the long and heavy grades by which the Northern Pacific crosses the barrier of the Cascades. Within convenient reach are numerous mining regions and an agricultural country of great extent and high degree of fertility. About seventy-five miles to the southeast are the Coeur d'Alene mines, with a population of about five thousand, connected with Spokane by a railroad operated by the Northern Pacific. Less than ninety miles east on the main line of that company are the Pend d'Oreille mines supporting some three thousand persons. To the northeast are the Kootenai mines in British Columbia, reached *via* Hope on said main line eighty-five miles east of Spokane and supporting some two thousand inhabitants. The Salmon river mines, with a population of five thousand, are about one hundred and fifty miles northwesterly, and between lies a fertile farming region, called the "Big Bend Country," situated on a bend of the Columbia river, and already occupied by upwards of fifteen thousand persons

Southerly and southwesterly is the "Palouse Country," so called, with an area of some twelve thousand square miles, peculiarly adapted to wheat raising, and containing an estimated population of forty thousand. Into this district runs the Spokane & Palouse railroad operated by the Northern Pacific. In various directions within a radius of one hundred and fifty miles are numerous towns and villages surrounded by farming communities, or supported by mining and kindred industries. The advantages of soil and climate, and the attractions of great mineral resources, have already brought to eastern Washington a large and enterprising population, and there is every reason to believe that its further development in wealth and numbers will be rapid and permanent. The natural location of Spokane, and the transportation facilities afforded by the various railroads which converge at that point, indicate that it is the appropriate and destined center for the distribution of an extensive and steadily increasing traffic through a large territory of consumers. These facts are stated at this length because they bear, quite forcefully we believe, upon the measure of compensation which public carriers may justly receive for services rendered to a community so situated and having such important relations to a large portion of this state.

5. The chief competitors of Spokane for the distributing trade of eastern Washington are the western terminals of the Northern Pacific, Portland, Tacoma and Seattle, all situated on navigable waters connected with the Pacific ocean, and the interior towns of Ellensburg in Washington, Genesee in Idaho and Missoula in Montana. Portland is on the Willamette river a few miles above its junction with the Columbia and about one hundred and thirty miles from the sea. It is the principal city on the Pacific coast north of San Francisco, of large wealth and commercial importance, and a population of nearly seventy thousand. Until within a comparatively few years it enjoyed almost a monopoly of the wholesale trade in the territory now comprising the states of Oregon, Washington and Idaho, and its jobbing business at the present time is said to exceed \$175,000,000 a year, one fourth of which is in eastern Washington. It reaches the Palouse country, some 400 miles distant, by an independent railroad, and its trade now extends to the towns and villages on the lines of the Northern Pacific as far east as Spokane. The rail rates obtained by Portland on through shipments from the east are so much lower than those accorded to Spokane that Portland dealers can lay down their merchandise in the territory immediately surrounding Spokane at prices which Spokane wholesalers cannot profitably meet. Indeed, it appears from the testimony that Portland merchants, and possibly

those of Tacoma and Seattle also, actually compete on some lines of goods for the trade of Spokane itself. In consequence of this disparity in rates the wholesale business of Spokane is necessarily confined to a limited area, and its distributing trade kept within small dimensions. Where the cost of transportation forms in any event so large a part of the selling price of an article, the difference in rates between Spokane and Portland is great enough to give the latter the command of the market even in territory naturally tributary to the former. When the local rate from Spokane is added to the higher rate to that point, it is obvious that the Spokane dealer cannot successfully extend his business to any considerable distance in the direction of Portland. So long as the present co-relation of rates between these towns is maintained, Spokane will be practically debarred from competing for trade in the territory bordering it on the west, even that lying at its doors, and its development as a distributing center to that extent prevented.

The competition of Tacoma and Seattle is similar in character to that of Portland, and so also is its effect. Both these cities are situated on Puget sound, and have the advantage of water communication with the seaports of the world. They have grown with great rapidity in recent years, Tacoma having upwards of 36,000 inhabitants and Seattle several thousand more. Their through rates from the east are the same as Portland's, and each of them has built up an extensive trade in the surrounding country. Ellensburg lies nearer the Salmon river mining region and parts of the "big bend country" than Spokane, but is less accessible to those districts on account of the Columbia river and the physical conditions of the intervening country. Genesee is the southern terminus of the Spokane and Palouse railway, and engages to some extent in the business of supplying the district by which it is immediately surrounded. Neither of these towns, however, by reason of their population, railroad facilities or relatively lower rates of transportation, sustain any vital relation to the main controversy in this proceeding. Missoula is something over two hundred and fifty miles east of Spokane, on the main line of the Northern Pacific, and competes with the latter place more or less successfully in the territory lying between them. Freight rates from the east are considerably lower to Missoula than to Spokane in proportion to their respective distances from eastern points of shipment, and the alleged disadvantage to which Spokane is thereby subjected is one of the grievances of which that town complains. The population of Missoula is stated to be about thirty-five hundred, and it is a station of considerable importance in the adjustment of rates affecting Spokane.

6. The freight rates investigated in this proceeding are made by the Northern Pacific Railroad and the Trans-Continental Association, of which both defendants are members. A clear understanding of the principal question in this case will be aided by some explanation of the general method pursued in constructing the tariffs of this association, and a statement of the territory to which they apply.

The Trans-Continental Association, as we understand, is composed of the following roads, viz: Atchison, Topeka & Santa Fe; Atlantic & Pacific; Burlington & Missouri River; Canadian Pacific; Chicago, Rock Island & Pacific (West of Missouri river); Colorado Midland; Denver & Rio Grande; Great Northern; Missouri Pacific; Northern Pacific; Oregon & California; Rio Grande Western; Southern California; Southern Pacific; St. Louis & San Francisco; Texas & Pacific, and Union Pacific. The territory covered by this Association, over which rates are made, includes, on the one hand, common points east of the 97th meridian of longitude located on roads of the Association, and points east thereof on roads with which the Association has an agreed basis for dividing rates, and on the other "Pacific Coast Terminals" and "Intermediate Points."

The Pacific Coast Terminals are the following: San Francisco, Sacramento, Marysville, Stockton, San Jose, Oakland (16th St.), Los Angeles and San Diego, in the state of California. Portland, East Portland, Albina and Astoria in Oregon. Tacoma, Seattle, Port Townsend, Olympia, Anacortes, Fair Haven, New Whatcom, Edmonds, Everett, Blaine and Quartermaster Harbor in Washington. Vancouver, Victoria, Nanaimo, Ladner's Landing and New Westminster in British Columbia.

Intermediate points are described in the tariffs of the Association as follows: "Intermediate points are points located on roads of this Association on direct line over which traffic passes in reaching any of the following "Terminals," viz:

(1) "San Francisco, Sacramento, Marysville, Stockton, San Jose, and Oakland (16th St.), California, when routed *via* any of the lines members of this Association, except the Canadian Pacific Ry.;

(2) Los Angeles and San Diego, Cal. when routed *via* any of the lines members of this Association, except the Canadian Pacific Ry.

Between
"Pacific Coast Terminals"
and
"Intermediate Points."

	Classes.									
—and—	1	2	3	4	5	A	B	C	D	E
Missouri River Com. Pts.	350	300	250	200	175	175	155	125	110	100
Mississippi River Com. Pts.	370	320	260	205	180	182	163	130	115	105
Chicago, Milwaukee & Com. Pts.	390	340	270	210	185	190	170	135	120	110
Cincinnati, Detroit & Com. Pts.	395	345	275	215	190	195	175	140	125	115
Pittsburgh, Buffalo & Com. Pts.	400	350	280	220	195	195	175	140	125	115
N. Y., Bos., Phila., Balto. & Com. Pts.	420	370	295	230	200	200	180	145	130	120

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the Northern Pacific R. R. or the line of the Union Pacific System *via* Huntington and East Portland;

(8) Portland, East Portland and Albina, Ore. when routed *via* the Canadian Pacific Ry. Northern Pacific R. R. or Union Pacific System; and *via* Ogden, Roseville Junction, El Paso, Mojave, and the Mt. Shasta route;

(4) Astoria, Ore. when routed *via* the Canadian Pacific Ry. Northern Pacific R. R. or Union Pacific System only;"

(5) "Tacoma, Seattle, Port Townsend, Olympia, Anacortes, Fair Haven, New Whatcom, Edmonds, Everett, Blaine, and Quartermaster Harbor, Wash.; Victoria, Nanaimo, and Ladner's Landing, B. C. *only* when routed *via* the Canadian Pacific Ry. Northern Pacific R. R. or Union Pacific Ry. and steamer from Portland, Ore."

"(6) Vancouver and New Westminster, B. C. *only* when routed *via* the Canadian Pacific Ry. or Northern Pacific R. R."

The region between the 97th meridian of longitude and the Atlantic seaboard is divided into six groups or territories, as follows:

Missouri River Common Points,
Mississippi River Common Points,
Chicago—Milwaukee and Common Points,
Cincinnati—Detroit and Common Points,
Pittsburgh—Buffalo and Common Points,
New York, Boston, Philadelphia, Baltimore, and points common with each.

The tariffs of the Association give detailed descriptions of the boundaries of each of the above mentioned territories.

Theoretically, the various articles of traffic are divided into ten classes, designated by the numerals, 1, 2, 3, 4, 5, and the letters A, B, C, D and E; and each class ordinarily has a different rate between the same points. Upon all classified traffic carried under the tariffs of the Trans-Continental Association the Western Classification is applied. This classification is made by a committee representing the lines leading westward from Chicago and the Mississippi river, and governs all through and local traffic on such lines; but upon transcontinental business its application is extended to embrace shipments originating at the Atlantic seaboard.

The following table shows the present *class* rates between "Pacific Coast Terminals" and "Intermediate Points," and the six territories above described; east of the 97th meridian of longitude. These rates apply in both directions, and there have been no material changes in them since September 1, 1888.

Spokane is an "Intermediate Point" within the definition of that phrase in the tariffs of the Association, and takes the same class rates as the above mentioned "Terminals."

Rates to and from San Francisco *via* Canadian Pacific Railway are the following differentials lower than the rates shown above:

	Classes.									
	1	2	3	4	5	A	B	C	D	E
St. Paul & Minneapolis.....	15	12	10	10	10	8	8	7	5	5
Chi.-Mil. & Com. Pts.....	17	14	12	10	10	8	8	7	5	5
Cinn. — Det. & Com. Pts.....	21	17	14	11	11	9	9	7	5	5
Ptsb. — Buff. & Com. Pts.....	22	18	15	12	12	10	10	8	7	5
N. Y., Boston, Phila., Balto. & Com. Pts.....	28	24	17	14	14	12	12	8	8	5

Besides these class rates there are a large number of *special commodity rates* both east and west bound. The commodity rates applying west bound, however, are largely in excess of those applying east bound. In the west bound tariffs as now printed there are about three pages of commodity rates applying to both "Pacific Coast Terminals" and "Intermediate Points," and more than fifty pages applying to "Terminal" points only. The latter list probably includes the greater portion of articles which are shipped from points east of the 97th meridian to Pacific coast points. When a commodity rate to a "Terminal" point plus the local back to an "Intermediate" point makes a lower rate than the straight "Intermediate" rate, the combination rate applies.

The rates upon classified traffic to Pacific coast points are the maximum rates to intermediate points.

It will be observed that the roads which are members of the Trans-Continental Association extend no further east than the Mississippi river, while rates are published by the Association from the various eastern grouped territories described. Under the present plan of co-operation with lines east of the Mississippi river, tariffs are promulgated by the Trans-Continental Association only after concurrence in the rates by the lines east of the Mississippi through their associations, under which arrangement the eastern lines exact certain proportional rates to the Mississippi river.

The rates from St. Paul to Spokane are made and published by the Northern Pacific Railroad. These rates are progressive until a point is reached where the rate is found to be as high

as the class rate to Pacific coast terminals; from such point to the coast the terminal rate is applied under the rule that the rate to the Pacific coast shall be the maximum rate to intermediate points, except when a commodity rate to a "terminal" point plus the local back to an "intermediate" point under the classification produces a lower rate than the straight "intermediate" rate.

As the tariffs are now arranged the maximum class rate is reached at Athol, Idaho, forty-two miles east of Spokane, and continued from there west to Portland, a distance of 586 miles. No group of points receiving the same rate embracing anything like so great a distance is observed on any other portion of the road. The next largest group, West End, Montana, to Garrison, Montana, inclusive, covers only 160 miles.

7. The class rates to Spokane on the several classes of freight from eastern terminals of the Northern Pacific are as follows:

Merchandise in cents per 100 lbs.

1	2	3	4
350	300	250	200

Special carload classes in cents per 100 lbs.

Fifth Class	A	B	C	D	E
175	175	155	125	110	90

All stations west of Spokane to and including Portland, *via* Tacoma, and all stations on the Spokane and Palouse road, are grouped with Spokane and charged the same rates. As a general rule commodity rates are made to terminal points, and classification and local rates to intermediate points. Ellensburg freight appears to be billed through to Tacoma and returned at local east bound rates.

The great bulk of shipments from eastern points to Spokane is charged the class rates above given, while most of the traffic to Portland and other western terminals is taken at commodity rates, as already stated. In the printed tariffs Spokane has only two or three pages of articles bearing commodity rates against upwards of fifty pages applying to Portland.

The following table exhibits the class rates and distances from St. Paul to the various stations therein named, with the rates per ton per mile on first class freight to each such station, from which may be seen the increased rate per hundred pounds compared with increased distance from starting point.

Miles from St. Paul.	Stations.	Rates per ton per mile 1st class.	Per hundred pounds.									
			1	2	3	4	5	A	B	C	D	E
231	Hitterdal, Minn.....	08.57	77	65	50	39	31	31	27	23	19	15
251	Fargo, N. D.....	08.37	80	68	52	40	32	32	28	24	20	16
436	Sims, N. D.....	05.35	190	109	90	78	66	54	48	41	37	30
744	Miles City, Mont.....	04.57	170	144	124	107	94	84	74	65	57	47
1007	Livingston, Mont.....	04.66	235	205	165	140	120	105	88	78	68	56
1180	Helena, Mont.....	04.42	250	215	175	145	125	110	92	82	72	62
1254	Missoula, Mont.....	04.15	280	225	185	155	135	120	102	87	77	67
1512	Spokane, Wash.....	04.63	350	300	251	200	175	175	155	125	110	90
2056	Portland, Oregon.....	03.40	350	300	250	200	175	175	155	125	110	90

The following deductions from this table show the increase in first class rates between different points at substantially equal distances from each other between St. Paul and Spokane.

Hitterdal, 231 miles from St. Paul,	77 cents.
Sims, 255 " " Hitterdal,	53 "
Miles City, 258 " " Sims,	40 "
Livingston, 263 " " Miles City,	65 "
Missoula, 247 " " Livingston,	25 "
Spokane, 238 " " Missoula,	90 "

The increase on the other nine classes is in approximately the same proportion.

These tables show an extraordinary increase from Missoula to Spokane. Figured in cents per ton per mile, the increase on through freight from the east to Spokane and Missoula respectively, for the 250 miles east of each place, is approximately as follows:

First class	{ Spokane, 7½ cents.
	{ Missoula, 2 "
Fifth class	{ Spokane, 3½ "
	{ Missoula, 1½ "
Class E,	{ Spokane, 2 "
	{ Missoula, 7 mills.

The rates to Spokane and Missoula were originally on a similar progressive basis, but upon the construction of the Great Northern road to Missoula that town was granted a \$2.60 rate. While Missoula has proportionally lower rates on shipments from the east, its rates from San Francisco are but little higher than those to Spokane. On fifth class freight, for instance, rates from the east to Spokane are 40 cents higher than to Missoula, while the rates from Portland to Missoula are only ten cents higher than to Spokane. The highest rate on sugar going east is at Spokane, but on most other articles at Miles City, Montana. On east bound freight, Pacific coast products, Missoula is grouped with Spokane on certain commodity rates, and on classified traffic the increase from Spokane to Missoula is only about one third the increase on west bound freight from Missoula to Spokane.

The rate per ton per mile, St. Paul to Spokane, on each of the ten classes is approximately as follows: 1st, 4½ cents; 2d, 4 cents; 3d, 3½ cents; 4th, 2½ cents; 5th, 2½ cents; A, 2½ cents; B, 2 cents; C, 1½ cents; D, 1½ cents; E, 1½ cents.

The average, therefore, of the first five classes is about 3½ cents, and of all the classes 2½ cents. Assuming the average (commodity) rate to Portland to be \$1.50 per 100 lbs. the average rate per ton per mile would be about 1½ cents. On this assumption the rate per ton per mile from the east to Portland is less than three fifths as much as to Spokane, although the distance is more than one third greater. And if, as seems to be the fact, most of the goods shipped are in the first five classes, the disparity between these towns is still more marked. There is no point on the line of the

Northern Pacific where west bound rates are higher than to Spokane; consequently western terminals pay no more than Spokane even on articles carried at classification rates, and notwithstanding such articles may not be adapted to water carriage or actually subject to water competition.

8. The freight tonnage carried to Spokane and the earnings derived therefrom, compared with corresponding figures relating to Portland, Tacoma, and Seattle, give some idea of the relative revenues obtained at these towns respectively.

The following statement furnished by the Northern Pacific Company, shows tonnage received and earnings therefrom at the several stations therein named for the year ending June 30, 1890.

Freight Received.		
Station.	Tonnage.	Earnings.
Spokane.....	182,018	\$1,664,905.48
Seattle.....	122,174	1,216,494.42
Tacoma.....	524,219	1,859,645.86
Portland.....	73,883	743,194.99

Tonnage given in tons of 2,000 lbs.

The total number of tons handled by this company during the same year was 3,569,969, and the total freight earnings, \$15,600,319.22.

The following figures are for the eleven months ending May 31, 1891:

Freight Received.		
Station.	Tonnage.	Earnings.
Spokane.....	199,752,385	\$ 970,061.60
Seattle.....	295,642,502	1,261,950.17
Tacoma.....	1,424,075,167	2,068,119.82
Portland.....	195,347,991	871,825.15

Tonnage given in pounds.

The freight shipped from these points during the same periods and the earnings therefrom appear from the following statements furnished by the same company:

Freight Forwarded.		
Station.	Tonnage.	Earnings.
Spokane.....	48,809	\$163,848.82
Seattle.....	19,371	110,882.97
Tacoma.....	84,404	457,789.44
Portland.....	118,086	585,451.14

Tonnage given in tons of 2,000 lbs.

Freight Forwarded.		
Station.	Tonnage.	Earnings.
Spokane.....	32,602,738	\$203,044.52
Seattle.....	66,448,832	158,305.58
Tacoma.....	192,247,775	509,847.16
Portland.....	241,682,675	711,250.54

Tonnage given in pounds.

The foregoing figures include all the business of the Northern Pacific, both through and local, at the places and during the periods named, but the division of that business between through and local at either point cannot be determined from the evidence. Of the aggregate earnings of this company from its whole mileage, about 26 per cent is received at terminal and 74 per cent at intermediate points. Mr. Hannaford, the General Traffic Manager of this road, testified in substance that 60,000 tons a year was a moderate

estimate of the traffic to Spokane from St. Paul and points further east, but the tonnage of such traffic to Pacific coast terminals, or either of them, does not appear. Neither do the proofs show how the through shipments to Spokane are divided between the different classes of freight, nor the relative tonnage of different articles taken at commodity rates to the several terminals. There may be some estimates upon these points but no accurate and reliable figures. The information, however, is of no special value. The main question upon this branch of the case grows out of the rates themselves in connection with the distances and other related facts which distinctly appear and are wholly undisputed.

Since the completion of its branch line from Pendleton, the Union Pacific has secured from ten to fifteen per cent of the eastern traffic to Spokane, and probably handles about one fourth of the entire tonnage of that town. It does not appear to be in a situation to do otherwise than meet the rates made by the Northern Pacific.

The tonnage from east to west on the Northern Pacific is much greater than from west to east; consequently a large number of empty cars must be hauled in the latter direction. This feature of the business seems more prominent in respect to western terminals than points in eastern Washington, and this circumstance may have some bearing on the relatively higher rates from the coast to Spokane than to Missoula and more easterly points.

9. As already explained most of the traffic to Pacific terminals is carried, not at class rates, but at special commodity rates. The difference between the class rate and the commodity rate on any particular article is easily ascertainable from the tariffs, and the difference in revenue can be determined by multiplying the tonnage actually carried to terminal and intermediate points respectively by the respective rates to each. This difference will sufficiently appear, without entering into numerous calculations, by the following illustrations, taken at random from the tariff sheets, and showing the rates actually charged on shipments from the east to the several points named, on a number of articles of general consumption, the traffic in which is presumably large. It will be remembered that Tacoma, Seattle and other terminal points take the same rate as Portland.

Statement showing rate per 100 lbs. on the several commodities named from St. Paul to the points given.

Rates to Missoula, Spokane and Genessee are local class rates of the Northern Pacific R. R. from St. Paul.

Rates to Ellensburg are constructed upon a combination of the commodity rate to Portland and the class rate Portland to Ellensburg.

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Rates to Portland are the commodity rates to "Terminal" points as per Trans-Continental Association Tariffs.

Class.	Commodity.	Missoula.	Spokane.	Genessee.	Ellensburg.	Portland.
5	Canned Goods, C. L.	135	175	175	162	107
3	Coffee, roasted, L. C. L.	185	250	250	250	176
2	Calicos, etc. L. C. L.	200	350	350	294	189
2	Crockery and Earthenware, L. C. L.	225	300	300	242	149
5	Iron Bolts and Nuts, C. L.	135	175	175	160	105
3	Paper Bags, L. C. L.	185	250	250	224	149
5	Stoves, Ranges, etc. C. L.	135	175	175	172	117
4	Tin Plate, L. C. L.	155	200	200	196	131
A	Farm Wagons, C. L.	120	175	175	163	113
5	Nails, C. L.	135	175	175	154	99
1	Table Sauce, L. C. L.	220	350	350	276	171
2	Twine (Harvesting) L. C. L.	220	300	300	242	149
3	Baking Powder, L. C. L.	185	250	250	246	171
1	Brooms, L. C. L.	200	350	350	294	189
4	Candles, C. L.	155	200	200	172	107
2	Cordage, L. C. L.	220	300	300	282	189
3	Currants (Dried) L. C. L.	185	250	250	250	220
1	Ink, in glass, L. C. L.	260	350	350	254	149
5	Soap, in glass, L. C. L.	135	175	175	154	99
5	Syrups, C. L.	135	175	175	162	107
1	Staple Woodenware, L. C. L.	260	350	350	294	189
1	Bulky Woodenware, L. C. L.	260	350	350	250	270
1	Woodenware, notions, L. C. L.	260	350	350	287	216

These examples, it is believed, fairly characterize the entire list of commodities, and indicate the general relation of rates between Spokane and the other points named in the table. A simple computation shows that the average rate per 100 pounds on the twenty-three articles or classes of merchandise above mentioned is \$2.60 to Spokane and Genessee, \$1.94 to Missoula, \$2.29 to Ellensburg, and \$1.54 to Portland. Substantially the same results would doubtless be obtained by a more extended comparison. On the basis of these figures the rate per ton per mile is $3\frac{4}{10}$ cents to Spokane as against $1\frac{8}{10}$ cents to Portland. It is manifest from this showing that numerous articles of common consumption which are produced at various points in the east can be laid down at Portland, Tacoma or Seattle so much cheaper than at Spokane that the latter town is placed at constant and serious disadvantage.

10. We also find in a few instances differences in classification which favor these terminal points irrespective of their lower rates. On some articles car-load rates are made to Portland when no car-load rate is given to Spokane. In such a case the less than car-load rates apply to Spokane although the shipment is in car-load quantities, thus depriving Spokane of the advantage of Portland's car-load rate. The privilege of shipping mixed car-load lots at car-load rates is also allowed to Portland when the same privilege is denied to Spokane; and there appear to be some instances in which the car-load rate is granted to Portland on a shipment of 15,000 pounds, but not accorded to Spokane on a

shipment under 30,000 pounds. The virtual admission of the defendants that such discriminations are unlawful, and their avowed intention of correcting all inequalities of this description, render it unnecessary to cite examples from the evidence or add further statement to this general finding.

11. The comparative volume of eastern traffic which actually reaches these Pacific terminals by water cannot with entire satisfaction be determined from the evidence. Special facts relating to particular shipments might be multiplied indefinitely, but their chief value would consist in furnishing instances of ocean carriage; while general statements, though leading more directly to correct conclusions, would doubtless be subject to modifying exceptions. The primary question, however, is not so much whether rail rates to the Pacific are lower than is necessary to prevent water carriers from doing the business, but whether in fact such competition exists at these western terminals as justifies the railroads in maintaining higher rates to intermediate points than are accepted by them for through transportation. In other words, is the dissimilarity of conditions so substantial and unavoidable that the greater charge for the lesser distance may be lawfully exacted? The fundamental fact observed in this connection is that all of these three towns, Portland, Tacoma and Seattle, possess the natural advantages of seaport location. They enjoy the benefits of water communication with the great supply markets of the world. The opportunity for receiving eastern shipments independent of the rail transportation furnished by the defendants is constantly afforded them. Through the navigable waters which connect them with the Pacific, sea-going vessels of ample size can bring merchandise from all quarters directly to their docks. In the nature of the case the railroads neither have nor can have a monopoly of the carrying trade to these towns, for the facilities of water carriage are always available to them. Having the choice of two methods they can employ the one which on the whole proves most economical. Under these circumstances the railroads must necessarily make rates low enough to secure the business or abandon it to rival carriers using the cheaper modes of water transportation. Prior to the construction of the trans-continental lines the great bulk of eastern merchandise consumed on the Pacific coast was conveyed to its destination in ocean vessels either around Cape Horn or by the Isthmus of Panama. This resulted in an established commerce by those routes between Atlantic and Pacific ports. When the railroads were built they were able to participate in this trade only by offering rates which, all things considered, were more advantageous to

shippers than those afforded by the water lines. That was the obvious condition upon which they could engage to any great extent in carrying freight to the Pacific coast. They had the alternative of making rates which would attract the business or leaving it mainly to the ocean carriers. But while the inducements held out by the railroads have given them a large portion of this through traffic, they have at no time secured it all. More or less has always gone by water, and a considerable share of it still follows the ocean routes notwithstanding the low rates offered by the overland lines.

The extension of railroad facilities to the Pacific coast caused a large addition to the population west of the Rocky mountains, and greatly stimulated the demands of that territory for eastern products. The volume of business rapidly increased and is all the while enlarging. The railroads, it would seem, are amply equipped for handling the entire traffic, but the ocean lines have not been discontinued. The cheaper cost of water transportation cannot be wholly overcome by the advantages of rail conveyance. Under the existing relation between land and water rates a certain amount of eastern freight will continue to reach the Pacific coast by ocean carriage, and the constant opportunity to employ that mode of shipment is an unyielding limitation upon the through charges of the railroads.

Nor is the quantity of merchandise which now goes by water to these western terminals by any means insignificant. A line of steamships between New York and San Francisco by the Isthmus of Panama dispatches a steamer of large tonnage every ten days and has done so for a number of years, and numerous sailing vessels take cargoes with more or less regularity from Atlantic and foreign ports to various distributing points on the Pacific coast. Several lines of steamers run from San Francisco to Portland and Puget Sound ports, one of them sending a vessel to the last named ports every five days, and two others every ten days. Between August, 1888, and April, 1889, nineteen ships with merchandise cleared from New York for San Francisco and Portland, and during the twelve months ending in May, 1891, eight loaded vessels entered the port of Portland sailing directly from the Atlantic coast. Clipper ships also make more or less frequent voyages from New York to Puget Sound ports direct, bringing merchandise of various kinds to Tacoma and Seattle in competition with the overland roads. In addition to these are occasional vessels coming to those ports for return cargoes of lumber, wheat, etc. and willing to take outgoing freight in place of ballast at almost nominal figures. The eastern goods conveyed to these points by water are mostly of the coarser and cheaper grades,

such as heavy hardware, groceries and commodities of a similar character; but they include, to some extent at least, such merchandise as school and blank books, ink, paper, certain kinds of drugs, foreign crockery, notions, and many other articles of general consumption. Part of this traffic comes direct from the eastern port of shipment, and part of it is transshipped at San Francisco. In the aggregate it is quite moderate both in weight and value compared with the rail transportation to these terminals, probably not exceeding five per cent of the total tonnage. The average time required for a voyage from New York around Cape Horn to Puget Sound ports is approximately five months, and this circumstance alone gives an enormous advantage to the carrier by rail. The great variation in the length of ocean voyages, uncertain and irregular arrivals of sailing vessels, increased liability to loss and damage while in transit, cost of marine insurance and long interval between date of shipment and arrival, with consequent loss of interest upon the purchase price, all operate against the general and constant use of water transportation for such unusual distances. Articles of a delicate or perishable nature will rarely take the ocean routes when any other method of conveyance is obtainable, while the great variety of goods which are adapted to a particular season or depend upon the fluctuations of fashion will, as a matter of course, seek the speedier movement and more certain delivery afforded by the overland lines. In favor of the ocean routes, however, are their constantly lower charges. Rates which would be ruinous to the railroads are freely offered by their competitors. The water carriers solicit traffic for transportation from the Atlantic seaboard to Pacific terminals at a cost to the shipper greatly below the commodity rates of these defendants. Shipments are made by the ocean lines at 50 to 75 cents per hundred on many lines of goods, and the average water rate appears to be not more than half the rail rate to the same points on the Pacific coast. Freight is sought for by agents of the water lines at \$10 per ton from New York to Seattle, and it seems to have been carried for less than \$9 per ton by steamer to Antwerp and thence by sailing vessel to Puget Sound.* Between the lower rates offered by one carrier and the greater speed, safety, etc., afforded by the other, the shipper can choose from time to time

as interest seems to dictate. The opportunity for choice between competing modes of transportation, permanently enjoyed by these terminal towns, places them in a very different relation to the railroads than intermediate points not favored with a similar competition.

The investigation of this case satisfies us, and we so find, that under existing rates for land and water transportation respectively, the tendency is in the direction of increased shipments by the ocean routes. This is due in part to the improved facilities and diminished cost of water carriage, but still more to the enlarged business and greater financial strength of wholesale dealers on the Pacific coast. As these terminal points develop and their trade becomes more assured and important, the increase of capital will gradually remove the necessity for quick delivery and speedy sales of eastern purchases, while competition with each other will more and more compel resort to the cheaper modes of transportation.

Between the lowest charges of the rail carriers and the rates accepted by the water lines there is a wide margin in favor of the latter. So long as this margin exceeds the items of interest, insurance and the like, the ocean routes will attract the patronage of shippers whose financial condition leaves them at liberty to select the cheapest method of securing their supplies. While the rail tariffs in question remain so much above the water rates, it may be reasonably expected that staple goods required for general consumption at all seasons of the year, particularly the low-priced and and heavy grades in which the traffic is extremely large, will, so far as they are fairly adapted to long distance transportation by water, very largely take that method of reaching their destination.

12. The commodity rates accepted by the defendants on shipments to their western terminals afford them a margin of profit over the cost of moving the traffic. Their net revenues are increased by engaging in this competitive business. Measured by the income which these roads are entitled to receive upon the large outlay required for their construction, their through rates are not remunerative. Their entire business could not be done on the same basis without financial disaster. A certain revenue above operating expenses is necessary to their solvency and justified by the original investment. But such returns would not be realized if they were compelled to carry freight to all points on their lines at rates proportioned to their through charges, nor even if the intermediate rate in no case exceeded the present terminal rate. If the existing intermediate or class rates should be enforced on all shipments to the Pacific, a large portion of the through traffic would go to the ocean carriers and the railroads be mainly con-

*To these facts which are established by the testimony in this case, it may not be improper to add that information subsequently acquired in other proceedings shows a much more extensive use of water transportation and much lower rates by water lines than are indicated by the foregoing statements. The actual course of business at the present time justifies the finding that water transportation, of merchandise adapted to that mode of conveyance, is practically available for shipments from the Atlantic seaboard to the Pacific terminals.

fined to the business of their local and interior points. It is quite suitable, therefore, for the defendants to make through rates which enable them to participate in this competitive traffic, provided the receipts therefrom clearly exceed the added risk and expense involved in handling the business. This we find to be the general fact in respect of the through rates in question.

Conclusions.

From the foregoing statement of our views respecting the principal questions of fact in this case, it follows that the complainants' petition cannot be sustained so far as it seeks to enforce the general rule of the statute prohibiting the greater charge for the lesser distance. The circumstances and conditions under which through transportation is effected over the lines of the Northern Pacific to its western terminals are substantially different from those attending like transportation to Spokane, such dissimilarity consisting in the competition at these terminal points of carriers not subject to the Act. To what extent this competition is created by the rates made and traffic secured by the Canadian Pacific road does not very clearly appear. The known facts concerning that road, however, are not wanting in significance. It is a foreign railroad, chartered and subsidized by a foreign government and not directly amenable to the regulating authority of Congress. It extends entirely across the continent at no great distance from our northern border, and is so located and connected with domestic lines as to constitute a prominent factor in all questions of transportation between the eastern and western sections of the United States. The circumstance that this carrier is allowed certain differentials by agreement of the transcontinental lines, presumably with the view of insuring stability of rates, plainly indicates its power to divert traffic from the American lines and the generally formidable character of its competition. How far the rivalry of the Canadian Pacific would excuse the defendants in making lower rates to terminal than to intermediate points, if no water competition existed at those terminals, we do not undertake to determine. Whatever opinion might be formed under such circumstances, it is manifest that the existing situation is modified in a considerable degree by the presence of this foreign railroad; that it exercises a distinct and appreciable influence upon the rates in question, and that it is not to be disregarded in estimating the obligations of the defendants to the various localities which they serve. In saying this, however, no assumption is implied that the Canadian Pacific road is not subject to the Act to Regulate Commerce, as to this competitive traffic; the observations are made without reference to

that question. This explanation is perhaps needful as nothing is intended to be here stated conflicting in any respect with our recent decision in the Georgia Railroad Commission cases, *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 120.

There is sharp disagreement between the parties both as to the kind and volume of shipments which actually reach these Pacific terminals by water, and as to the necessary effect of water carriage and water rates upon the proper adjustment of railroad charges. Without reviewing the evidence or repeating the findings upon that issue, we are constrained to hold that water competition of controlling force, and affecting a variety of traffic important in character and amount, actually exists at these several terminals, and that such competition, taken in connection with the competitive position and attitude of the Canadian Pacific road, justifies the defendants in accepting less compensation on eastern shipments to the cities of Portland, Tacoma and Seattle than they may lawfully charge on like shipments to the intermediate city of Spokane. The conditions attending transportation to the interior towns are radically different with respect of obtainable rates than those governing like transportation to the Pacific coast. The carrying trade to Spokane is monopolized by the defendants, but the traffic to their various terminals is subject to constant and controlling competition. The ocean lines which reach these ports furnish independent and efficient facilities for the carriage of eastern merchandise, and offer their services at rates which the rail carriers must approximate or be mainly excluded from participation in the through business. Virtually in one case the railroads exact "what the traffic will bear;" in the other they must carry for what they can get. The lower charge to competitive points is fairly excused by the necessities of the case.

While this conclusion is reached without serious difficulty, we have the impression at the same time that some of the commodity rates under which traffic is taken to western terminals are lower than is necessary to prevent water lines from getting the business, and that commodity rates are accorded to more or less articles which are not adapted to water transportation and therefore not subject to water competition. The only justification for a through rate less than the intermediate rate on the same article is the compulsion of the rail carriers to accept the reduced compensation or suffer their ocean rivals to perform the service. Where the pressure of this alternative is not felt there is no ground upon which the lower terminal charge can be excused. Nothing but the stress of unavoidable competition can legalize the inequality resulting from higher rates for shorter than for longer hauls.

It is evident, therefore, that no article should be carried to terminal points at commodity rates, which if the class rates were imposed, would still seek rail rather than water transportation. Any violation of this rule is an unjust discrimination against the intermediate town compelled to pay the higher class rate on the same article. Theoretically it would be suitable to examine the entire list of commodities with the view of ascertaining which of them in fact are practically adapted to ocean carriage, and to restrict the defendants in making lower terminal rates to such articles as are actually subject to water competition. Merchandise which would usually and naturally go by the overland lines, if the classified rates were enforced, should not be allowed the more favorable tariffs granted to strictly competitive business. If that principle is regarded the discriminations complained of will be limited to traffic fairly capable of conveyance by either mode, and the rates in question equitably adjusted to the different conditions prevailing at terminal and intermediate points. Moreover, as it seems to us, the interests of the rail carriers themselves would be promoted and their revenues increased by adherence to this policy in regulating their charges. But the evidence upon this subject permits no such minute analysis of the situation and furnishes no basis for such detailed directions. Upon the facts before us we can do little more than decide the general question involved in this phase of the controversy and indicate the rule which, under that decision, should be rigidly applied in making lower rates to competitive terminals than may lawfully be maintained at shorter distance points where no other transportation is available than that furnished by the defendants. The principle of relative justice will not be observed if commodity tariffs are made needlessly low to prevent traffic from going by the ocean lines, nor if articles not really subject to water competition are given through carriage at commodity rates. Our impression that this rule is departed from in some cases may be erroneous, but even if well founded the correction of any injustice in this direction must await further investigation of the facts and circumstances relating to particular articles and the commodity rates at which they are carried.

It should be understood, therefore, that nothing contained in this report is intended to formally approve the present schedule of commodity rates to Pacific terminals either in detail or as a whole. We sustain the general contention of the defendants that competitive conditions existing at these terminals justify a departure from the rule which prohibits a higher charge for a shorter than for a longer haul, but we pass no judgment upon the necessity or propriety of any particular rate.

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All questions of that character are reserved for future inquiry. If specific cases of discrimination against interior shippers are alleged to result from these commodity rates, either because some article receives a rate clearly below the necessities of competition, or because the commodity rate is applied to an article not actually competitive, the Commission will be at liberty within the spirit of this decision to investigate any complaint of that nature and make such correcting order as the facts may require.

Although we find justification for the defendants in maintaining higher rates on shipments to Spokane than they accept on like shipments to Portland and other Pacific terminals, we are at the same time clearly convinced that the rates now in force from St. Paul and eastern points to Spokane are in themselves unreasonable and should be considerably reduced. The conditions of water and rail competition at western terminals may compel these roads to make through rates less than those justly established at intermediate places, but the intermediate rate must itself be fair and reasonable. The Spokane rate does not meet this requirement; we are satisfied that it is excessive. It discriminates against those who are compelled to pay it, not because lower rates are granted to towns at greater distance from St. Paul, but because under all the circumstances it is unreasonably high; and our warrant for this conclusion is found in the published tariffs and long continued practices of the railroads themselves. In connection with other carriers they have promulgated and for years maintained certain class rates on traffic to Pacific terminals which are identical with their rates on shipments terminating at Spokane. Their standing proposition is to carry at these class rates to their several terminals regarded as noncompetitive points. In effect they say, we should charge these class rates and no more for transportation of all kinds to our Pacific terminals, if there was no competition for the carrying trade to those points, and we would be willing in the absence of such competition to perform the service for that compensation. This is equivalent to a declaration on their part that the class rates afford reasonable and adequate remuneration for hauling traffic to the Pacific coast. They profess now to charge the class rates on all articles not suited to water carriage and for that reason not subject to water competition, and they excuse the lower commodity rates on through shipments solely on the ground of such competition. They must be deemed to admit, therefore, that only the present class rates would be expected for carrying to their various terminals if those terminals were noncompetitive points under similar conditions to those existing at Spokane. In short the class

rate is concededly fair compensation for through carriage to the Pacific. But if the class rate is reasonable and compensatory for carrying to Portland, must not the same rate for carrying only to Spokane be excessive and unreasonable? If that rate sufficiently rewards the carrier for the greater service, is not the lesser service clearly overpaid? Bearing in mind the great difference in the distances of these towns from eastern points, and the difficult grades over the intervening Cascades, a rate which is admitted to be enough for the longer haul would seem little less than extortionate for the shorter. There can be no justification for applying the same tariffs to places so far apart as these, with a range of mountains between them, when rates are made without reference to competitive conditions at the longer distance point. The scheme of tariff construction by which uniform charges are made to all points between the eastern line of Washington and the city of Portland, a distance of more than five hundred and sixty miles, carries on its face the presumption of injustice. A "blanket" of such extraordinary dimensions must cover a multitude of transportation sins.

Moreover, the great disparity in this case between through and intermediate rates tends strongly to prove the unreasonableness of the latter. The Northern Pacific would not be competing for terminal business at these low commodity rates if they did not yield a margin of profit over the cost of performing the service. Granted that those rates applied to all the traffic of this company would not produce the revenue to which it is entitled—and we have so found—nevertheless the earnings on competitive business exceed the additional expense incurred in its transportation. Something, the carrier asserts, is made on this traffic over the cost of "physical movement." That is the fact relied upon to excuse the lower rates on through shipments and constitutes the ground upon which the policy of the railroads is defended. But if it is profitable even to that extent to carry merchandise of every grade 2056 miles to Portland at an average compensation of about \$30 per ton, must there not be, in the broadest sense, an unreasonable profit in taking \$52 a ton for carrying the same merchandise to Spokane a distance of only 1512 miles? If a rate of less than one and a half cents per ton per mile yields a desirable margin over the bare cost of moving the traffic, may we not fairly infer that a rate of nearly three and a half cents per ton per mile pays an unwarranted return upon the whole investment? The difference between these figures is too great to permit the lower charge to be justified by the rule of expediency without condemning the higher charge by the rule of reasonable compensation. The fact that through business

is sought at these terminal rates leaves no doubt in our minds that the Spokane rate is excessive.

This conclusion seems quite inevitable when comparison is made between rates to Spokane and rates to Missoula and points further east. The distance from St. Paul to Missoula is 1254 miles, only 258 miles less than to Spokane, yet the difference in first class rates is ninety cents per hundred pounds, viz: \$3.50 to Spokane and \$2.60 to Missoula. Rates on the other classes differ in about the same proportion. From every point of view the Missoula rate is materially lower than the Spokane rate, and no substantial reason appears for this striking inequality. The increased distance to Spokane is about 20 per cent of the distance to Missoula, but the increase in rate for this distance is nearly 35 per cent of the Missoula rate. Under the ordinary and suitable rules of tariff construction, rates per ton per mile diminish as distances increase, but Spokane's rate per ton per mile is considerably greater than Missoula's, as great in fact as Livingston's, only two thirds the distance from St. Paul. The increase in first class charges from Livingston to Missoula is only 25 cents per hundred though the distance is nearly as great as from Missoula to Spokane. The increase from Miles City to Livingston, a distance of 263 miles, is 65 cents, and this is the largest increase between any points east of Missoula at similar distances from each other. In brief the rates of the Northern Pacific are built up much faster from Missoula to Spokane than on any other portion of its line, though nothing appears in the way of more expensive construction or operation between these points to account for the relatively greater rates charged for the longer haul. The same classification is used to both points, and the only variation from the comparative figures contained in the table set forth in the findings is in cases where the Trans-continental Association rate through to the Pacific, plus the local rate back to Spokane, makes a less rate than those figures give to Spokane; in such cases the lower rate is applied. But the instances must be quite rare when a combination of through and local rates materially improves the situation of the Spokane jobber, since the rates to all points west of Spokane are subject to the same exception, so that when the local rate back is used in making the through rate to Spokane a still lower local is used in making the through rate to the points west of that town.

The rates to Spokane and Missoula respectively might be compared indefinitely and from every standpoint, without finding any ground upon which the Spokane rate can be upheld. The more it is contrasted with the rates which Missoula receives, and even with those granted to Livingston, Miles City and

other places, the more indefensible does it appear. Whatever rule is applied or test resorted to confirms the belief that it is relatively and inherently unjust. The fact that more favorable rates have long been accepted by the defendants for carrying merchandise to these other places, where the general conditions competitive and otherwise are substantially similar to those existing at Spokane, is sufficient proof that the transportation charges imposed upon the latter town are so clearly excessive as to constitute a violation of the law which requires all rates to be fair and reasonable.

The amount of reduction to which Spokane is entitled cannot easily be determined. There may be general agreement that the present tariff is too high, and great conflict of opinion as to how much it should be reduced. Any relieving order containing definite directions in that regard must be more or less arbitrary. Between the opposing interests of the defendants on the one hand and the Spokane shippers on the other, we must decide as fairly as we are able by prescribing for this locality such maximum rates as on the whole best accord with our judgment. We are largely influenced in the conclusions we have reached by the classified rates which the railroads have voluntarily fixed for transportation to the Pacific coast and by the measure of compensation which, with equal freedom, they have so long accepted on shipments to Missoula and other points east of Spokane. Between the lower schedule to the latter places and the uniform rates now extending from the Idaho line to Portland, there must be an intermediate scale which approximates justice to both shipper and carrier. The practical basis we have decided to adopt is a percentage reduction from the classified rates now applied equally to Spokane and the Pacific coast; our conviction being that a fixed relation between intermediate rates to Spokane and class rates to the terminals is the most equitable theory upon which a re-adjustment can be effected. If the great bulk of terminal traffic was governed by the class rates now in force, so that those rates measured the compensation actually received for through transportation, we should have little hesitation in holding that the Spokane rate should not be much below ninety per cent of the class rate to the terminals. But in point of fact comparatively little of the through business pays the classified rates; the main volume of rail shipments to the Pacific takes the lower commodity rates made necessary by water competition. The class rates, therefore, are little more than nominal so far as through traffic is concerned. To base the Spokane reduction solely on those rates is to assume their reasonableness for through transportation if they were in fact obtained on a large portion

of the business, and to apply a rule which, under existing conditions, would not insure relative justice to Spokane. That being the main purpose to be kept in view, we cannot overlook the long list of commodity rates which are freely accepted for carriage to terminal points, because those rates are of material and unmistakable value in determining what is just compensation for the shorter haul. Taking into account the respective rates actually established at terminal and intermediate points, and the wide difference between class and commodity rates on the principal articles to which they are applied, a greater reduction is required at Spokane than its distance and location would warrant if the class rates were in fact enforced on shipments to the Pacific. We must have regard also, in seeking the proper differential for Spokane, to the tariff rates maintained at Missoula and points further east where the circumstances and conditions appear to be substantially the same. The result, in a word, must be arrived at upon an examination of the entire field and a survey of the whole situation. These considerations lead to the conclusion that the Spokane rate should be approximately eighteen per cent below the rates now in force at that point, and should not materially exceed eighty-two per cent of the present class rates to Pacific terminals, the latter being used as a convenient basis for fixing the reduction at Spokane. For the purpose of avoiding fractions, and because there may be some reason why the reduction in first class rates should be under rather than over the percentage named, the general basis may be so far modified as to give the following figures, as a maximum reasonable rate, for each of the several classes, viz: Class 1, \$2.90; 2, \$2.46; 3, \$2.05; 4, \$1.64; 5, \$1.44; A, \$1.44; B, \$1.28; C, \$1.02; D, \$0.90; E, \$0.74.

We undertake no demonstration of the exact correctness of this conclusion. We take into account the geographical position of Spokane between Missoula on the east and Pacific points on the west, and make that division between the rates now applied to these respective localities which, all things considered, we deem just and fair to Spokane and best calculated to produce equitable results. It may be that the practical operation of these rates will disclose the propriety of some alterations, but that can be determined only by the test of experience, in the light of which the rates can be re-adjusted upon the application of either party. Our idea is to make the Spokane rate a definite percentage of the class rate to the Pacific, and we have fixed the relation which, under present conditions, is most in harmony with our convictions. In case the class rates to western terminals are reduced, there should be a corresponding reduction in rates to

Spokane, unless such reduction should greatly increase the volume of shipments at classified rates to Pacific terminals, in which case the proper relation between Spokane and the terminals on such traffic can be further considered. This ruling will not apply to the commodity rates now accorded to Spokane nor will it excuse the defendants in withdrawing or increasing such commodity rates.

This decision will apply not only to rates from St. Paul and other eastern terminals of the defendants, but is intended to include directions for a proportionate reduction in the grouped rates from points east of St. Paul, so far as they are applied to Spokane traffic. The railroads which join with the defendants in making these rates were not made parties to this proceeding; but the case will be reopened, if necessary, for the purpose of bringing them in, to the end that all carriers affected may be bound by the order herein unless cause be shown for a different ruling.

It is quite apparent that a reduction of Spokane rates in compliance with this decision will require some modification in rates to shorter distance points to avoid infraction of the long and short haul clause of the statute. This will especially be the case on the line of the Union Pacific between Pendleton and Spokane, to both of which towns the rates on that road are the same. The lines of the defendants in this territory are practically parallel, the Northern Pacific reaching Pendleton through Spokane, and the Union Pacific reaching Spokane through Pendleton; but whatever embarrassment may result from this situation must be met in the first instance by the railroads themselves.

The contention of counsel that this Commission has no authority over the rates of the Northern Pacific railroad, by reason of certain provisions in its charter, has already been considered in another proceeding against that company where the same defense was interposed. *Raworth v. Northern Pacific R. Co.* 3 Inters. Com. Rep. 857.

The opinion of the Commission in that case reviews the argument by which this claim of immunity is supported, and rejects the proposition as demonstrably unsound. The question will not be discussed in this report further than to add a single suggestion. The language mainly relied upon to sustain the position is, "... and they (the Board of Directors) shall from time to time fix, determine and regulate the fares, tolls and charges to be received and paid for transportation of persons and property on said road or any part thereof."

Does this provision add anything to the incidental and essential powers which are inherent in the nature of such a corporation? If this express declaration were omitted, would

not the same authority exist by necessary implication?

The right to construct and operate a railroad, whether acquired under general laws or by special enactment, includes and carries with it the implied right to fix and collect compensation for its services. In the absence of statutory restrictions there is no limitation upon this authority except the common law rule of reasonable charges. It seems to us, therefore, that the charter of this company confers no peculiar or exclusive control over its rates and charges, because, in the absence of the express authority contained in the paragraph quoted, its Board of Directors would have the same power in all respects that they now possess to "fix, determine and regulate the fares, tolls and charges" in question. We adhere to the ruling in the Raworth case and hold that the Northern Pacific road, notwithstanding those provisions in its charter, is subject like all other interstate carriers to the authority conferred by Congress in the Act to Regulate Commerce.

There are some features of the case more or less novel and interesting, which are not referred to in this opinion, because want of time and the necessary length of our report confine the discussion to questions actually decided. We have attempted only to set forth the material facts upon which the controversy depends and the general reasons which have induced our conclusions. As some little time may be required for a revision of tariffs and re-adjustment of rates in conformity with this decision, a reasonable interval will be allowed for that purpose. Reducing our determination to the form of specific directions, the order of the Commission in this proceeding is stated as follows:

1. The defendants herein, by reason of the competition at their Pacific terminals of carriers not subject to the Act to Regulate Commerce, may make commodity rates on competitive traffic to those terminals which are less than their rates on like traffic to Spokane; but such commodity rates must not be lower than are necessary from time to time to meet such competition, nor allowed in any case on articles not actually subject thereto.

2. In the matter of car-load rates, mixed car-load lots at car-load rates, minimum weight of shipments entitled to car-load rates, and in all other respects, the defendants and each of them will furnish, provide and allow the same privileges, facilities and advantages on shipments to Spokane as are or may be at any time furnished, provided or allowed on like shipments to Portland or other Pacific terminals.

3. On or before the first day of January, 1893, the defendants in this case and each of them

will prepare, publish and put in effect tariff rates on all classified traffic from their eastern terminals to Spokane which shall be approximately eighteen per cent less than the tariffs now in force at that point, and shall not materially exceed eighty-two per cent of the class rates now applied both to Spokane and the Pacific terminals; and thereafter the defendants will not, nor will either of them, charge, collect or receive for transportation from their eastern terminals to Spokane a greater sum or amount than the rates fixed and prescribed by such reduced tariffs.

The following named rates on each of the ten classes respectively shall be deemed a compliance with this requirement, viz: Class 1, \$2.90; 2, \$2.46; 3, \$2.05; 4, \$1.64; 5, \$1.44; A, \$1.44; B, \$1.28; C, \$1.02; D, \$0.90; E, \$0.74.

In case of any reduction in class rates to Pa-

cific terminals a further and corresponding reduction will be made on like shipments to Spokane except as provided in the foregoing opinion.

This order will apply not only to rates from St. Paul and other eastern terminals of the defendants, but is intended to include directions for a corresponding reduction in the grouped rates from points east of St. Paul so far as they are applied to Spokane traffic. As the railroads which join with the defendants in making these rates have not been made parties to this proceeding, the case will be reopened, if necessary, for the purpose of bringing them in, to the end that all carriers affected may be bound by this order unless cause be shown for a different ruling.

In this report and opinion all the Commissioners concur.

MAINE SUPREME JUDICIAL COURT.

ANTHONY A. LAFARIER
v.
GRAND TRUNK R. CO.

A state statute making railroad tickets good for six years and giving the holder of one the right to stop off at as many stopping places as he pleases, before reaching his destination, cannot, in view of the power of Congress over commerce, be applied

contrary to their terms to tickets sold beyond the limits of the state and entitling their holders to passage from a point in a foreign state or country to one in the state which enacted the statute.

Decided February 4, 1892.

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Oxford County made during the trial of an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train, which resulted in a verdict in favor of defendant. *Overruled.*

The facts are stated in the opinion.

Mr. James L. Wright, for plaintiff:

No railroad company shall limit the right of a ticket holder to any given train; but such ticket holder may travel on any train, whether regular or express, and may stop at any of the stations along the line of the road, at which such train stops; and such ticket shall be good for a passage as above for six years from the day it was first used; provided, that railroad companies may sell excursion, return, or other special tickets at less than the regular rates of

fare, to be used only as provided on the ticket.

Me. Rev. Stat. chap. 51, § 44.

Section 45 of chap. 51, Me. Rev. Stat. provides that "any ticket or check given in exchange for the unused portion of a partially used ticket, continues in force for the full term of the original ticket."

This statute is obligatory upon this defendant corporation; "and it is its duty, when doing business in this state, to conform to it."

Dryden v. Grand Trunk R. Co. of Canada, 60 Me. 519.

While the law of Canada where the ticket was purchased, in the absence of proof is supposed to be the common law, as determined in *Carpenter v. Grand Trunk R. Co.*, 72 Me. 888, 39 Am. Rep. 340, yet, when the plaintiff got within the territorial limits of this state, he

NOTE.—For notes on the power of states to make regulations affecting interstate commerce, see *People v. Budd* (N. Y.) 5 L. R. A. 559; *Norfolk & W. R. Co. v. State* (Va.) 13 L. R. A. 107; *Bangor v. Smith* (Me.) 13 L. R. A. 686.

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For note on power of Congress to regulate interstate commerce, see *State v. Indiana & O. Oil, Gas & Min. Co.* (Ind.) 6 L. R. A. 579. See also the recent case of *Bagg v. Wilmington, C. & A. R. Co.* (N. C.) 14 L. R. A. 586.

was entitled to be conveyed upon his ticket or check according to the law of Maine. And while using this ticket within this state all limitations thereon were inoperative, by force of the statute.

Mr. A. A. Strout for defendant.

Peters, Ch. J., delivered the opinion of the court:

The plaintiff purchased a ticket for a passage on defendant's road from Somerset, in the dominion of Canada, to Portland, in this state, the ticket reading thus:

"Issued by Grand Trunk Railway. Good for one second-class passage within five days from date. Not good to stop over. Not transferable. From Somerset to Portland. Conductors will collect or exchange this ticket for check 'Z.' L. S. 6. Series B. J. Hickson, General Manager."

While on the route, before passing out of Canada, the conductor took up the ticket, and gave the plaintiff a check, which represented the same contract that the ticket did,—a matter well understood by the plaintiff, who had been a frequent traveler on the road. The ticket was purchased at a cheaper rate than stop-off tickets were sold. The plaintiff passed on his ticket to Paris, in this state, where he stopped off for two months. At the end of that time he undertook to resume his passage for Portland, when, refusing to pay any fare, he was ejected from the train by the conductor, for which act he sues the road. The case turns wholly upon the question whether our statute, which makes railroad tickets good for six years, with the right of the holder to stop off at as many stopping places as he pleases, can constitutionally be made to apply to a ticket sold by the Grand Trunk Railway Company for a continuous passage from a place in Canada to a place in Maine, so that the holder can rightfully stop off on such ticket, and afterwards pursue the passage at any time during the period named while within the limits of this state. We think the statute, if to be applied to a case like the present, is amenable to the objection of unconstitutionality as an interference with both interstate and foreign commerce.

We regard the question as virtually determined by the case of *Carpenter v. Grand Trunk R. Co.*, 72 Me. 888, 89 Am. Rep. 840, although there is some difference between that case and this. In that the ticket was purchased for a passage from Portland to Montreal, and the passenger was put off in Canada, while in this case the ticket was for a passage from a place in Canada to Portland, and the passenger was put off in this state. The act of the company in that case was decided to be justifiable. It is difficult, however, to appreciate any difference of principle in the two cases. It seems inconsistent that a ticket for a continuous passage should be binding while going one way, but not the other; or rather, perhaps, that either contract should be valid while the passenger is riding in Canada, and not valid while upon the soil of Maine. Such apparent incongruity is avoidable by construing the statute as applying to contracts for passage to be performed wholly within the state, and not to

contracts performable partly within and partly without the state.

The plaintiff places great reliance upon the case of *Dryden v. Grand Trunk R. Co. of Canada*, 60 Me. 512, a case much like the present, where the statute in question was held to be valid. But that was many years ago, and the point now presented was not even intimated to the court. No thought was taken of it. Questions of interstate commerce have grown to an immense national importance since the time of that decision.

It is now well settled that the principles of foreign or interstate commerce apply to persons as well as to property,—to passengers as to freight; also that the power of the nation is paramount to that of the state on such questions. And, if Congress does not exercise its power upon any subject of commerce, still the state cannot interfere with it, if it be of a national rather than of a local character, or admits of a uniform system of regulation. The powers of Congress in such case are exclusive. If Congress does not legislate, the presumption is that legislation is not deemed necessary. No legislation may be the best legislation. Not only is there a constitutional prohibition against state interference, but there is now a congressional prohibition as well, expressed by the Interstate Commerce Act of 1887, which intrusts to a judicial commission the decision of many questions concerning carriage between states, or states and adjacent foreign countries.

These principles apply closely to the case in hand. The ticket in this instance entitled its bearer to a passage from a place in a foreign country, through portions of the states of Vermont and New Hampshire, into and across the state of Maine. Each state might have a policy of its own, and Canada another, affecting the contract between the railroad and the passenger, conflicting with one another. It would be even a more awkward result should there be conflicting state policies as to the carriage of freight as well as passengers. To be sure, the state of Maine does not undertake to regulate the contract beyond the limits of the state, but the trouble is that interference within the state in a case like this has the effect of interference without. There should be some uniform rule established by each railroad for itself, or by Congress or the interstate commission for all roads. As said before, the absence of Federal regulation is the best evidence that the management of such interstate carriage should be left free. The omission of regulations is of itself a regulation. It is enough that the subject-matter is susceptible of management through some uniform plan or system. See 2 Redfield, Railroads (6th ed.) pp. 505, 513, notes and cases.

Nor can such an application of the statute as the plaintiff insists upon be justified upon the ground that it is an exercise of a portion of the police power of the state. A right conferred or protected by the Federal Constitution cannot be overthrown or impaired by any authority derived from the police power. 1 Dill. Mun. Corp. (3d ed.) § 143, and citations. Congress can best exercise its own police power on national subjects. In the matter under present

discussion, the three states interested might exercise such power differently, and undertake to enforce their contradictory policies with penalties, thus placing the road in an uncomfortable predicament. Whatever different views may be entertained as to the power of Congress to supersede the action of a state in some particular applications of the principle of police power, no court has gone to such an extreme as to pretend that a state can, in the abused name of police power, intermeddle with the affairs of interstate carriage to the extent that the statute in question would if literally construed. It relates to no matter of life or health or morals; but it imposes burdens, and affects or alters contracts.

Speaking of the power vested in Congress over foreign and interstate commerce, in *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347, Mr. Justice Field said, "The power is unlimited." That case declared a state license act void which imposed a tax for vending from place to place goods manufactured in another state. Chief Justice Waite, in speaking on the same subject in *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708, says: "The powers thus granted keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse and its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought

into use to meet the demand of increasing population and wealth." In that case a tax levied upon interstate telegraphic business by virtue of a state enactment was held to be void. In *State Freight Tax Case*, 82 U. S. 15 Wall. 232, 21 L. ed. 146, a statute of Pennsylvania was held void which provided for taxing a railroad corporation upon its receipts from interstate traffic. The case of *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, is to the same effect. So is the case of *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547, upon the strength of which the opinion in the case of *Carpenter v. Grand Trunk R. Co.* 72 Me. 388, 39 Am. Rep. 340, largely depended.

There are numerous other decisions by the Federal supreme court and also many decisions by state courts, to the effect that state legislation is not allowable which imposes burdens or restraint upon interstate commerce, but they are not better illustrations of the doctrine than the cases cited. The only exceptions are cases which allow of acts of legislation that are designed to obtain from railroads a reasonable and just taxation. The principle of the above cases and of all similar cases is the principle of the present case. Here no taxes were sought for. But a burden is imposed, a meddlesome interference and restraint, which the railroad corporation is not obliged to endure.

Exceptions overruled.

Walton, Virgin, Emory, Foster, and Haskell, JJ., concurred.

ALABAMA SUPREME COURT.

MOBILE & OHIO R. CO. *Appt.*

v.

H. C. DISMUKES.

1. A state statute regulating the rights of carriers and declaring what rates shall be regarded as extortionate does not apply to the case of interstate shipments.
2. A contract with a carrier for rates less than those on its schedule, and which is,

therefore, unlawful as to the carrier because in violation of the Interstate Commerce Law, may nevertheless be enforced by the shipper if he had no knowledge that the schedule rate was higher than that given him.

Decided November 27, 1891.

NOTE.—*Relief to less guilty party to illegal contract.*

Unless the parties are *in pari delicto* as well as *particeps criminis* the courts, although the contract be illegal, will afford relief, where equity requires it, to the more innocent party whether it has been executed or not. *Tracy v. Talmage*, 14 N. Y. 181, 67 Am. Dec. 132.

In equity as between the parties the general maxim of *in pari delicto* does not always prevail; circumstances in the particular case often form exceptions and when it is necessary relief will be granted. *Bellamy v. Bellamy*, 6 Fla. 62.

"Where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the most excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities." *Reynell v. Sprye*, 1 De G. M. & G. 680-679, Knight-Bruce, J.

The rule of law governing the decision of the main case is admirably expressed by Mr. Bishop: "If, as in some special cases, it happens, the contract was unlawful in one of the parties only, the other may recover back what he has paid under it; and this principle is sometimes even carried to the extent that if both are in fault, yet not equally so, and especially if the one more in the wrong has taken any unconscientious advantage of the other, the more culpable party may be compelled to refund what the less culpable has paid." Bishop, *Cont.* § 623, 629, citing *Tracy v. Talmage*, *supra*; *Curtiss v. Leavitt*, 15 N. Y. 9; *Smith v. Bromley*, 2 Dougl. 695, note; *Worcester v. Eaton*, 11 Mass. 368, 376.

In the case of *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, where the objection was raised that the parties were *particeps criminis*, it was said: "In respect to offenses, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into

APPEAL by defendant from a judgment of the Circuit Court for Mobile County in favor of plaintiff in an action brought to recover damages for the alleged conversion of certain goods which had been delivered to defendant for transportation. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. E. L. Russell for appellant.

Mr. Shelton Sims for appellee.

McClellan, J., delivered the opinion of the court:

A statute of this state (Code, § 1159) provides that "any person or corporation engaged in the business of transporting passengers or freights over any railroad in this state who shall exact and receive more than just compensation therefor, or demands more than the rates specified in any bill of lading issued for such freights, . . . is guilty of extortion, and is liable to the party injured in double the damages sustained," etc. The Act of Congress, known as the "Interstate Commerce Law," of February 4, 1887, as amended by acts approved March 2, 1889, makes it unlawful for any common carrier to issue bills of lading at rates, or to demand or receive freight charges variant from the rates, established and published as therein prescribed, and filed with the interstate commerce commission; and this, whether the carriage in a given instance is by one common carrier, or by more than one, having traffic arrangements and a joint tariff of charges. Not only so, but it is also made unlawful for any person or corporation, by what means soever, and whether with the consent and con-

nivance of the carrier or otherwise, to knowingly obtain transportation at less than the regular rates at the time in force on the line of transportation; and the infraction of the statute in the particulars referred to, as well by consignors and consignees as by carriers, is made a highly penal offense. In the case at bar the Mobile & Ohio Railroad Company received at Cairo, Ill., certain goods of the value of about \$40 for transportation to Sunny South, Ala., a station on the Mobile & Birmingham Railway, with which the initial line connected at Mobile, Ala.; and delivered to the shipper a bill of lading whereby it was undertaken to transport the goods over the two roads in question to Sunny South, and there deliver them to H. C. Dismukes, for a compensation of \$5.44. There was at the time a joint tariff of rates in force between the Mobile & Ohio and the Mobile & Birmingham Railway Companies between the initial and terminal points of this shipment, which had been duly filed with the interstate commerce commission, approved, promulgated, and published in consonance with the Act of Congress; and, according to the rates fixed in this schedule, the freight charges on this consignment were, or should have been, \$29.30. On arrival of the goods at Sunny South, the consignee tendered to the agent of the Mobile & Birmingham Railway Company \$5.44, the amount of charges stipulated in the bill of lading, and demanded the property. This demand was refused, the insistence being that, the bill of lading to the contrary notwithstanding, the consignee was liable for the schedule rate of \$29.30; and thereupon the consignee instituted

their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers." The same doctrine was reiterated in *Atlas Bank v. Nahant Bank*, 3 Met. 581.

The principle of these cases was also adopted by the New York supreme court in the case of *Mount v. Waite*, 7 Johns. 434, in which it was held that one who had paid a premium for insurance on a ticket in a foreign lottery was entitled to recover it on the ground that he was not equally guilty with the defendants.

So in *Wheaton v. Hibbard*, 20 Johns. 280, 11 Am. Dec. 284, it was held that usurious interest paid by a borrower could be recovered independent of the statute, and that the maxim *inter partes in part delicto potior est conditio defendentis* did not apply as the law considered the borrower the victim of the usurer.

In *Schermerhorn v. Talman*, 14 N. Y. 93, Selden, J., reviews earlier cases as follows: "There is no rule better established than that which refuses the active interposition of a court of equity in favor of one who is *particeps criminis*; but like most other rules it admits of exceptions. There are certain cases where the party seeking relief, although *particeps criminis*, is not *in part delicto*, to which it does not apply. This distinction seems to have been first taken by Lord Mansfield, in the case of *Smith v. Bromley*, 2 Dougl. 686, note to *Jones v. Barkley*, 2 Dougl. 684. The exception was there applied only to cases where the law violated was intended to protect one of the parties from particular acts of oppression or extortion by the other, as for instance the statute against usury. Subsequent cases, however, show that the principle is 4 INTER S.

not confined to that class of cases. The next case in which the question arose was that of *Jaques v. Goddard*, 2 W. Bl. 1073. The plaintiff had paid to the defendant money as a premium for insuring lottery tickets, a transaction prohibited by statute, and the action was brought to recover it back. It was insisted for the defendant that the plaintiff, being *particeps criminis*, could not recover. But the action was sustained. Blackstone, J., said it was not like the stock-jobbing act; 'because there both parties are made criminal, and subject to penalties.' Browning v. Morris, Cowp. 790, was another case of the same kind. Lord Mansfield there draws the distinction between acts which are *malum in se*, such as bribery, and those which are merely prohibited by statute; and in the course of his opinion remarks that, "It is very material that the statute itself by the distinction it makes has marked the criminal; for the penalties are all on one side,—upon the office keeper." A similar question afterwards arose in the case of *Williams v. Hedley*, 8 East. 378, where it was very elaborately examined by Lord Ellenborough, who confirmed the doctrine of the previous cases. The principle of these cases is so obviously just that no argument seems necessary to sustain it. To say that in every transaction prohibited by positive enactment the parties concerned are necessarily *in part delicto*, would in many cases be manifestly absurd; and the test adopted by Lord Mansfield and Mr. Justice Blackstone, by which to determine the relative guilt of the parties, viz: to see upon which party the penalty is imposed, would seem to be just.

These cases have been several times reviewed and approved by the Supreme Court of Massachusetts. In the case of *Worcester v. Eaton*, 11 Mass. 368, Parker, Ch. J., after referring to the cases of *Smith v. Bromley* and *Browning v. Morris*, *supra*,

this action for the value of the goods as upon a failure to deliver the same to him, before a justice of the peace, whence, on judgment for plaintiff, an appeal was taken to the circuit court, where a trial *de novo* was had before the judge without jury on agreed facts. Judgment was again entered for plaintiff in the circuit court, and from that judgment this appeal is prosecuted, presenting for review the conclusion of the trial judge on the facts.

The statute of Alabama which we have quoted is relied on in support of the judgment. We do not think any aid can be derived from that source. The shipment—the transportation being from a point in Illinois, through the states of Kentucky, Tennessee, and Mississippi, into Alabama,—was an act of interstate commerce, and clearly within the laws of the United States regulating that commerce. It, of course, cannot be doubted that Alabama is without power to declare what rates of charge in respect of such commerce shall amount to extortion on the part of the carrier, or to declare that the demand for an amount of freight charges which the carrier is authorized under the Act of Congress to impose is rendered extortionate by reason of the fact that a less amount is stipulated to be paid and received between the parties to the bill of lading. To hold otherwise would be to give paramount efficacy to state regulation of a subject which is not only within exclusive national control, but with respect to which national legislation has already provided all regulations deemed necessary or expedient. Our statute may, no doubt, be looked to as determining what is extortion in freight charges for transportation within the state, and also, it may be, as affording a remedy and measure of

redress for extortion in interstate shipments, but not as declaratory of what shall constitute extortion in transactions of the class last named.

But, leaving the Alabama statute out of consideration, there is an element of contract in this case which, in our opinion, upon the agreed facts, will support the judgment below. The Mobile & Ohio Company agreed and bound itself to carry this consignment to Sunny South, Ala., and there deliver it to Dismukes, for a certain compensation. That company had no right, under the law and its tariff of rates adopted, approved, and promulgated as by the law provided, to enter into any such contract; and so far as the company is beneficially concerned in it, so far as the contract might otherwise be relied on by the carrier against the consignee, it is void, as being in the teeth of the law of Congress, as the same has been put into practical operation, upon the carrying business of the company. But it by no means follows that the consignee has no rights under it, or, indeed, any less or other right than would have been his had the rate set down in the bill of lading been the approved rate for the transportation. It nowhere appears that either the consignor or consignee knew that the stipulated rate was different from the approved rate. It is not in the contemplation of the Interstate Commerce Law that persons dealing with common carriers should be held to a knowledge of what their published schedules of rates contain. These schedules are no part of the law which all men are held to know, but are resultants *in pais*, so to speak, of the acts of the carrier, and of the interstate commerce commission, done under and in execution of the law. There is nothing in the law

says: "This distinction seems to have been ever afterwards observed in the English courts; and being founded in sound principle, is worthy of adoption, as a principle of common law in this country." The same question afterwards arose in the same court, in *White v. Franklin Bank*, 22 Pick. 181, and was there very fully discussed. The suit was brought to recover money which the plaintiff had deposited with the defendant, under an agreement that it should remain for a certain specific time, in violation of an express statutory provision, which prohibited the bank from making contracts "for the payment of money at a future day certain." The action was held to lie, and the principle of the English cases was emphatically sustained by the unanimous opinion of the court. *Lowell v. Boston & L. R. Corp.* 23 Pick. 24; *Atlas Bank v. Nahant Bank*, 3 Met. 581.

In *Woodruff v. Erie R. Co.*, 93 N. Y. 609, it is said there is a manifest distinction between cases arising under contracts which are contrary to public policy or *malum in se* or *malum prohibitum*, and those which are claimed to be *ultra vires* alone.

In *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 9 L. R. A. 689, it is said the doctrine everywhere running through the books is that relief will be granted where both parties are *in delicto* provided they do not stand *in pari delicto*.

In that case a railroad company which continued to operate a rival and competing line under a prior contract after the passage of a statute prohibiting such contracts and subjecting a company which operated a rival line to a penalty was not allowed to retain the money acquired by such operation when called upon by the owner of the road for an accounting although the continuation was illegal, since the owner not being *in pari delicto*

was entitled to an equitable share of the earnings.

In *Duval v. Wellman*, 124 N. Y. 156, it is said that courts both at law and equity have held that two parties may concur in an illegal act without being deemed in all respects *in pari delicto*; and that in many such cases relief from the contract will be afforded to the least guilty party when he appears to have acted under circumstances of imposition, hardship, or undue influence, and especially where there is a necessity of supporting public interests or a well-settled policy of the law whether that policy be declared in the statutes of the state or by the outgrowth of the decisions of the courts.

The doctrine thus stated was applied in that case to a marriage brokerage contract and it was held error to hold as a legal conclusion of law that the parties to such a contract were equal in guilt.

In *Place v. Hayward*, 117 N. Y. 487, a person who made a fraudulent transfer to his lawyer of property held by him in a representative capacity for the purpose of protecting it and covering it up against the assaults of his father's creditors where this was done under his attorney's advice was held not to be *in pari delicto* with the lawyer so as to prevent relief from the transfer.

In *Timmerman v. Bidwell*, 62 Mich. 206, the decision although not put on exactly this ground seems to come very near this principle. In that case a person who had become a member of an organization which proposed to repay to each member an extravagantly large profit on moneys paid it was held to be a dupe of a sharp, unscrupulous swindle, and that the latter could not be permitted to say that his scheme for fraud was so transparent that the other parties ought to have seen through it.

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which forbids shippers to contract for transportation at other rates than those specified in these schedules. It is only when the shipper knowingly contracts for a rate differing from that therein prescribed that his act is denounced as unlawful and punished as a crime. The motive of this legislation, moreover, is the protection of persons dealing with common carriers. Its primary purpose is to prevent a resort on the part of carriers to the undue advantages which accrue to them from the circumstances of their relations to persons having need for their services. The provisions of the law should not be so strained or contorted as to defeat its purposes, and convert the shield it was intended to afford the unwary shipper, who has no choice but to patronize the carrier, into a sword with which to work his destruction more certainly and completely than would have been possible had not the arm of the government been put forth in his behalf. To allow the carrier to draw the shipper, entirely ignorant of the schedule of rates approved by the commission, into a contract of affreightment, upon which the goods are delivered and carried, at a stipulated rate which the shipper can afford to pay,—as in this instance, about 12½ per cent of the value of the property,—

and then to refuse to deliver the shipment to the consignee, except upon payment of a rate which he cannot afford to pay,—in this instance, 75 per cent of the value,—and upon which the property would not have been shipped at all, would be to put a construction on the law of Congress which its terms do not require or justify, and which would defeat the purposes which actuated its enactment. True it is that the contract here is one which the Mobile & Ohio Company had no right to make. True it is that its execution on their part involved a crime. But the act of the shipper in entering into it is not, in the absence of knowledge on his part of the schedule rate, tainted with criminality, or violative of any provision of the interstate commerce acts. He is not *in pari delicto* with the contracting carrier; and he is entitled to the protection of that principle of law which enforces such a contract in behalf of the innocent party to it,—a principle which we conceive to be logically sound, and thoroughly settled upon authority. See *Tracy v. Talmage*, 14 N. Y. 162, and numerous later cases, which are cited and discussed in a *note* to that case as reported in 67 Am. Dec. 153.

Affirmed.

IOWA SUPREME COURT.

CAMPBELL *et al.* Railroad Commissioners,
Appts.,
v.
CHICAGO, MILWAUKEE & ST. PAUL
R. CO.

1. Shipments between points within the same state do not constitute interstate commerce because made on a railroad which runs for part of the trip in another state.
2. The enforcing of an order of railroad commissioners requiring a railroad company to conform to their schedule of rates is a matter of public

right for which an action may be maintained in behalf of the state.

3. A claim for the refusing to a shipper of an overcharge made in a petition by railroad commissioners for the enforcement of their order as to rates is waived on appeal if not asked in the appellate court.

Decided October 24, 1892.

APPEAL by complainants from a judgment of the District Court for Lyon County in favor of defendant in an action brought to compel defendant to conform its freight rates to the schedule made by the board of railroad commissioners, and to compel it to refund cer-

tain charges which it had made in excess of such rate. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. John Y. Stone, Atty. Gen., and T. C. Dawson* for appellants. *Mr. John W. Cary* for appellee.

NOTE.—Whether shipments from points in the same state lose their character of domestic commerce by passing out of the state during transportation.

In *Lord v. Goodall*, N. & P. S. S. Co., 102 U. S. 541, 38 L. ed. 224, it was decided that vessels navigating the high seas although engaged only in the transportation of goods and passengers between ports and places in the same state were subject to the acts of Congress regulating the liability of the owners of vessels navigating the high seas by virtue of the power of Congress over commerce.

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But in the recent case of *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, affirming the decision of the supreme court of Pennsylvania reported in 2 Inters. Com. Rep. 228, also in *note* to 1 L. R. A. 232, it was also decided by the Supreme Court of the United States that the mere passage of freight and passengers over the soil of another state in transit between points in the same state, does not render the transportation interstate commerce so as to exclude the power of the state in which the shipments were made to tax the traffic. And the court says that it

Robinson, Ch. J., delivered the opinion of the court:

At different times during the months of October, November, and December, 1889, and January, 1890, one D. J. Carpenter shipped from Beloit, Iowa, to Sioux City, Iowa, 15 carloads of livestock over the railway of defendant. He was charged by defendant for the transportation of the freight so shipped the sum of \$289.38, or \$56.76 more than the schedule rate as fixed by the board of railroad commissioners. Carpenter made complaint of the overcharge to the board and also complained that the defendant had raised its rate for transporting flour between the points named from ten cents per 100 pounds as fixed by the commissioners' schedule, to seventeen cents per 100 pounds. The commissioners investigated the complaints, found that the facts were as claimed by Carpenter, and ordered the defendant to conform its charges to the maximum schedule which they had established, and informed defendant that the overcharge of \$56.76 should be refunded to Carpenter. The defendant having failed to obey that order, this action is brought to enforce it. The defendant admits that the shipments and charges were substantially as claimed by Carpenter, but contends that its railway between Beloit and Sioux City is partly in Iowa and partly in South Dakota, and that the shipments in question were interstate commerce, and therefore not subject to the control of this state nor to the schedule of rates fixed by its board of railroad commissioners. The district court found that the statutes of Iowa, so far as they attempted to authorize the making of the order in question, were unconstitutional, and that the order was invalid.

1. The railway of defendant from Beloit to Sioux City is sixty-seven miles in length, and a little more than one half of it is in this state, the remainder being in South Dakota. Between the points named the railway crosses the boundary of the state four times. The schedule of the board of railroad commissioners in question was adopted under the provisions of chapter 28 of the Acts of the 22d General Assembly. Section 1 of that Act contains the following: "The provisions of this Act shall ap-

ply to the transportation of passengers and property, . . . and shall also be held to apply to shipments of property made from any point within the state to any point within the state, whether the transportation of the same shall be wholly within this state or partly within this state and an adjoining state or states." The question presented for our determination is whether freight shipped from Beloit to Sioux City over the railway described is interstate commerce, within the meaning of that provision of section 8 of article 1 of the Constitution of the United States which reads as follows: "The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes." In *Welton v. Missouri*, 91 U. S. 280, 23 L. ed. 849, the Supreme Court of the United States used this language: "'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states." In *Mobile County v. Kimball*, 102 U. S. 702, 26 L. ed. 241, it was said that "commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." In construing the constitutional provision under consideration, the same court, in *Gibbons v. Ogden*, 22 U. S. 6 Wheat. 189, 6 L. ed. 68, defined commerce as follows: "Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." The language last quoted was used to refute the claim that the commerce contemplated by the Constitution was mere traffic, the buying and selling or the interchange of commodities; but it was quoted with approval by the court which used it in the recent case of *Lekigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters.

was unnecessary in *Lord v. Goodall, N. & P. S. S. Co.* 102 U. S. 541, 26 L. ed. 224, to invoke the power to regulate commerce in order to find authority for the law in question as it might be referred to the power as to maritime law. Another consideration as stated in both cases is that the laws of nations on the high seas might become involved and the United States compelled to respond.

In *Pacific Coast S. S. Co. v. Board of Railroad Comrs.*, 9 Sawy. 253, the circuit court of the United States held that California state railroad commissioners had no power to regulate or interfere with transportation by a steamship company between ports within the state if they were in transit to or from other states or if the transportation consisted of voyages upon the ocean bringing the steamships under the exclusive control of Congress.

The above decision of the United States Supreme Court seems to settle the law in accordance with the decision in the main case, thus overruling *State v. Chicago, St. P. M. & O. R. Co.*, 3 L. R. A. 238, 40 Minn. 267, in which the railroad and warehouse commission of the state was held to have no au-

thority to fix the rates for transportation between two points within the state over a route extending across a neighboring state. And it would seem also to overrule *Sternberger v. Cape Fear & Y. V. R. Co.*, 2 L. R. A. 105, 29 S. C. 510, 2 Inters. Com. Rep. 426, in which the decision was similar to that of the Minnesota case unless a distinction is to be made in the South Carolina case by reason of the fact that the transportation between points in the same state was over several railroads, some of which were entirely in that state and some entirely in North Carolina and others partly in both states.

Somewhat remotely connected with this question is the decision in *Scammon v. Kansas City, St. J. & C. B. R. Co.*, 41 Mo. App. 194, to the effect that a shipment from another point in the same state to Kansas City, Mo., does not become interstate commerce because the delivery was actually made across the state line in Kansas where the consignee's place of business was, as the contract was for a shipment to Kansas City, Mo., and any other place of delivery was merely for the convenience of the parties.

B. A. R.

Com. Rep. 87, and applied to facts similar to those under consideration. The question involved in the case last cited was whether the state had the power to levy and collect a tax on the gross earnings of a railway for the continuous transportation of passengers and freight from points in Pennsylvania to other points in the same state, over a line of railway which passed from that state to another and back. It was held that such transportation was not interstate commerce within the meaning of the Federal Constitution, and that the tax was valid. Since the question under consideration is a Federal one, the decision last cited is decisive of it. Following that decision, we hold that the continuous transportation of articles of commerce from Beloit to Sioux City over the line of railway described is not interstate commerce, and that the statute under which the schedule of rates in question was made is not unconstitutional, so far as it has been questioned on this appeal. The board of railroad commissioners were authorized to make a schedule of reasonable maximum charges for the continuous transportation of freight from points in this state to other points in this state

over a railway partly in another state. It is not shown that the rates fixed by the schedule in question are unreasonable, and, in the absence of a showing to the contrary, we must presume that they are fully authorized by the statute.

2. Counsel for appellee insists that this action cannot be maintained in behalf of the state, for the reason that, so far as the record shows, it is solely for the benefit of Carpenter. The enforcing of the order of the commissioners requiring defendant to comply with the schedule of rates prepared for it is a matter of public right, and an action therefor can be maintained for the state. No objection to the prosecution of this action in the name of the commissioners has been made. Appellants have not asked in this court a refund of the overcharge, and the claim therefor made in the petition must be deemed waived. Therefore we decide nothing in regard to the right of the state to prosecute an action in behalf of a private person to compel the refunding of overcharges he has paid. For reasons indicated the judgment of the district court is reversed.

INTERSTATE COMMERCE COMMISSION.

P. H. LOUD, JR.,
v.

THE SOUTH CAROLINA R. COMPANY; THE BLACKVILLE, ALSTON & NEWBERRY RAILROAD COMPANY; THE CHARLOTTE, COLUMBIA & AUGUSTA RAILROAD COMPANY; THE CAROLINA, CUMBERLAND GAP & CHICAGO RAILWAY COMPANY; THE VIRGINIA MIDLAND RAILWAY COMPANY; THE BARNWELL RAILROAD COMPANY; THE RICHMOND & DANVILLE RAILROAD COMPANY; THE PORT ROYAL & WESTERN CAROLINA RAILWAY COMPANY; THE PENNSYLVANIA RAILROAD COMPANY AND THE NORTH CAROLINA RAILROAD COMPANY.

[No. 252.]

1. The question, whether property of a carrier in the hands of a receiver appointed after the matters complained of before this Commission are alleged to have occurred, is subject to an order of reparation issued by this Commission, is one to be presented to and disposed of by the courts on proceedings therein for the enforcement of such order.
2. Rates should bear a fair and reasonable relation to the antecedent cost of the traffic as delivered to the carrier and to the commercial value of such traffic (*Delaware State Grange of Patrons of Husbandry v. New York, P. & N. R. Co.* 8 Inters. Com. Rep. 561, 4 I. C. C. Rep. 605), but it is incumbent on parties invoking this rule to make satisfactory and reliable proof as to such antecedent cost and commercial value.
3. In passing upon the reasonableness of rates, the question whether they afford the carrier a proper return for the service rendered is to be considered as well as the result of the business to the shipper or producer of the traffic.
4. Where a special service is required of the carrier, such as rapid transit and speedy delivery in cases of perishable freight, a higher rate than for the carriage of ordinary freight is warranted, and, if a carrier charging a rate based on such special service, fails to render it, to the damage of the shipper, and without legal excuse, the remedy of the latter would seem to be by a proper proceeding in a court of law.
5. A reduction in rates by a carrier is not *per se* evidence that the former rates were unreasonable, as such reduction may, as in the present case, be accounted for because of a decrease in cost of transportation and an increase in the volume of the traffic to which such rates apply.
6. The rates on melons complained of in this case having been materially reduced by the defendant carriers since the commencement of this proceeding and there being no satisfactory evidence that the rates so reduced are unreasonable or excessive, the complaint is dismissed.

Complaint filed, February 13, 1890.—Answers filed, March 6 to May 15, 1890.—Testimony taken at Aiken, S. C., April 3, 1891, and at Atlanta, Ga., March 24, 1892.—Brief filed for Complainant, April 26, 1892.—Decided, December 24, 1892.

SEE Complaint, 2 Inters. Com. Rep. 782. Order 2 Inters. Com. Rep. 768.

Messrs. Croft & Chafee, John Gary Evans and E. S. Hammond, for complainant.
Messrs. Lawton & Cunningham and Joseph Ganahl, for the Port Royal & Western Carolina Railway Company.
J. T. Worthington and John N. Staples, for the Richmond & Danville lines.
James A. Logan, for Pennsylvania Railroad Company.
Messrs. Brawley & Barnwell, for the South Carolina Railway Company.

REPORT AND OPINION OF THE COMMISSION.

Clements, Commissioner:

The complaint in this case is made by P. H. Loud, Jr., who, it is alleged, during the seasons of 1887, 1888 and 1889, was engaged in planting and buying watermelons and shipping them over lines formed by defendants from Williston, Blackville, and other points in the state of South Carolina, to New York, Philadelphia, Baltimore, Washington and other cities on those lines.

The complainant charges:

1. That the defendants had established 24,000 lbs. as the weight of a carload of melons and exacted from complainant as freight on such carload from shipping points on the South Carolina Railway, the sum of \$87.12 to Washington and Baltimore, \$96.72 to Philadelphia, and \$103.92 to New York, and charged "excess freights on all carloads which they claimed exceeded 24,000 pounds in weight, the excess rates being per hundred pounds for all over 24,000 pounds;" that these rates of freight are unreasonable and excessive, and that 32,000 pounds would be a just and fair weight to allow for a carload of melons and \$75.00 would be an adequate and reasonable freight charge for such carload.
2. That the defendants, "in violation of the law and the rights of the complainant, have discriminated against him by charging him a higher rate of freight than they did other shippers of same weights per carload over their lines of railways."
3. That the defendants "in determining the weight of such carloads have rendered untrue and false weights."
4. That the defendants have "in a number of instances charged a higher rate per hundred pounds than they agreed to charge" and "have changed their rates of freight without giving the notice required by law."
5. That melons being of a perishable nature, the defendants received complainant's shipments with the understanding that they were to have rapid transportation to their destination and immediate delivery, but that in many instances the defendants failed to make "rapid transit and immediate delivery, in consequence

of which the melons were overripe and in bad condition on their arrival, to the great injury of the complainant."

The complainant claims that by reason of these alleged breaches of contract and violations of the Act to Regulate Commerce on the part of defendants, he has been damaged to the amount of \$5,000 and asks for an order of reparation; he further prays that the defendants be required to cease and desist from said alleged violations of the law, and for general relief.

Answers have been filed by or on behalf of all the defendants except the Carolina, Cumberland Gap & Augusta Railroad Company and the Barnwell Railroad Company. These answers put in issue all the allegations of the complaint charging violations of the interstate-commerce law or other wrongful and illegal act on the part of the defendants or any of them. The answer on behalf of the South Carolina Railway Company is filed by D. H. Chamberlain, who alleges among other things that he was, October 7, 1889, appointed receiver of that company in proceedings in the United States Circuit Court for the District of South Carolina and that "inasmuch as all the matters and things complained of occurred before his appointment as such receiver, no judgment should be entered affecting the property in his hands." As to this proposition, we here remark, that the question raised by it would properly be presented and disposed of on proceedings in the courts for the enforcement of any order of reparation which might be issued by us in this case.

The Richmond & Danville Railroad Company, in answering for itself and The Charlotte, Columbia & Augusta Railroad Company, The Virginia Midland Railway Company and the North Carolina Railroad Company, alleges that during the period embraced in the complaint, it (the Richmond & Danville) "was operating said other roads" for which it answers "under contracts of lease made with them respectively, and that neither of said roads was during said period in charge of or operating its line of railway or committed

either or any of the acts alleged in the complaint." This respondent further asked that an order be issued requiring the complainant "within a day therein named to make his complaint more certain and definite to the end that the Commission and the respondents be duly informed and notified of the cause of complaint set forth only in general language in said complaint." In response to this request an order was issued, March 10, 1890, requiring the complainant within twenty days from the service of the order to file a verified statement "showing as nearly as he may be able each shipment of melons over the respondents' lines during the period covered by the complaint, with the quantity and weight, point of origin and destination and dates of shipment." The complainant in compliance with this order filed a list of shipments during the months of July and August, 1889, accompanying it with an affidavit setting forth that in the limited time allowed, he was able to furnish only a "partial statement of his transactions with the defendant companies, showing a portion of his shipments for the season of 1889, upon which he would make his case." Subsequently, when the testimony was taken, the complainant, through his attorney, stated that he could not furnish a statement of all the shipments of which he complained unless the railroads would make out for him a list of all the cars he had shipped and their destinations.

The Richmond & Danville Company furnished a statement of shipments by the complainant from stations on the Charlotte, Columbia & Augusta Road during July and August, 1889. None was furnished by the other defendants.

Facts.

We find the following to be the material facts established by evidence:

1. The complainant was engaged during the seasons of 1887, 1888 and 1889, in planting and buying watermelons and shipping them to market over lines of railway formed by the defendants. These shipments were made from various localities in the state of South Carolina. As appears from the statements filed by the complainant and the Richmond & Danville Company, shipments during the season of 1889 (July and August of that year) were made by complainant from Williston, Bamberg, St. Matthews, Elko, Grahams and other towns and stations on the lines of the South Carolina Railway; from Lewiedale, Summit, Leesville, Batesburg, Johnston and Ridge Springs, on the Charlotte, Columbia & Augusta Railroad; from Ellenton and Hattiesville, on the Port Royal & Augusta Railway; from Barnwell on the Carolina Midland Railroad; and from four stations on the Blackville, Alston & Newberry Rail-

road. (None of these shipments appear to have been made from stations on the Port Royal & Western Carolina Railway and the complaint was probably aimed at the Port Royal & Augusta Railway.) The market points or points of destination of these shipments were New York, Philadelphia, Newark, Baltimore, Washington, Richmond, and numerous other cities in the states of New York, Pennsylvania, New Jersey and Virginia.

2. The defendant roads are common carriers and constitute lines of railway over which the shipments of complainant are transported under a common arrangement for continuous carriage between the localities above named, and in respect to such transportation are subject to the Act to Regulate Commerce. The South Carolina Railway Company has a main line from Charleston to Augusta; also, a line from Branchville on the said main line to Columbia, and several smaller lines, among which is the line from Aiken on the main line to Edgefield Court House, called the Carolina, Cumberland Gap & Chicago Railway Company, which is made a party defendant to the complaint. The Blackville, Alston & Newberry Railroad (now the Carolina Midland) is a small branch road which connects with the South Carolina Railway at Blackville on its main line. The Barnwell Railroad is a branch of the Carolina Midland from Barnwell on the latter road to Walterborough. The Port Royal & Western Carolina Railway is a part of the Central Railroad of Georgia extending from Spartansburg where it connects with the Richmond & Danville system, to Augusta. The Charlotte, Columbia & Augusta Railroad is leased and operated by the Richmond & Danville and runs from Charlotte through South Carolina *via* Columbia to Augusta, connecting with the South Carolina Railway at Columbia and Augusta. The Virginia Midland Railway and the North Carolina Railroad are also divisions of the Richmond & Danville system. The Richmond & Danville system extends from Augusta *via* Columbia and Charlotte to Danville and from Danville by one line to Richmond and by another *via* Lynchburg and Charlottesville to Alexandria; at the latter point it connects with the Pennsylvania Railroad, by which the carriage of complainant's melons is continued to Washington, Baltimore, Philadelphia, New York and other points. In 1887, the melon traffic went largely by the Clyde Line of steamers from Charleston and to some extent by the Atlantic Coast Line, but in 1888 and 1889 it was turned to the route *via* Columbia and the Richmond & Danville Line, and in the latter year, the complainant's shipments appear to have been exclusively by that route. The rates by these different lines were the same and they were equally open to shippers, but the South Carolina Railway Com-

pany preferred the Richmond & Danville line because of return loads by that line and would not furnish cars for shipments over the coast line.

3. The rates from stations on the South Carolina Railway are the same to any one point of destination; this is the case for the most part, also, as to the other initial roads. The rate sheets giving rates from stations on the South Carolina Railway and its local tributaries, the Carolina, Cumberland Gap & Chicago Railroad, the Blackville, Alston & Newberry Railroad and the Barnwell Railroad, to the north-eastern markets *via* Columbia and the Richmond & Danville route, are issued from the freight office of the South Carolina Railway at Charleston by the General Freight Agents of that Company and of the Richmond & Danville Railroad. The rate sheets giving rates from stations on the Charlotte, Columbia & Augusta Railroad (which as before stated is a division of the Richmond & Danville system running from Charlotte through South Carolina *via* Columbia to Augusta) are issued from the General Freight Department of the Richmond & Danville Railroad Company at Richmond. The following table shows the rates on melons per hundred pounds to the points named therein, from stations on those roads and the Port Royal & Augusta Road, during the months of July and August, 1889, and for some time previous, with minimum carloads of 24,000 pounds:

From	Stations on South Carolina Railway.	Stations on Carolina, Cumberland Gap & Chicago Railroad.	Stations on Barnwell Railroad.	Stations on Barnwell, Alston & Newberry Railroad.	Stations on Charlotte, Columbia & Augusta Railroad, South of Columbia.	Columbia.	Stations on Port Royal & Augusta Railway.
To	cts.	cts.	cts.	cts.	cts.	cts.	cts.
Richmond, Lynchburg, Petersburg, Norfolk, Alexandria, Washington, Baltimore, Philadelphia, Jersey City, New York.	31.3	33.5	33.5	34.	25.	23.	31.
	6.3	38.5	38.	.9.	30.	28.	36.
	40.3	42.5	.5	43.	34.	32.	40.
	43.3	45.5	4.5	46.	37.	35.	43.

The above rates applied to the stations on all the initial roads in South Carolina, from which it appears that complainant's melon shipments were made.

Since the institution of proceedings in this case, the above rates have been reduced, and, as appears from tariffs on file with this Commission, are now as follows:

4 INTER S.

	Stations on South Carolina Railway.	Stations on Carolina, Cumberland Gap & Chicago Railroad.	Stations on Barnwell to Aldrich, Inclusive.	Springfield to Selverna, Inclusive.	Stations on Charlotte, Columbia & Augusta Railway, South of Columbia.	Columbia.	Stations on Port Royal & Augusta Railroad.
To	cts.	cts.	cts.	cts.	cts.	cts.	cts.
Richmond, Lynchburg, Petersburg, Norfolk, Alexandria, Washington, Baltimore, Philadelphia, Jersey City, New York.	24.	26.5	26.5	27.25		23.	28.
	29.	31.5	31.5	32.25	29.	28.	33.
	33.	35.5	35.5	36.25	33.	32.	37.
	38.	38.5	38.5	39.25	36.	35.	40.

The distances from the shipping points named below to New York, Philadelphia, Baltimore and Washington, are, as follows, *via* defendants' lines:

Distances.

From Points on the C. C. & A. Ry.							
To				New York.	Philadelphia.	Baltimore.	Washington.
From	Lewisdale, S. C.	741	651	558	513		
	Summit, S. C.	743	653	555	515		
	Leesville, S. C.	748	658	560	520		
	Batesburg, S. C.	751	661	563	523		
	Johnston, S. C.	768	678	580	540		
	Ridge Springs, S. C.	756	669	571	531		

From Points on the Port Royal & Augusta R. R.							
To				New York.	Philadelphia.	Baltimore.	Washington.
From	Ellenton, S. C.	833	733	636	596		
	Hattiesville, S. C.	833	743	645	606		

From Points on the S. C. Ry.							
To				New York.	Philadelphia.	Baltimore.	Washington.
From	Williston, S. C.	845	750	652	612		
	Bamberg, S. C.	853	773	675	635		
	Graham, S. C.	858	768	670	630		
	St. Mathews, S. C.	755	665	567	527		
	Elko, S. C.	843	753	655	615		

From the following Points.							
To				New York.	Philadelphia.	Baltimore.	Washington.
From	Augusta, Ga.	801	711	627	587		
	Columbia, S. C.	717	627	533	493		

On the basis of the average distance of these cities named, the rates per ton per mile under stations on each road, respectively, from the old and the new rates are as follows:

From.	To New York.		To Philadelphia.		To Baltimore.		To Washington.	
	Old Rate.	Present Rate.	Old Rate.	Present Rate.	Old Rate.	Present Rate.	Old Rate.	Present Rate.
	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.
Lewisdale								
Summit								
Leesville .....	.965	.966	1.028	.998	1.065	1.030	1.147	1.108
Johnston								
Ridge Springs								
Batesburg								
Ellenton	1.088	.966	1.064	1.002	1.125	1.081	1.200	1.100
Hartsville								
Williston								
Bamberg	1.042	.866	1.087	.890	1.129	.902	1.196	.955
Graham								
St. Matthews								
Elko .....	.923	.896	.956	.928	.978	.962	1.047	1.012
Augusta								

The following table gives the average receipts per ton per mile and estimated cost of carrying a ton a mile for the years ending June 30, 1888, 1889 and 1890, as reported to this Commission by the roads named therein:

Average Receipts per ton per mile and Estimated cost of carrying one ton one mile for Roads named for the Years ending June 30, 1888, 1889 and 1890.

Name of Road.	1888.		1889.		1890.	
	Average receipts.	Estimated cost.	Average receipts.	Estimated cost.	Average receipts.	Estimated cost.
	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.
South Carolina Railway	1.594	1.223	1.686	1.227	1.615	.885
Charlotte, Columbia & Augusta Railroad (1)						
Richmond & Danville Railroad	1.710	1.062	1.476	1.022	1.310	1.090
Port Royal & Western Carolina Railway	3.062	2.729	3.522	3.109	3.108	3.352
Pennsylvania Railroad .....	.723	.509	.685	.486	.661	.457

(1) No separate report filed. Included in report of the Rich. & Danv. R. R. Co.

(2) As computed by this Office. Returned by Pennsylvania R. Co. as .462 cent.

Interstate Commerce Commission,
July 27, 1892.

4. On shipments to New York there is a terminal charge by the delivering road of 7 cts. per hundred pounds, for handling in the harbor and making deliveries within the lighterage limits. There also appears to be a charge of 1 cent per hundred pounds by the initial road for gathering up the melons. These charges are deducted from the through rate and the remainder is divided between the connecting roads. The rate sheets filed by the defendants do not show these terminal charges but only the through gross rates.

5. Twelve hundred melons of average weight of 20 lbs. per melon, are estimated as a carload. The better grades average about 23½ pounds. Few, if any, under 20 pounds, are shipped. The minimum carload during complainant's shipments in 1889 was fixed by the roads at 24,000 pounds, and any excess charged for at the carload rate per hundred pounds. The cars are not loaded to their full capacity, as that would be detrimental to the bottom layers of melons and render them unsalable. A car of ordinary size loaded to the extent practicable will carry from 24,000 to 26,000 pounds.

6. The roads have special melon trains and place cars on the side tracks where they are loaded with melons by the shipper or owner.

The cars furnished for this purpose are for the most part box cars and the shipper has to prepare them by laying straw on the bottom to the depth of 8 or 10 inches as a bed for the melons and by sealing the door horizontally with strips of lumber 2 or 3 inches apart. Melons are perishable freight and begin to deteriorate two or three days after they mature, but this depends to a great extent upon the weather. They are also liable to injury from the bumping of the cars against each other. The transportation of melons by the road is at the owner's risk; but the roads sometimes have to sell the melons to pay freight charges, and when they do not bring enough for that purpose, it is the loss of the roads. As a security against this loss, the roads, whenever they deem it advisable, require prepayment of freight. The roads do not contract to make melon shipments within a specified time, but publish schedules for their melon trains and the understanding is that quick time and prompt delivery are to be made. The schedule time on the lines of defendants during complainant's shipments in 1889 appears to have been 49 hours from Augusta and 41½ hours from Columbia to New York, and proportionately less for intermediate points. This gives a speed of from 16 to 18 miles per hour, and is a reasonable time for the performance

of the service by the roads. There is evidence tending to show that melon trains are frequently delayed much beyond the schedule time and that the freight has been greatly injured in this way; but there is no reliable data as to the amount of the damage thus sustained, and it does not appear what was the cause of the delay or whether it was avoidable by reasonable diligence on the part of the roads. Cars employed in transporting melons to the east bring return loads, but to what extent is not satisfactorily shown.

7. There is a charge of 10% commissions by the commission merchant on the sale of melons and a cartage and handling charge, amounting to \$8 or \$10 per car, at Baltimore and Philadelphia. In New York the melons are usually sold directly from the dock and no expense is incurred for cartage or handling. A charge of \$2 per car is also made for "passing" the melons from the car to the vehicle by which they are carried to their destination. All these expenses are paid by the shipper. There is no evidence as to the cost of the raising of melons and placing them on board the cars for shipment. An average carload of melons at shipping point is estimated to be worth, taking the season through, from \$50 to \$75, and they sell in the eastern markets, according to the testimony of the complainant, at from 12 to 16 cts. per melon; another witness testifies that good melons bring in New York from 14 to 25 cents per melon.

A carload of melons generally loses from 100 to 150 by reason of their becoming unsalable in transit. The testimony was to the effect that the melon business had not proved very profitable to the shipper. The markets are sometimes over-stocked, and, the melon being perishable, if it does not reach the market at the right time, cannot be held over and has to be sold for anything it will bring. The business of raising and shipping melons appears, however, to have grown steadily; in 1887, it is stated, there were shipped over the South Carolina Railway about 500 carloads—in 1888, about 1,000 carloads, and in 1890, nearly 2,200 carloads. It is to the interest of the roads to encourage the melon industry and they appear to have done so; the cars placed upon the side track for receipt of the melons are allowed to remain there for some time for the convenience of the shipper and telegraphic information as to the state of the market and other facilities are furnished by the roads free of cost to persons engaged in the business.

8. The melon shipping season extends through July and August. During those months in 1889, the complainant's partial statement and that furnished by the Richmond & Danville Company for the Charlotte, Columbia & Augusta road, show 121 carloads shipped by him. Of these 114 weighed (ac-

cording to those statements) 24,000 lbs., six weighed 30,000, and one 35,750 lbs. The complainant states that during the season of 1887, 1888, 1889 and 1890, he shipped between four and five hundred carloads of melons.

9. The complainant testifies that for carloads of lighter weight he was charged during the season of 1889, the same or a greater amount of freight than other parties were charged on two or more carloads of greater weight. There is, however, no satisfactory proof as to the weights of the carloads referred to. The evidence also fails in our opinion to sustain the charge that the defendants willfully "rendered untrue and false weights." As to overcharges, it appears that some of small amount were made by the road, but no complaint was ever made of them by the complainant and the attention of the railroad officials was not called to them. The complainant appears to have attributed the overcharges to "mistake in rates." In one instance, an offer was made after the institution of this proceeding to refund the amount of one of the alleged overcharges, but the complainant refused to accede to the offer. It is also shown that in some instances, the complainant was charged for less than the actual weight of his carloads. The complainant's method of ascertaining the weight of melons was to have an expert estimate the weight of such melons as he could and weigh those as to which he was in doubt.

10. As showing that the defendants "changed their rates without giving the notice required by law," the complainant introduced in evidence a rate sheet of the "Richmond & Danville Despatch" dated July 13, 1888, No. 1266, superseding one dated July 6, 1888, No. 1261. The through rates on both these rate sheets are, however, the same, and there is no difference between them except as to the divisions between the connecting roads of the through rate to Baltimore. A rate sheet signed by the general freight agents of the Richmond & Danville Railroad and the South Carolina Railway, dated July 12, 1889, and taking effect July 15, 1889, was also placed in evidence; but it does not purport to supersede any former rate sheet and appears to have only established melon rates to certain points on the North Carolina and other railroads to which they had not been previously announced. The changes in the rates on melons appear to have been for the most part (if not entirely) reductions and they were made prior to the melon shipping season. The complainant was duly advised as to the rates each season and no injury is shown to have resulted to him or any other shipper from a want of notice. There is no positive or other satisfactory proof that the rates were not in fact posted as required by law and none whatever of a willful neglect

on the part of any of the defendants of their duty in this respect. *Railroad Commission of Florida v. Savannah, F. & W. R. Co.* 5 I. C. C. Rep. 13, 8 Inters. Com. Rep. 688.

11. In letters dated, respectively, Dec. 8, and Nov. 24, 1888, the complainant wrote the General Freight Agent of the Richmond & Danville Road, expressing the hope that rates would remain as they were and that the same treatment as in the past would be accorded to melon shippers. At that time, the rates in force were about the same as those now complained of being (as shown by the rate sheets of July 6 and July 13, 1888) per carload to Washington and Baltimore \$88.00, to Philadelphia \$96.00 and to New York \$102.00. By rate sheet of June 20, 1888, the rates were very much higher, being 51 cents per hundred pounds, or \$122.40 per carload, to New York. In a subsequent letter, dated Feb. 26, 1889, the complainant, while referring to the "liberal treatment" the roads had accorded shippers of melons during the past season asked for a reduction of from 10 to 15 per cent.

Conclusions.

The claim of the complainant for an order of reparation calls in question the reasonableness of the rates charged on complainant's shipments in July and August, 1889, and which were in force when this proceeding was instituted. As bearing on this question, the complainant alleges that 32,000 lbs. would be a just and fair minimum carload weight to be allowed on melons and not 24,000 lbs., the weight established by the defendants. The complainant, however, testifies (and the other evidence is to the same effect) that from 24,000 to 36,000 lbs., is the proper weight of melons to be loaded in a car and it appears that a greater weight would result in detriment to the lower layers of the melons. The smallest melons shipped, moreover, do not as a rule weigh under 20 lbs. and as 1200 melons is a carload in numbers, 24,000 lbs. would seem to be the natural minimum carload weight. In any event the real question is as to the reasonableness of the rates in themselves.

These rates, as alleged in the complaint, yielded on a carload of 24,000 pounds from stations on South Carolina Railway, \$103.92 to New York; \$96.72 to Philadelphia; and \$87.12 to Baltimore and Washington. According to complainant's testimony, the average market price of a melon in New York is about 14 cents. As there is a loss of from 100 to 150 melons in transit, the carload on reaching market would not contain on an average more than 1075 salable melons, which at 14 cents per melon, would sell for \$150.50. Deducting from this the 10 per cent commission on sales, \$15.05, and the freight to New York, \$103.92, there is left a balance of \$31.53 for the shipper. This is less than the amount (from \$50.00

to \$75.00 per carload), which, according to the testimony, the carload would sell for at point of shipment. The only other witness as to the market price in New York (a witness for complainant) states that good melons sold there at from 14 cents to 25 cents per melon. This gives an average of 19½ cents per melon and at this price a carload shipped to New York would net the shipper after deducting freight charges and commissions, \$84.74. It is not reasonable that shipments would be made of a commodity which is worth more to the shipper at point of shipment than it yields him in the market shipped to, and we are of opinion that the market price in New York as testified to by the witness last referred to is more nearly correct than that given by complainant. There is no evidence as to the market price of melons at other points. At Baltimore and Philadelphia, the shipper has to pay for cartage and hauling as appears from our statement of facts.

The evidence in this case is materially deficient in furnishing no data whatever as to the cost of raising melons (embracing interest on investment, labor and other items of such cost), and the expense of conveying them to the cars and preparing the latter for their safe transportation.

The complainant in his brief invokes the rule laid down by us in the case of *Delaware State Grange Patrons of Husbandry v. New York, P. & N. R. Co.*, 8 Inters. Com. Rep. 561, 4 I. C. C. Rep. 605, that "rates should bear a fair and reasonable relation to the antecedent cost of the traffic as delivered to the carrier for transportation, and the average market price the freight will command, or, as it is termed, the commercial value of the property." In the absence of any evidence showing the "antecedent cost of the traffic as delivered to the carrier" and in view of the meagre and unsatisfactory evidence as to the "average market price of melons," it would seem impracticable to apply that rule in this case as now presented to us.

In passing upon the lawfulness of rates, the question whether they afford the carrier a proper return for the service rendered is to be considered as well as the result of the business to the shipper or producer of the traffic. Melons being perishable, rapid transit and prompt delivery are of the first importance and where the carrier renders this special service a higher rate than for the carriage of ordinary freight is warranted. *Delaware State Grange Patrons of Husbandry v. New York, P. & N. R. Co. supra.* The defendants furnish special trains for the melon traffic and undertake to make quick movement and speedy delivery. It appears that in numerous instances they have, from some cause not stated, failed in this respect to the damage of the shipper. This

failure, when avoidable by the exercise of reasonable diligence on their part, would seem to constitute a ground of action for damages in the courts. If, because of such default on the part of the carrier, the rate should be, at the shipper's request, reduced to such a rate as would be reasonable in the absence of rapid transit and prompt delivery, the carrier would be relieved of the duty of rendering this special service, so essential to the melon traffic. It would seem, therefore, to be to the interest of the shipper not to seek a reduction of rates on the ground of a failure of duty on the part of the carrier, but to endeavor to enforce that duty by proper proceedings in the courts. A reduction of rates by us would, as we have shown, tend to a contrary result.

By a comparison of the table in our statement of facts showing the rates per ton per mile under the old as well as the present rates from the several shipping points to New York, Philadelphia, Baltimore and Washington, with that giving the average receipts per ton per mile on freight in general and the estimated cost of carrying a ton a mile, for the three years, 1888, 1889 and 1890, as reported by the roads, it will be seen that those rates per ton per mile are less than the average receipts per ton per mile on all the roads named except the Pennsylvania, and are also less than the estimated cost of carrying a ton a mile on most of them. There was no evidence introduced as to the actual cost to the roads of melon transportation.

The complainant contends that the reduction in rates since this proceeding was commenced is in the nature of an acknowledgment that the rates as they existed before the reduction were excessive. This does not necessarily follow. On an examination of the tables of rates complained of and present rates, it will be seen that the main reduction is in the rates from stations on the South Carolina Railway and the small roads tributary to it—the reduction from those stations being 7 cents per hundred pounds, while from stations on the other roads it is only from 1 to 8 cent. It will also be seen from the table relating to that matter, that the estimated cost of carrying a ton a mile on the South Carolina Railway has decreased from 1.227 cents in 1889 to .885 cents in 1890. A decrease in cost of transportation and the increase shown to have taken place in the volume of the melon traffic might authorize and account for a reduction in rates. The rates complained of appear to have been less than those at times previously in force and the complain-

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ant does not appear, when he wrote the letters referred to in our statement of facts, to have considered such prior rates excessive.

We have been considering the reasonableness of the rates in force during the complainant's shipments in 1889 as bearing upon the claim of complainant for an order of reparation. We do not feel justified under the state of proof in issuing such order based on the ground that those rates were excessive and unlawful.

Under the present rate of 86 cents per hundred pounds the freight on a carload of 24,000 lbs. from stations on the South Carolina Railway to New York is \$86.40. Taking the complainant's statement of the market value of melons in New York and deducting the above freight and 10 per cent commissions, there will be left \$49.05 per carload. On the testimony of the other witness as to such market value, the balance after making those deductions will be \$102.80. In order to find the net profit to the producer or shipper, there must be subtracted from the balance so ascertained, the cost of raising the melons, conveying them to and loading them in the cars and preparing the latter for their transportation. Of this cost, as before stated, we have no proof. The complainant claims that a rate somewhat lower than that now in force should be made, but we are not prepared, on the facts disclosed by the record, to sustain this claim. In view of the absence of any evidence whatever as to the cost incurred by the producer or shipper in raising the melons and otherwise as above stated prior to the commencement of the transit, and of the other matters bearing on this question to which we have adverted, we do not feel justified in ordering a greater reduction of the rate complained of than that already made by the defendants since the commencement of this proceeding. It may be noted in this connection that the complainant in his letter of February 26, 1889, to the General Freight Agent of the Richmond & Danville Road, asked for a reduction on rates of from 10 to 15 per cent. The present rates from stations on the South Carolina Railway are about 15 per cent less than those in force at that time. The rates specifically set forth in the complaint as exorbitant are those then in force from stations on the South Carolina Railway.

¶ As to overcharges, or charges in excess of the published or agreed rates, and false weighing, we deem it unnecessary to add anything to what we have said in our statement of facts.

The complaint must be dismissed.

THE BOARD OF TRADE OF CHATTANOOGA

v.

THE EAST TENNESSEE, VIRGINIA & GEORGIA R. CO.; THE NORFOLK & WESTERN RAILROAD COMPANY; THE OLD DOMINION STEAMSHIP COMPANY; THE WESTERN & ATLANTIC RAILROAD COMPANY; THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA; THE GEORGIA RAILROAD COMPANY; THE OCEAN STEAMSHIP COMPANY OF SAVANNAH; THE SOUTH CAROLINA RAILWAY COMPANY; THE CLYDE STEAMSHIP COMPANY; THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE PENNSYLVANIA COMPANY; THE NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY; THE NEW YORK & NEW ENGLAND RAILROAD COMPANY AND THE DELAWARE & HUDSON CANAL COMPANY.

[No. 259.]

1. Upon complaint alleging that rates on traffic from New York and other Atlantic seaboard points to Chattanooga are unreasonable and greater for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Memphis and Nashville:

Held, That defendants are justified by the existence of water competition of controlling force in charging less on such traffic for the longer distance to Memphis, but that no such competition exists for such traffic to Nashville, and any greater charge for the transportation of like kind of property from said seaboard points for the shorter distance to Chattanooga than for the longer distance through Chattanooga to Nashville is in violation of the fourth section of the Act to Regulate Commerce. Defendants ordered to cease and desist from making such greater

charge to Chattanooga, with leave to file application for relief under the proviso clause of the fourth section within a specified time. *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 120; 5 I. C. C. Rep. 324, cited and affirmed.

2. One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it.
3. When great disparity exists between charges which are lower to competitive than to intermediate points much less remote, the inference is irresistible that the lower rate must be unremunerative upon any theory, or else the larger rate gives an unwarranted return for the service rendered.

Complaint filed, April 9, 1890.—Answers filed, May 5 to June 20, 1890.—Heard at Chattanooga, Tennessee, November 12, 1890.—Briefs filed, January 2 to January 20, 1891.—Decided December 30, 1892.

THE FOURTH section of the Act to Regulate Commerce. See Complaint, 2 Inters. Com. Rep. 798; Answer, 3 Inters. Com. Rep. 106.

G. C. Connor, J. A. Moon and E. S. Daniels for Complainant.

W. M. Baxter, for the East Tennessee, Virginia & Georgia Railway Company.

A. Pope, for the Norfolk & Western Railroad Company, and Old Dominion Steamship Company.

Lawton & Cunningham, for the Central Railroad & Banking Company of Georgia and the Ocean Steamship Company of Savannah.

Shepherd & Cist, for the Cincinnati, New Orleans & Texas Pacific Railway Company.

Clarke & Brown, for the Nashville, Chattanooga & St. Louis Railway Company.

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REPORT AND OPINION OF THE COMMISSION.

Knapp, Commissioner:

The complainant, an association of merchants and manufacturers of the city of Chattanooga, Tennessee, incorporated under the laws of that state in the name of "The Board of Trade of Chattanooga," alleges that its objects, among others, are "to study the workings of our" (the Chattanooga's) "system of transportation, upon which our" (Chattanooga's) "commercial prosperity depends so largely, and to endeavor to remedy, by all proper means, the defects and abuses existing therein;" and that the defendants, as common carriers engaged in interstate commerce, "separately and jointly, have been and are now transporting property and participating in *through rates* of freight charges for transporting the same," from Boston, New York, Philadelphia and Baltimore, designated as Eastern Seaboard points, to Nashville, Memphis and Chattanooga, in the state of Tennessee.

The complaint charges in substance:

1. That the through rates to Chattanooga participated in by the defendants are unjust and unreasonable in themselves, (as well as relatively to those to Nashville and Memphis) and therefore, in violation of section 1 of the Act to Regulate Commerce.

2. That Nashville, Memphis and Chattanooga compete for business in the same territory; that the through rates so charged and participated in by defendants are much lower to Nashville and Memphis than to Chattanooga "for transporting like property from said seaboard points under the same, or substantially the same circumstances and conditions;" and that the defendants are thus guilty of unjust discrimination against Chattanooga, in violation of section 2 of the Act to Regulate Commerce, and of giving an undue preference or advantage to Nashville and Memphis and subjecting Chattanooga to an undue prejudice or disadvantage in violation of section 3 of said Act.

3. That the defendants are guilty of a violation of section 4 of the Act to Regulate Commerce, in that under said through rates they charge and receive a greater compensation for the transportation of the "like kind of property, under substantially similar circumstances and conditions" from said eastern seaboard cities to Chattanooga than they charge and receive for such transportation over their several lines *through* Chattanooga to Nashville and Memphis, which latter cities are respectively 151 miles and 810 miles farther from said eastern seaboard points.

In proof of these allegations, complainant

refers to the tariffs on file with the Interstate Commerce Commission, and gives tables illustrating the alleged discriminating and otherwise illegal character of said rates.

The prayer of the complainant is, that, after hearing and investigation by this Commission on due notice, "an order be made commanding the defendants to cease and desist from said violations of the Act to Regulate Commerce, and that said order require them to transport property to Chattanooga from eastern seaboard points at such rates as this Commission may decide to be just and reasonable," and "to cease transporting property from eastern seaboard points to the cities of Nashville and Memphis at lower rates of freight charges than they charge and collect for transporting like property to the city of Chattanooga; and for such other and further order as the Commission may deem necessary to grant relief to the merchants and manufacturers of Chattanooga."

All of the defendants filed answers to the complaint except the Pennsylvania Company, The Old Dominion Steamship Company and the Clyde Steamship Company.

Some of these answers put in issue the allegation of complainant that Nashville, Memphis, and Chattanooga compete for business in the same territory, and the answer of the Norfolk & Western Railroad Company sets up that "there are natural causes between Nashville and Chattanooga, or between Cincinnati and Chattanooga, in the shape of ranges of mountains and streams that divide the territories naturally and, as a consequence, commercially, that absolutely prevent under any reasonable conditions a growth of trade to any extent northward from Chattanooga in the direction of Nashville for any considerable distance along the line of the Nashville, Chattanooga & St. Louis Railway, or northward in the direction of Cincinnati along the line of the Cincinnati Southern Railway; that the character of the productions of the territories named, the interdependence of the communities in said sections one upon another, and in their relations towards the larger markets that lie in the direction of Ohio, Kentucky or Indiana, as well as the community of interest between the cities of Nashville or Cincinnati and the towns along the respective lines of railway named, are sufficient to determine or control the trade of said communities toward said cities or others adjacent thereto." This answer also contains the following statement: "The adjustment of rates between eastern cities and Chattanooga in a uniform measure with those for all important points in interior Alabama and Georgia, was

because of the necessity that existed, commencing in 1868, for harmonizing the various commercial interests of said towns and cities, and, as the result of such effort, a system of rate adjustment was indicated in 1874, under the auspices of an association then formed, called the Southern Railway & Steamship Association, which, first embracing the cities of Atlanta, Chattanooga, Montgomery, Selma and Rome, became enlarged in its area as other railway lines were built and as the freight interests of other towns interested became enlarged. The cities or towns taking rates uniform with Chattanooga at this time are, Anniston, Ala., Athens, Ga., Atlanta, Ga., Birmingham, Ala., Cedartown, Ga., Columbus, Ga., Dalton, Ga., Montgomery, Ala., Eu-
 faula, Ala., Rome, Ga., Selma, Ala., Meridian, Miss., Opelika, Ala., Talladega, Ala., and possibly others. The natural conditions that exist, as well as the transportation facilities that are enjoyed by each of these towns, make them more or less competitive with each other, and a large portion of them competitive with Chattanooga, those more particularly competitive with Chattanooga being Anniston, Ala., Atlanta, Ga., Birmingham, Ala., Rome, Ga., and Dalton, Ga., and taking New York as a representative point, the rates to said points are as have been named by the complainants, viz: \$1.14, \$.98, \$.86, \$.73, \$.60 and \$.49, for the six figured classes of merchandise traffic; and your respondent believes that the competition for business and the interchange of traffic one town with another or one territory with another, in which Chattanooga is most largely if not wholly interested, is with the towns named or with the territories that said towns likewise reach, and that it is in reference to rate adjustment in connection with these towns that the efforts of the complainants should be directed."

It is expressly admitted in most of the answers, and not denied in any, that the through rates from said eastern seaboard cities are higher to Chattanooga than to Nashville and Memphis; but it is claimed that this is not in violation of any of the provisions of the Act to Regulate Commerce, because it is alleged, the rates to Nashville and Memphis are forced upon the defendants by actual water competition of controlling force at both said points, and the transportation thereto from said eastern seaboard cities is not under substantially similar circumstances and conditions as that to Chattanooga. It is further denied that the rates to Chattanooga are unjust and unreasonable in themselves.

The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railroad, The Central Railroad & Banking Company of Georgia and The Ocean Steamship Company of Savannah, allege that among

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other circumstances which justify them in charging less rates for the longer haul through Chattanooga to Memphis and Nashville than are charged to Chattanooga, is the fact that, while the transportation is through Chattanooga the rates to Memphis and Nashville from said seaboard points are made through Cincinnati. It is also claimed by some of the defendants that the through rates to Memphis and Nashville are not made under a joint prorating arrangement, but are made by adding the regular tariff rate under the Official (or Trunk Line) Classification to Cincinnati to the rates of the railroads south of that point, and that for said last named rates said roads south of Cincinnati are alone responsible.

On the part of the Nashville, Chattanooga & St. Louis Railway Company it is alleged, that said company "neither owns nor operates any railroad running into Chattanooga except the one from Nashville," and said company denies that it has anything to do "in fixing the rates or participating therein on freight shipped from any of the named points to Chattanooga," but it admits "that it takes freight destined for Nashville of its codefendants at Chattanooga from said named points at through rates and participates therein with its codefendants."

The New York, Lake Erie & Western Railway Company alleges "that the freight and traffic sent by it go direct to Memphis and Nashville via Louisville and do not pass through Chattanooga, and, therefore, that the Board of Trade of Chattanooga has no legal ground of complaint against it under the Act to Regulate Commerce, as it has no control whatever of the rates to Chattanooga."

The Cincinnati, New Orleans & Texas Pacific Railway Company avers that it is operating as lessee thereof the Cincinnati Southern Railway, extending from Cincinnati to Chattanooga, and "that the city of Nashville is not on the defendant's line of railway and that it does not operate or control any part of any through route from said eastern seaboard points to Nashville."

The Central Railroad Company of New Jersey denies "that it makes through rates from any seaboard points named in the complaint to Chattanooga, Memphis and Nashville."

Facts.

1. The complainant is an association of merchants and manufacturers of the city of Chattanooga, Tennessee, incorporated under the laws of that state for the purposes named in the complaint, and the defendants, The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railroad Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company

of Georgia, The Georgia Railroad Company, The Ocean Steamship Company of Savannah, The South Carolina Railway Company, The Clyde Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company (as lessee of the Cincinnati Southern), The Baltimore & Ohio Railroad Company, The Delaware & Hudson Canal Company, The Pennsylvania Company, The Pennsylvania Railroad Company, The New York, Lake Erie & Western Railroad Company, The New York & New England Railroad Company, and The Nashville, Chattanooga & St. Louis Railway Company, are severally common carriers engaged in interstate commerce as parts of through lines and under joint tariffs of rates to Chattanooga, Nashville and Memphis, Tennessee. There is no proof controverting the denial of the Central Railroad Company of New Jersey that it is so engaged.

2. The following are the through rates from New York and Boston to Chattanooga, Nashville and Memphis, respectively:

Classes:—	1	2	3	4	5	6
To Chattanooga.....	114	98	86	78	60	49
To Memphis, 310 miles farther	100	85	65	45	38	35
To Nashville, 151 miles farther	91	78	60	42	36	31

It thus appears that the rates from New York and Boston are less to Nashville than to Chattanooga, on the six numbered classes respectively, by 28 cents, 20 cents, 26 cents, 31 cents, 24 cents and 18 cents; and less to Memphis than to Chattanooga by 14 cents, 13 cents, 21 cents, 28 cents, 22 cents and 14 cents. These differences prevail in favor of Nashville and Memphis on all goods transported to those cities from eastern seaboard points through Chattanooga—the distance to Nashville being 151 miles, and to Memphis 310 miles, further than to Chattanooga.

3. There are a number of routes by which traffic from the eastern seaboard is carried to Nashville. These may be separated into two classes or groups; one consisting of the lines passing through Chattanooga, the other of the lines passing through Cincinnati, Louisville, Evansville and possibly other points north of Chattanooga. How the aggregate through business to Nashville is divided between these different groups was not very definitely shown, but it is fairly inferable from the evidence that the lines through Chattanooga carry fifty to sixty per cent of the total tonnage. There was considerable disagreement as to whether the through rate to Nashville (with reference to the routes *via* Cincinnati, Louisville, etc.) is pro-rated on the whole mileage, or made up by adding certain arbitrary amounts to the "trunk line" rates from the east to these intermediate points respectively.

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The rates from New York and Boston to Cincinnati are:

1	2	3	4	5	6
65	57	44	30	26	22

From the same points to Louisville the rates are:

1	2	3	4	5	6
75	65	50	35	30	25

And to Evansville:

1	2	3	4	5	6
88	72	55	39	33	28

The above charges are imposed for carrying the traffic to these towns respectively, whether the transportation terminates there or is continued to Nashville; in other words the lines east of these points receive the same compensation in either case. The through rate to Nashville, hereinbefore stated, is less than the local rates from these several places plus the trunk line rates from the seaboard to each of them respectively, that is, less than the amount produced by adding the locals from Cincinnati, Louisville or Evansville to the eastern rates severally applied to those towns. For this reason the Nashville rate may be said to be made by "arbitrary" additions to the trunk line rates to the intermediate points. On the other hand a comparison of these additions with the distances to Nashville from the several points mentioned shows that they give substantially the same rate per ton per mile in each case—one and seven tenths cents—as the trunk line rate per ton per mile east of those points. Practically, therefore, the Nashville rate by the several routes now under consideration is an extension of the trunk line rate to that point, the total charge being divided between the several carriers in nearly exact proportion to the mileage operated by each. This being the material fact, the origin of the rate, or the proper name by which to describe it, can be of no importance. As any differences between the several routes in this group appear to be insignificant, their relation to the controversy will be sufficiently shown by taking one of them as an illustration, and accordingly the route *via* Cincinnati will be hereafter used for that purpose.

The following comparison shows the difference between the local rate from Cincinnati to Nashville and the amounts added to the trunk line rate to the former place to make the through rate to the latter.

Local Rate	1	2	3	4	5	6
Cin. to Nash.	53	48	39	31	25	25
Additions to	1	2	3	4	5	6
Trunk Line Rate	—	—	—	—	—	—
to Cincinnati	26	21	16	13	10	9

The seaboard traffic which is carried to Nashville through Chattanooga reaches the lat-

ter place by several different routes. The most important of these appears to be the East Tennessee, Virginia & Georgia Railway with its eastern connections by rail and water. The water portion of this route is by the vessels of the old Dominion Steamship Company from New York to Norfolk, where they connect with the Norfolk & Western Railroad which extends to Bristol, Tennessee, the eastern terminus of the East Tennessee, Virginia and Georgia; the rail portion of this route consists of the Pennsylvania system, and possibly other lines, reaching Roanoke, Va., on the main line of the Norfolk & Western by way of the Shenandoah Valley. All traffic over this route passes through Knoxville, Tenn., the rates to which point are about the same as to Memphis.

Another route is by the Clyde Steamship Company to Charleston, connecting at that port with rail lines running through Augusta and Atlanta; and a third route is by the Ocean Steamship Company to Savannah, and thence by rail through Macon and Atlanta. There is no testimony in the case indicating the relative portion of Nashville traffic *via* Chattanooga which passes by either of these routes, but our understanding is that the greater portion of it goes by the one first above described.

The traffic from Atlantic seaboard points to Memphis is also divided between several independent routes. One of these general routes is by the all rail lines through Cincinnati, Louisville, Evansville, etc. The Memphis through rate is the trunk line rate to Cincinnati, etc., plus certain additions which are less than the local rates from those points to Memphis. The difference between such local rates and these additions appears by the following statement:

Local Rate	1	2	3	4	5	6
Cin. to Memp.	75	60	55	40	35	30
Additions to	1	2	3	4	5	6
Trunk Line Rate	—	—	—	—	—	—
to Cincinnati	35	29	21	15	12	13

A comparison of these additions with the distances from Cincinnati, etc., shows that the Memphis through rate, like the Nashville through rate, is in effect an extension of the trunk line rate to Memphis, the total charge being divided between the different carriers in proportion to their respective mileage.

A second route is the one through Chattanooga, formed by the East Tennessee, Virginia & Georgia Railway with its eastern connections, and requires no further description.

Two other routes are those already mentioned by way of Charleston and Savannah respectively. The Memphis traffic by the last named routes does not necessarily go through Chattanooga, but may take a shorter course from Atlanta by way of Birmingham.

In addition to these is the ocean route to New

Orleans, and thence to Memphis by rail or by the Mississippi river.

There are likewise several routes by which shipments terminating at Chattanooga reach their destination. A portion of this traffic goes by the trunk lines to Cincinnati, and thence by the Cincinnati Southern Railroad, now controlled by the Cincinnati, New Orleans & Texas Pacific Company. The through rate by this route, as in the case of Nashville and Memphis, is made by adding to the trunk line rates to Cincinnati certain amounts which represent the proportion of the total charge taken by the carrier from Cincinnati to Chattanooga. The additions so made give a considerably greater rate per ton per mile for this portion of the haul than the trunk line rate east of Cincinnati, but they are at the same time materially less than the local rates between those points. The precise difference appears by the following statement:

Local rates	1	2	3	4	5	6
Cin. to Chat.	76	65	57	47	40	30
Additions to	1	2	3	4	5	6
Trunk Line	—	—	—	—	—	—
Rates to Cin.	49	41	42	43	34	27

Another portion of the Chattanooga traffic goes by the route formed by the lines of the East Tennessee, Virginia & Georgia Railway and its eastern connections by rail and water hereinbefore mentioned. The other routes by which Chattanooga shipments reach their destination are those by water and rail through Charleston and Savannah respectively which have already been sufficiently described. The proportions of the through rate taken by the several lines operating the three routes last named are not disclosed by the record; nor is there any proof showing the relative amount of Chattanooga shipments by either of the routes mentioned. Our impression, however, is that the larger portion of this traffic goes by the Cincinnati route and by the route of the East Tennessee, Virginia & Georgia Railway and its connecting lines.

There may be other routes or lines by which traffic from the Atlantic seaboard reaches Nashville, Memphis or Chattanooga, but the foregoing are those by which the great bulk of eastern shipments is carried to these several points, and the only ones which need to be considered in this investigation. The rates to each of these towns are the same by whatever route the transportation is effected, except the rate to Memphis *via* New Orleans.

Cincinnati, Louisville and Evansville have water communication with Nashville by the Ohio and Cumberland rivers, and also with Memphis by the Ohio and Mississippi rivers, but no traffic from the eastern seaboard by way

of Cincinnati, etc., reaches Nashville or Memphis by these water routes.

4. As the matter of distance is of considerable importance in one aspect of this case, the following tables are given which are believed to be substantially correct.

Distances via Cincinnati, Louisville and Evansville.

	miles
New York to Cincinnati.....	757
Cincinnati to Nashville.....	295
New York to Nashville.....	1052
New York to Louisville.....	927
Louisville to Nashville.....	185
New York to Nashville.....	1112
New York to Evansville.....	986
Evansville to Nashville.....	157
New York to Nashville.....	1143
New York to Cincinnati.....	757
Cincinnati to Memphis.....	487
New York to Memphis.....	1244
New York to Louisville.....	927
Louisville to Memphis.....	377
New York to Memphis.....	1304
New York to Evansville.....	986
Evansville to Memphis.....	322
New York to Memphis.....	1308
New York to Cincinnati.....	757
Cincinnati to Chattanooga.....	335
New York to Chattanooga.....	1092

Distances via Chattanooga all rail.

New York to Bristol.....	659
Bristol to Chattanooga.....	242
New York to Chattanooga.....	901
Chattanooga to Nashville.....	151
New York to Nashville.....	1052
New York to Chattanooga.....	901
Chattanooga to Memphis.....	310
New York to Memphis.....	1211

Distances via Chattanooga, part water.

Norfolk to Bristol.....	408
Bristol to Chattanooga.....	242
Norfolk to Chattanooga.....	650
Chattanooga to Nashville.....	151
Norfolk to Nashville.....	801
Norfolk to Chattanooga.....	650
Chattanooga to Memphis.....	310
Norfolk to Memphis.....	960

(This does not include water distance from New York to Norfolk.)

Charleston to Chattanooga.....	448
Chattanooga to Nashville.....	151
Charleston to Nashville.....	599
Charleston to Chattanooga.....	448
Chattanooga to Memphis.....	310
Charleston to Memphis.....	758

(This does not include water distance New York to Charleston.)

Savannah to Atlanta.....	295
Atlanta to Chattanooga.....	140
Savannah to Chattanooga.....	435
Chattanooga to Nashville.....	151
Savannah to Nashville.....	586

Savannah to Chattanooga.....	435
Chattanooga to Memphis.....	310
Savannah to Memphis.....	745

(This does not include water distance New York to Savannah.)

The distance from New Orleans to Memphis by rail is 394 miles, and by river very much greater.

The distance from Cincinnati to Nashville by the Ohio and Cumberland rivers is about 617 miles.

5. The city of Chattanooga is in southeastern Tennessee on the river bearing the same name as the state. During the last ten years especially its growth has been extremely rapid, and it has become a manufacturing and commercial point of considerable importance. It competes for the trade of the surrounding country largely in the same territory as Nashville, and also to some extent in the same territory as Memphis. By reason of the disparity in charges on shipments from the east, in favor of Nashville and Memphis, Chattanooga is placed at serious disadvantage in this competition and its business materially lessened. The tendency of existing rates to these rival towns is to limit the area in which eastern merchandise can be profitably distributed from Chattanooga, and to impede the growth and prosperity of that city which would naturally result from the development of its wholesale trade.

Under the tariffs now in force goods may be carried from the east through Chattanooga to Nashville, and back through Chattanooga to points south and east, and there sold at lower prices than Chattanooga merchants can sell for; and this appears to have actually occurred in many instances. On a carload of first class freight, 40,000 pounds, the charges to Chattanooga, at \$1.14 per hundred, amount to \$456.00; while to Nashville, at 91 cents, the charges are only \$364.00, making a difference of \$92.00 in favor of Nashville, the longer haul by 151 miles. On fourth class freight the advantage in favor of Nashville is \$124.00 per car, and on sixth class, \$72.00. The advantage in favor of Memphis, a longer haul by 310 miles, is also large.

The proportion of the Nashville through rate charged on a ton of first class goods from Cincinnati to Nashville via the Louisville & Nashville Railroad, a distance of 295 miles, is \$5.20, while the proportion of the Chattanooga through rate charged from Cincinnati to Chat-

tanooga *via* the Cincinnati Southern Railway, a distance of 335 miles (only 40 miles further), is \$9.80.

It is quite unnecessary to multiply examples showing the differences resulting from these relative rates in the transportation charges on eastern merchandise to these several towns, as their necessary effect in limiting the distance to which distribution from Chattanooga can be profitably effected is sufficiently obvious without further illustration.

6. As appears from tariffs on file with the Commission, the following cities and towns, among others, are grouped with Chattanooga and take the same *rail and water* rates on classified traffic, to wit: Dalton, Rome, Atlanta, Americus, Athens, Columbus, Fort Gaines, and Griffin, in the state of Georgia; Huntsville, Decatur, Sheffield, Tusculumbia, Florence, Gadsden, Oxford, Talladega, Anniston, Birmingham, Opelika, Montgomery, Selma, and Eufaula, in the state of Alabama; and Enterprise and Meridian, in the state of Mississippi. Of these, Dalton, Rome, Atlanta, Americus, Athens, Columbus, Griffin, Anniston, Gadsden, Oxford, Opelika and Eufaula have higher *all rail* class rates than Chattanooga—their all rail rates on the six numbered classes being as follows:

1	2	3	4	5	6
122	104	91	77	68	51

The rates to Chattanooga and the above named common points, both *rail and water* and *all rail*, are established by the Southern Railway & Steamship Association, of which the defendant lines herein are members, and all traffic to those points is governed by the classification of that Association. The traffic to Nashville and Memphis, however, irrespective of the route by which it is transported, is governed by the Official or Trunk Line classification. There may be some disadvantage to Chattanooga from this circumstance, since an article of a given class under the first named system may be in a lower class under the other system, but the injury, if any, resulting from differences of that character is not believed to be serious.

The general range of rates in the territory covered by the Southern Railway & Steamship Association is materially higher than in the territory of the Trunk Line Association, the difference resulting mainly from the much greater volume of traffic in the latter section; and it is inevitable that difficulties should exist and complaints arise along the line of division between varying systems of classification and unlike methods of tariff construction.

7. There are no through lines by water from Cincinnati to Nashville, but a few boats are run from Cincinnati to Paducah, Kentucky, and two or three a week, carrying from six to eight carloads each, from Paducah

to Nashville. Boats are unloaded and loaded again at Paducah. No eastern business of any consequence is done, and these water lines have no agents to solicit eastern trade. Their traffic is from Ohio river points. The Atlantic seaboard shipments to Nashville by way of Cincinnati are carried wholly by rail.

The lower Cumberland river, on which Nashville is situated, is navigable about nine months in the year, and boats run that number of months on an average. Many years ago, before the days of railroads, there were through lines of boats to Nashville from Cincinnati and other cities, but they have all been discontinued on account of the rates and facilities afforded by the railroads. The railroads have the advantage in time, insurance and handling. If goods were shipped from the East and sent by water from Cincinnati to Nashville, they would have to be unloaded from the cars and loaded in boats at Cincinnati, and loading and unloading would also be necessary at Paducah. A through line of boats was established and kept up with difficulty for some time after the war, but was long ago abandoned. The uncertainty of return cargoes from Nashville would apparently prevent the maintenance of such a line of boats at the present time, even if secured against a reduction in rates by the railroads.

8. The lower rates accepted by the carriers engaged in the transportation of eastern merchandise to Nashville *via* Chattanooga are not forced upon them by any water competition at the former place. In performing this service for the compensation fixed by the present tariffs, these carriers are not affected by the circumstance that water communication exists between Cincinnati and Nashville. The Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount. That rate is made by the all rail carriers *via* Cincinnati, and their action is uncontrolled by the defendant lines. The competition which the latter meet at Nashville is distinctly the competition of the trunk lines and the Louisville & Nashville system whose northern termini are at points on the Ohio river which receive trunk line rates on eastern shipments. The competitors of the defendants for this Nashville traffic, therefore, are the railroads from the Atlantic seaboard reaching Nashville by way of Cincinnati, etc., all of which are interstate carriers subject to the Act to Regulate Commerce. These carriers established rates and united in joint tariffs from eastern points to Nashville long before the lines through Chattanooga engaged in the Nashville business. The acceptance of the rates so fixed by the rail lines *via* Cincinnati was the necessary condition upon which the lines *via* Chattanooga could compete for Nashville traffic.

As already stated, the through rate to Nashville by the Cincinnati route is made by certain additions to the trunk line rate from the east to the latter point. The amount of such additions was doubtless fixed originally with reference to the water rates between those cities, and it may be that the possibilities of water carriage have some influence in maintaining the present figures. But we are far from satisfied, and refuse to find on the evidence in this case, that there is any actual water competition for traffic from Atlantic points to Nashville, or that the Louisville and Nashville road is forced to take such traffic at the compensation now received by it, because of river communication between Cincinnati and Nashville furnishing the opportunity for such competition. The river rates between those places are now considerably lower than the rail rates, and more or less of the local traffic goes by water; but the through business from Atlantic cities, saving the time, distance and cost of breaking bulk at Cincinnati, would continue to go by rail, in our judgment, even if the disparity between land and water rates were materially greater than it is now. There might, of course, be such an advance in rail rates that shipments from the east would take the water route from Cincinnati. What amount of difference would produce that result it is impossible to determine from the testimony; but we find that such difference might be substantially greater than it is at present without important effect upon the railroad tonnage from the east, and that the through rate to Nashville is in no sense controlled by water competition at that point, either actually encountered or seriously apprehended.

9. The situation is quite different with respect to Memphis. The defendant lines actually meet water competition at that point which is direct and to a large degree controlling. The heavy shipments from the Atlantic seaboard to Memphis go for the most part by way of New Orleans, and the carriers complained of in this proceeding make little effort to compete with the water lines on traffic of that description. At least a third of the entire volume of eastern merchandise appears to reach Memphis by ocean steamer to New Orleans, and thence by water or rail to destination. The differences between the rates on the several classes of freight from eastern cities over the routes through Chattanooga, and the rates by ocean to New Orleans and thence by the Mississippi river to Memphis, are shown by the following table:

By defendants' lines.

1	2	3	4	5	6
1.00	.85	.65	.45	.88	.85

4 INTER S.

By New Orleans and River.

	.65	.60	.45	.33	.28	.27
Differences.	.85	.25	.20	.12	.10	.08

On shipments from New York to New Orleans by ocean, and thence by rail to Memphis, the rates now in force for the several classes are 83 cents, 75 cents, 57 cents, 40 cents, 34 cents and 32 cents; also the following commodity rates, viz: on bags, bagging, soda and coffee 82 cents; on boots and shoes, dry goods, carpets, clothing and notions 68 cents; and on cotton piece goods 52 cents.

There are two steamers per week of large capacity from New York to New Orleans, and three or four lines of boats ply the Mississippi at all seasons of the year between the latter place and Memphis. Large quantities of dry goods, staple groceries and other similar articles, which at Memphis amount to a very large tonnage, reach the wholesale dealers of that city *via* New Orleans at the rates above stated. The rail carriers from the east cannot meet these rates and do not control this class of business. Their participation in the traffic is mainly confined to the higher grades of freight, on which the advantages in time, insurance and other items compensate for the increased cost of transportation. It appears also that the East Tennessee, Virginia & Georgia Railway, and presumably the other defendants, have agreed with the steamship lines running to New Orleans, and their connecting carriers to Memphis, upon the present differentials in favor of the New Orleans route to that destination; and the fact of such an agreement to prevent ruinous rate cutting indicates with much force the existence and positive influence of water competition for the carrying trade to that town. The apparent effect of these differentials is to give to the water routes a large share of the heavy and bulky traffic, especially the coarser and cheaper goods of general consumption at all periods of the year, while the lines operated by the defendants transport the greater portion of the more valuable commodities embraced in the higher classes.

It is possible, also, that the obtainable rates on Memphis traffic are affected, in some measure at least, if not to a controlling degree, by the tariffs made and business secured by the rail lines reaching that point through Cincinnati. The action and influence of those lines have already been described in the findings relating to Nashville, and further statements in regard thereto can hardly be required in this connection. Indeed, there seems to be no occasion for reciting other facts bearing upon transportation charges to Memphis, because the still lower rates enjoyed by Nashville, and the greater proximity of that town to Chat-
ta-

nooga, present the leading issue in this investigation. An equitable adjustment of the relative rates applied to these two cities will, as it now appears, make any special consideration of the Memphis tariff practically unnecessary.

10. There is a conceded margin of profit in the rates now in force to Nashville and Memphis, with reference to the additional expense incurred in carrying eastern traffic to those destinations, but whether that margin affords reasonable compensation for the services thus rendered cannot be determined from the evidence.

Conclusions.

The situation which we have thus attempted to describe is one of peculiar difficulty. It is easy to perceive the disadvantages which gave rise to this complaint, but the remedy that can be applied, with due regard to the rights of the carriers affected, is not readily discovered. The prejudice to which Chattanooga is subjected by reason of the lower rates of transportation to Nashville and Memphis is obvious and conceded, but how to avoid that result without unjust consequences to the defendants is an extremely obstinate problem. There are certain considerations, however, bearing upon this question which indicate the direction in which a solution is to be sought.

In the findings of fact above set forth we have stated that the rates accepted for carrying eastern traffic to Nashville through Chattanooga are not influenced by water competition at the terminal point, but that the sole competition for Nashville business from the Atlantic seaboard comes from the all rail lines reaching the same destination by way of Cincinnati. We do not see how there can be actual competition between carriers except under circumstances where the traffic for which they compete would be taken by one of them if the other were not in the field; and such competition can be controlling at a given point only to the extent that either is in a position to do the entire business if the others were unable or unwilling to engage in it. One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it. This being so, the defendants cannot maintain that there is water competition for the carriage of eastern merchandise to Nashville, because none of that traffic would reach its destination by water if the lines through Chattanooga withdrew or were excluded from the Nashville business. Plainly, in such event, all traffic from the east to that point would be carried over the rail routes *via* Cincinnati; the water lines on the Ohio and Cumberland rivers would not participate in it any more than they

do at present. In other words the real competitors of the defendants for this transportation are the all rail carriers reaching Nashville by way of Cincinnati, and those carriers are confessedly amenable to the Act to Regulate Commerce. If these views are correct they control, *prima facie* at least, the determination of this case, for the primary question involved has been recently decided by the Commission.

In a series of proceedings instituted by the Georgia Railroad Commission, we have taken occasion to review with much care the fourth section of the statute, familiarly known as "the long and short haul clause," and have given it a construction intended to have general application.

Trammell v. Clyde Steamship Company, 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324.

The consideration which this feature of the law received in the cases here referred to, and the reasons advanced for the conclusions therein announced, will appear from an examination of the report of the Commission in those cases, made public a few weeks ago, and need not be repeated in this opinion. The proposition which distinctly applies to the present proceeding was stated with conciseness in the following language:

"The carrier has the right to judge in the first instance whether it is justified in making the greater charge for the shorter distance under the fourth section in all cases where the circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers not subject to regulation under the Act to Regulate Commerce. In other cases under the fourth section, the circumstances and conditions are not presumptively dissimilar, and carriers must not charge less for the longer distance except upon the order of this Commission."

This ruling is directly in point and conclusive upon the primary issue in this controversy, because the competitors of these defendants for the Nashville traffic in question are themselves interstate carriers by rail, and subject in all respects to the Act to Regulate Commerce. It follows, therefore, that the carriers herein complained of which engage in the transportation of freight from the eastern seaboard to Nashville *through* Chattanooga, and publish and accept rates therefor which are lower than the rates maintained by them for like transportation to Chattanooga,—a shorter haul included in the longer haul to Nashville,—are acting in plain violation of the fourth section, and that the resulting discrimination against Chattanooga must be adjudged unlawful.

Upon the facts ascertained in this case and the interpretation of the statute to which we adhere, any other conclusion would be quite inconsistent. The construction placed upon the long and short haul clause in the Georgia

cases was deliberately adopted, and its controlling application to the present controversy is not open to serious question. We must hold that the lower rates accorded by the defendants on shipments to Nashville are without warrant of law, and that the higher charges exacted on shipments to Chattanooga cannot be sanctioned in this proceeding.

In justice to the various parties in interest, however, it should be added that this disposition of the case is not intended to preclude the defendants from applying to the Commission for relief from the restrictions imposed by the fourth section of the Act, on the ground that the situation in which they are placed with reference to this Nashville traffic constitutes one of the "special cases" to which the proviso clause of that section should be applied.

It is stated in the foregoing findings that the present Nashville rate is prescribed by the rail lines reaching that point *via* Cincinnati, and that the defendant lines through Chattanooga have no voice or influence in determining its amount. These lines are under compulsion, therefore, to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals, or abandon the large percentage of Nashville business which they now secure. In addition to this, the geographical position of these two cities, the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic seaboard, the varying systems of classifications by which they are severally affected, and the greater volume of traffic at the lower rates prevailing in the trunk line territory, are existing conditions which govern, to some degree at least, the transportation in question. For these conditions the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is beyond their control, and the allowance of the same rate to the shorter distance point might reduce their revenues below the limits of fair compensation. Without in any sense prejudging the case, we hold that the defendants may invoke its consideration in an appropriate proceeding.

Any such intimation, however, should not be understood as covering an implied indorsement of the present disparity in rates as between Chattanooga and Nashville, for no such inference is intended. The suggestion here made goes no further than the propriety of an unprejudiced investigation, when permission to deviate from the general rule of the statute is applied for by these carriers on account of the special circumstances by which they are surrounded.

It seems improbable that the discrimination complained of can be made less oppressive

by any increase in the Nashville rate, and on that assumption the only practical relief is a reduction in rates to Chattanooga. We are aware of the difficulties attending a readjustment upon that basis, but we cannot regard them insuperable. On the contrary we firmly believe that the eastern rate to this point can be materially reduced without injustice to the defendants and without serious disturbance to the general scheme of tariff construction with which that rate is connected. Compared with rates to other points and on other lines, for similar distances and a corresponding volume of traffic, the rate to Chattanooga seems extremely liberal, to say the least; while a strong presumption of its unreasonableness is created by the voluntary action of the defendants themselves in seeking business at decidedly lower rates to points much more remote. When these carriers, for instance, charge seventy-three cents per hundred pounds on fourth class freight from New York to Chattanooga, and at the same time carry like shipments 150 miles further to Nashville for forty-two cents a hundred, and do this not incidentally but for a series of years, the belief that the higher rate is excessive becomes a positive conviction. We are familiar with the argument by which the policy of lower rates to competitive points is defended, and concede its conclusiveness in certain cases and within certain limits; but when the disparity between long and short distance charges reaches the proportions here exhibited, the inference is irresistible that the lesser rate must be unremunerative upon any theory, or else the larger rate gives an unwarranted return for the services rendered. As the Commission has said in another case where a similar question was considered: "the difference between the figures is too great to permit the lower charge to be justified by the rule of expediency without condemning the higher charge by the rule of reasonable compensation."

We entertain little doubt, therefore, that equity between shipper and carrier requires some reduction in the rates now enforced on Chattanooga traffic from Atlantic points, and are convinced of the necessity for such a reduction to secure relative justice between that town and Nashville. We refrain from further statement of the reasons which have induced this conclusion, as the amount to which the Chattanooga rate should be reduced will not now be decided. If the carriers engaged in Nashville transportation through Chattanooga act upon the suggestion above made, and apply for relief from the restrictive rule laid down in the fourth section, the subject can be more fully considered in disposing of that application; while if such action is not taken by them within the time allowed for that purpose, it will be the duty of the Commission to make a

final order in this proceeding prohibiting higher charges on shipments to Chattanooga than are or may be accepted on like shipments to Nashville. In addition to this, it may be remarked that the complainant's case was presented on the theory that the prohibitive requirement of the statute should be strictly enforced against these defendants, while they in turn contended that the full difference now maintained between rates to Chattanooga and to Nashville was justified by the necessities of the situation. The question which may arise, if permission is sought to depart from the general rule relating to long and short hauls, was not specially discussed. On this ground, also, it would seem suitable to allow opportunity for a further hearing before fixing maximum rates on shipments to Chattanooga.

We deem it unnecessary to make any comment upon the rates in force at Memphis or give any directions in respect thereto, because, as stated in the findings, the fundamental question in this case arises between Chattanooga and Nashville, and an equitable adjustment of rates between those towns may obviate any separate consideration of the Memphis tariff.

These views lead to the following order:

For reasons stated in the foregoing opinion, it is adjudged unlawful for the defendants herein to make or accept rates on shipments from Atlantic seaboard points to Nashville through Chattanooga, which are lower than the rates made and enforced by them at the same time on like shipments to Chattanooga—a shorter distance included in the longer distance to Nashville. The defendants, therefore, are ordered and required to cease and desist from making, enforcing or receiving any higher rates for such transportation as aforesaid to Chattanooga than are or may be made or accepted by them at the same time for like transportation to Nashville.

To enable the defendants to apply for relief under the proviso clause of the fourth section of the Act to Regulate Commerce, this order will be suspended until the first day of February, 1898; but the same will take effect and be in force from and after that date unless such application be made prior thereto. In case such relief shall be applied for within the time mentioned, the question of further suspending this order until the hearing and determination of such application will be duly considered.

In this report and opinion all the Commissioners concur.

THE POTTER MANUFACTURING COMPANY

THE CHICAGO & GRAND TRUNK R. CO.; THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, and THE SOUTHERN PACIFIC COMPANY.

1. Continuance of a system of unjust rates cannot be required or excused on the ground that parties have made investments and entered into the business affected thereby on the faith of assurances from carriers of their maintenance, although a change might work injury to the parties whom such rates had unduly favored.
2. An advantage, resulting from just rates coupled with the enterprise and outlay necessary to utilize them, is legitimate, and carriers should not undertake to deprive a shipper of this advantage by a change of such rates.
3. A rate on a particular class of goods which is unreasonable or discriminatory in itself, is not justifiable on the ground that the same rate is given another (and in this case a competitive) class of goods and as applied to the latter is liberal and advantageous.
4. The question as to correct weights and shipments, as between carrier and shipper, is one of fact to be determined in a manner just to both parties and as to which the *ex parte* action of either cannot conclude the other.
5. Taking into consideration the difference in value of the unfinished and finished cheap bedroom sets involved in this case and the greater tonnage per carload which can be hauled of the former, and having in view the interests of both carrier and shipper, it is held, that the rate on unfinished cheap bedroom sets as shipped by complainant from Lansing, Mich., to Oakland, Cal., should not exceed 85 per cent of whatever rate may be adopted for such sets in a finished condition.

Complaint filed Oct. 17, 1891.—Answers filed Nov. 2 to Nov. 16, 1891. Decided December 9, 1892

R. W. Montague, for complainant.

W. A. Day, for Chicago & Grand Trunk Railway Company.

A. B. Browne, for the Atchison, Topeka & Santa Fe Railroad Company.

H. S. Brown, for the Southern Pacific Company.

REPORT AND OPINION OF THE COMMISSION.

Clements, Commissioner.

The complainant, the Potter Manufacturing Company, is a corporation created under the laws of Michigan and engaged in the manufacture of furniture at Lansing in that state. The defendant railway companies are common carriers engaged in interstate transportation and under a common arrangement for continuous carriage transport the goods of complainant from Lansing to Emory, a station or switch near Oakland, California.

At its factory in Lansing the complainant does the machine and bench work on the furniture and ships it in an unfinished condition to the Michigan Furniture Company at Emory, where the work is completed. The Michigan Furniture Company is a corporation created under the laws of California. While the Potter Manufacturing Company (complainant) and the Michigan Furniture Company are distinct corporations, George N. Potter and James W. Potter of Michigan, own two thirds of the stock in each, and the latter was organized for receiving and finishing in California the unfinished furniture shipped by the former from Michigan. The Potter Manufacturing Company ships no goods to California except to the Michigan Furniture Company. The freight on such shipments is paid by the Michigan Furniture Company and the transaction is a sale by complainant to that company. The market for this furniture, when completed, is on the Pacific coast.

The substance of the complaint is that the rate charged by the defendants on cheap bedroom sets shipped by the complainant in an *unfinished* condition from Lansing to the Michigan Furniture Company at Emory is the same as that on such bedroom sets in a *finished* condition and that this is an unjust discrimination against complainant's shipments which consist for the most part of cheap unfinished sets, in favor of shippers of completed sets and gives an undue or unreasonable preference to the traffic in such finished furniture over that in such unfinished furniture.

The rate complained of was fixed by the Transcontinental Association Tariff No. 34, which became effective Sept. 21, 1891. In that tariff,

"Furniture, as from machine or bench, K. D., *unfinished*, in the white, not mahogany, rosewood, ebony, black walnut, maple or cherry, minimum weight of 24,000 lbs. per 4 INTER 8.

car not exceeding 30 ft. in length inside measurement, proportionate minimum weight to apply on cars in excess of 30 ft. in length," is charged a rate of \$1.30 per hundred pounds, and the same rate is fixed for

"Bedroom sets, not mahogany, rosewood, ebony, black walnut or cherry, consisting of six pieces, bedstead, bureau, washstand, small table and two chairs, actual value \$25.00 or less per set; or three pieces, bedstead, bureau and washstand, actual value \$20.00 or less per set, O. R. chafing and breakage, minimum weight 20,000 lbs."

In the above item of the tariff relating to unfinished furniture, the minimum weight is fixed at 24,000 lbs. "per car not exceeding 30 ft. in length inside measurement." This is objected to by complainant as an unjust discrimination. It was announced at the hearing (April 8, 1892) by counsel for defendants that the limitation as to length of car had been done away with, and it appears to have been omitted in Transcontinental Association Tariff No. 36, effective July 18, 1892.

In this tariff the item as to finished bedroom sets is also changed by the substitution of sets of four pieces (chairs being left out) of value of \$25.00 or less, for sets of six pieces, and by the addition of sets of two pieces, bedstead and bureau, of value of \$16.50 or less. It may be noted that this substitution of sets of four pieces for sets of six was made after the testimony in this case had been taken and that John H. Potter testified, among other things, that the Michigan Furniture Co. (of which he was a stockholder) did not handle chairs at all and made all its price lists on four piece sets. In the latter tariff *mixed* carloads of the cheap bedroom sets of minimum weight of 20,000 lbs. are also provided for at the rate of \$1.30 per hundred pounds.

As to all finished bedroom sets except the cheap ones above specified, the rate is \$2.75 per hundred pounds from Michigan points. At the time (Sept. 21, 1891) when Tariff No. 34, under which finished and unfinished cheap bedroom sets have the same rate, was adopted, and prior thereto, there was no distinction made in the matter of rates between cheap and costly bedroom sets, the rate at that date being \$2.75 on cheap sets as well as on the more costly, and the change was brought about by reducing the rate on the cheap bedroom sets from \$2.75 per hundred pounds to \$1.80. At the same time the rate on such unfinished sets

was reduced from \$1.35 per hundred pounds to \$1.30. These reductions amount to \$1.45 on finished and 5 cents on unfinished sets.

Prior to Sept. 21, 1891, a distinction in rates as between finished and unfinished cheap sets had been observed, the rate on the former having been materially higher than that on the latter. The following table gives the rates as they appear from a sworn statement furnished by J. W. Potter, General Manager of complainant, and not controverted, at the dates named therein on shipments of these two classes of freight to Oakland:

Date.	Rate Unfinished.	Rate Finished.	From
May, 1886.....	\$.70	\$1.00	Chicago.
Apr. 2, 1887.....	.80	1.00	"
July, 1887.....	.96	2.10	"
Aug. 1887.....	1.02	2.10	Factory.
March, 1888.....	1.11	2.10	"
Sept. 1, 1888.....	1.20	3.50 T.C.	"
Oct. 22, 1889.....	1.28	2.75	"
Jan. 15, 1891.....	1.35	2.75	"
Sept. 21, 1891.....	1.30	1.30	"

The change, making the rate on finished cheap bedroom sets the same as that on unfinished furniture, went into effect, as before stated, Sept. 21, 1891, but it was determined upon at the June session, 1891, of the Trans-continental Association, and this fact appears to have become known to the trade. The evidence tends to show that in anticipation of the change there was a large falling off during July and August, 1891, in the business of the complainant in the shipment of unfinished cheap bedroom sets to the Michigan Furniture Company at Emory and in the business of the latter company in such sets, and after the new rate became effective, there was a still greater decrease, if not a total discontinuance, of such shipments by the complainant. There were very few (if any, besides complainant) furniture companies or dealers in California that were prepared for manufacturing unfinished furniture at Michigan points and shipping it in that condition for completion and sale in the California and other Pacific coast markets, and the high rate on finished cheap furniture prevented its importation to any extent. These dealers, therefore, bought a large proportion of their cheap furniture from complainant's consignee, the Michigan Furniture Company. Since the adoption of the new rate on cheap bedroom sets *finished*, the shipment of these sets from Michigan and Wisconsin to the Pacific coast has greatly increased. One witness states that the importation of that class of goods by the California dealers has become tenfold greater. It appears that the reduction of the rate on completed sets was asked for by the Pacific coast furniture men, who represented that "the \$2.75 rate on cheap bedroom sets was prohibitory and precluded their importing that grade of furniture," and the Gen-

eral Freight Agent of the Southern Pacific Company states that in granting the reduction the object of the roads was to "give these people (Pacific coast traders) an opportunity of competing with the other good people that were bringing their goods here in unfinished form and completing them on this (Pacific) coast."

It is stated in the complaint that the rate of \$1.30 per hundred pounds on cheap unfinished furniture as provided in the Tariff of Sept. 21, 1891, "has been and would still be satisfactory except for the great reduction in finished sets;" but it is claimed that the rate for such unfinished furniture should not, since the reduction of the rate on finished sets to \$1.30 per 100 pounds, "exceed 90 cents per hundred pounds from Michigan points." In other words the complaint is, not of the rate on the unfinished cheap furniture as being unreasonable in itself, but of the alleged discrimination against the unfinished furniture resulting from giving unfinished furniture and finished sets the same rate.

In the case of *Bates v. Pennsylvania R. Co.*, 2 Inters. Com. Rep. 715, 8 I. C. C. Rep. 485, the complaint was the *reverse* of that in the present case. It appears that the defendant carriers in that case had for a long time maintained the *same* rate on corn and its direct products from Indianapolis to the eastern seaboard, and while this was the case and relying upon this equal rating, the complainants and others had at and in the vicinity of Indianapolis made investments and entered upon the business of buying and grinding corn and selling its direct products near eastern seaboard points where the principal markets for such products existed. Suddenly a discrimination was made between the two commodities by reducing the rate on corn four and a half cents per hundred pounds below that on the products. This resulted in serious injury to the milling industry at Indianapolis, and the Commission say: "The market for the product being in the east, it is plain that it would be folly to grind the corn in the west and transport the product when four and a half cents per hundred pounds could be saved by transporting the corn to the eastern market and grinding it there, *when presumably it could be done at about the same cost at both points.*" It was accordingly held, that the reduction of the rate on corn below that on its direct products, being "without necessity or advantage to the carrier or any reason founded on the character or condition of the traffic," gave the millers at the eastern terminus of the defendant roads an undue advantage over the complainants and other millers at and in the vicinity of Indianapolis and subjected the latter to an undue disadvantage, in violation of section 8 of the Act to Regulate Commerce, "notwithstanding the new rate on

corn was open to all persons equally and with equal service."

In the present case, as in *Bates v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 715, 3 I. C. C. Rep. 485, it will be presumed in the absence of proof on the subject, that the cost of manufacturing cheap bedroom sets or finishing such sets when in the condition in which they are shipped by complainant from Lansing, is about the same in Michigan and Wisconsin as on the Pacific coast. This being so, and it being borne in mind that the Potter Manufacturing Company (complainant) and the Michigan Furniture Company, although distinct legal entities, are practically one in interest, the much smaller rate on unfinished furniture (\$1.85 per cwt.) than on finished cheap sets (\$2.75 per cwt.) gave those companies a very great advantage over the shippers of the latter from Michigan and Wisconsin. This advantage, while primarily over the manufacturers and shippers of completed cheap sets from those states, operated also to the disadvantage of the California and Pacific coast jobbers by depriving them of the benefit of the lower prices which presumably would have resulted from competition on equal terms between complainant and its complement, the Michigan Furniture Company, on the one hand, and the western manufacturers of such sets, on the other. The Pacific coast dealers, therefore, importuned the roads for a reduction of the rate on finished cheap sets, and the latter thereupon adopted a tariff and classification which gave unfinished cheap furniture and finished cheap bedroom sets the same rate.

All the complainant asked for in the case of the *Chicago Board of Trade v. Chicago & A. R. Co.*, 3 Inters. Com. Rep. 283, 4 I. C. C. Rep. 158, in order to place the Chicago packers on an equal footing with the western packers was the *same* rate on the live hog as on the hog product, and all the Indianapolis miller claimed in the *Bates* case, *supra*, as necessary to place him on an equality with the seaboard miller, was the *same* rate on corn and its direct products. Under the principles laid down in the latter case, the lower rates on unfinished cheap bedroom sets than on finished cheap bedroom sets which prevailed from the east to the Pacific coast prior to Sept. 21, 1891, were in violation of section 3 of the Act to Regulate Commerce, *unless they were justified by "necessity or advantage to the carrier" or some "reason founded on the character or condition of the traffic."*

It was found in those cases that these grounds of justification were not shown by the evidence to exist and the principal questions in this case are, (1), Is there any such justification for lower rates on unfinished cheap bedroom sets than on finished cheap bedroom sets on shipments thereof over the de-

fendants' lines from the east to the Pacific coast, and, (2), If so, how much lower should the rate be on the former than on the latter.

As preliminary to the discussion of these questions, we remark that the fact, which the evidence tends to show and upon which great stress is laid by complainant, that the Potter Brothers (who originally conducted the business in Michigan and afterwards virtually organized the complainant and the Michigan Furniture Company) entered into the manufacture of unfinished cheap furniture and made their investments in Michigan and California on the faith of assurances by railroad authorities of low rates on such furniture and a maintenance of the greatly lower rates thereon than on finished goods, is not in itself a sufficient reason for adhering to such disparity in rates, if it is shown to be wrong in principle. In the case of *Bates v. Pennsylvania R. Co.*, 2 Inters. Com. Rep. 718, 3 I. C. C. Rep. 444, it is said, that "this Commission would not hold that a classification that was wrong should be adhered to, *although* its change might work injury to individuals whom the wrong classification had unduly favored."

On the other hand, the fact, that the lower rates on the unfinished goods shipped by complainant than on such goods in a finished condition, gave complainant and the Michigan Furniture Company so great an advantage as we have shown over the shippers of the latter does not authorize a change in the rate making it the same on the two classes, if the pre-existing inequality was on principle just and proper in itself. Carriers should not undertake to deprive a shipper of an advantage resulting from just rates by change of those rates. An advantage is legitimate, if it results from just rates coupled with the enterprise and outlay necessary to make use of such rates. Others may compete with the Potters by doing as they have done and this will result in benefit to the public by reducing the price of the commodity to the consumer.

As bearing upon the question, whether a lower rate on complainant's unfinished furniture than on such furniture when finished is justified by "any reason founded on the character and condition of the traffic," we will first consider the relative values of the two articles. The evidence on this point is conflicting and very indefinite. The machine and bench work is done at Lansing, and the finishing, which includes varnishing, at Emory; at the latter place, also, the plate glass and trimmings are furnished and the goods are packed for market. The cost of thus completing the work is stated by one witness to be about \$3.50 on a set that would sell for \$10.00 in carload lots, and \$7.00 on a set that would bring \$15.00 in carload lots. Another witness estimates it to be about \$1.00 on the cheapest sets and \$1.50 on the more

expensive. We are of the opinion that the first estimate is the more reliable. The evidence is that 61 per cent of the shipments of completed sets from the factory at Emory average \$7.50 per set; 4 per cent, \$15.00; and 55 per cent \$10.00. These shipments, then, would not average on the whole over \$10.00 per set, and the cost of completing the work at Emory would not average over \$3.50. Deducting this from \$10.00, we have the average value of the unfinished sets as shipped from Lansing, about \$6.50 per set. The \$3.50 is the actual cost of completion, and no profit is included. The completed sets would appear, therefore, to be worth about 50 per cent more than the unfinished goods. The evidence is that the completed sets average about 235 lbs. to the set; there is no evidence as to the weight of the unfinished material of a set as shipped from Lansing. At 235 lbs. per set a minimum carload (20,000 lbs.) would contain about 85 sets, and these at \$10.00 per set would be worth \$850. Deducting \$3.50 per set (the cost of finishing), the unfinished material for these sets as shipped from Lansing would be worth about \$570. This is as definite a result as we have been able to arrive at from the meager and conflicting evidence. While it is far from satisfactory, and we cannot affirm its accuracy, we are of the opinion that the value of the unfinished material as shipped by complainant is materially less than that of the finished sets.

Cost of service and the carrier's compensation are also important elements in fixing transportation charges. There is no evidence as to the actual cost of carrying either the unfinished or finished furniture. There appears to be nothing in the nature of the unfinished material for cheap bedroom sets as shipped by complainant or in the circumstances and conditions attending its transportation which calls for a higher than the average rate on shipments in general. The following table gives the estimated cost of carrying a ton of freight in general a mile as reported to this Commission by the Atchison, Topeka & Santa Fé and Chicago & Grand Trunk companies, for the years 1888, 1889, 1890 and 1891, and the cost on the line of the Southern Pacific Company, in the absence of a report, as computed by our statistician:

Name of road.	1888.	1889.	1890.	1891.
	cts.	cts.	cts.	cts.
Atchison, Topeka & Santa Fé.....	.861	.866	.656	.720
Chicago & Grand Trunk.....	.404	.411	.304	.305
So. Pacific Atlantic Sys.....	.733	.972	.679	.751
" Pacific Sys.....	.829		1.024	.900

The average cost, on the basis of the above figures, of carrying a ton a mile on these roads to the Pacific coast, was, .696 cents for 1888, .749 cents for 1889, .691 cents for 1890, and .672 cents for 1891. The distance from Lan-

sing to Oakland being 2790 miles, the rate per ton per mile, at \$1.30 per hundred pounds for the whole distance, is .981 cents. Deducting from this the above average estimated cost of carrying a ton a mile on the three roads to the Pacific coast for the year 1891, there is left .259 cents, or over $2\frac{1}{2}$ mills, per ton per mile. This amounts to \$7.23 per ton for the 2790 miles, and on a carload of 24,000 lbs. (12 tons) to \$86.64, as the amount per minimum carload, which the \$1.30 rate yields the defendants over the estimated average cost of carriage in general. For the years 1888, 1889 and 1890, it is somewhat less.

The complainant introduced in evidence a statement of fifteen of its carload shipments from Lansing to Oakland during the period from May 27 to September 11, 1891. The total "invoice value" of these shipments appears to have been \$14,305.52, an average of \$953.66 per carload, and the total freight paid \$5,502.73, an average of \$366.85 per carload and over 38 per cent of the average invoice value. These shipments were made under the \$1.35 rate. The total weight of these shipments at Oakland is given at 403,830 lbs. At the present rate of \$1.30, the total freight on that tonnage would be \$5243.94 or an average per carload of \$349.59, which is over 36 per cent of the above average invoice value per carload.

The unfinished furniture being required by the tariff under consideration to be shipped "knocked down" (K. D.), a larger tonnage of it can be carried in a car of given dimensions than of the finished bedroom sets as to which there is no such requirement. The carriers, recognizing this, have fixed the minimum carload of unfinished furniture at 24,000 lbs. and of the finished sets at 20,000 lbs. These carloads, respectively, at the rate of \$1.30 per hundred pounds, yield the carrier, \$312.00 and \$260.00—being \$52.00 more on a carload of unfinished furniture than on a carload of the finished sets. The actual weight per carload of complainant's shipments appears to be much in excess of the minimum prescribed, as the weights of the fifteen taken at Oakfield and referred to above show an average per carload of 26,922 lbs. and of four others, an average of 39,455 lbs. There is no reliable evidence as to the actual weight of carloads of finished sets, but it is shown that 20,000 lbs. and more of such sets can be loaded in the cars used for their transportation. While "a carrier should receive a greater compensation in the aggregate for hauling a carload of large tonnage than one of less tonnage, yet, other things being equal, as a general rule, the rate per hundred pounds should be less in the former than in the latter case." *Murphy, Wasey & Co. v. Wabash R. Co.* 3 Inters. Com. Rep. 725, 5 I. C. C. Rep. 122. This principle seems to have

had almost universal recognition by carriers in their rate sheets and systems of classification—the rate per hundred weight being less, and the class being lower, other things being equal, where a larger minimum carload weight is required. In the case of *Murphy, Wasey & Co., supra*, it was held, that a lower than the existing rate should be given unfinished chair material in view “particularly of the large minimum weight to be allowed and the larger actual weight per car of complainants’ shipments.” The minimum weight of 24,000 lbs. per carload of unfinished furniture is not only greater than that fixed for cheap bedroom sets completed but also than that on nine tenths or a greater proportion of the articles covered by the Transcontinental Association tariffs.

As appears from the table of rates heretofore given, the defendants for a number of years prior to Sept. 21, 1891, maintained rates on unfinished furniture fifty per cent or more lower, on an average, than the rates on finished furniture, and they still keep up this disparity in rates as between all unfinished and finished furniture except the unfinished and finished cheap bedroom sets specified in the items of their tariff which we have quoted. No just reason has been shown, for making the latter an exception to the general rule. The evidence tends to show that the railroad authorities concede that in the nature of things a lower rate should be placed on unfinished than on finished furniture. The object of the roads in giving unfinished and finished cheap bedroom sets the same rate, appears to have been, as stated by the General Manager of the Atlantic & Pacific Fast Freight Line, “to shut up the local factories on the Pacific coast, that were making this class of cheap stock and especially pine sets” and thus “give extra traffic” to the defendants.

Under the item in relation to “unfinished furniture,” there is no limitation as to value or character of such furniture, except as to the kind of wood to be used in its manufacture. This authorizes the shipment at the \$1.80 rate of expensive as well as cheap unfinished furniture and of other unfinished furniture besides the bedroom sets. It is contended in behalf of the defendants, that this is sufficient “to divest the tariff of anything like discrimination”—in other words, that the benefit to be derived from the low rate on the costly unfinished goods compensates or is an offset for any injury or disadvantage which may result to the traffic in unfinished material for cheap bedroom sets from giving those sets the same rate as such finished material. This position is not sustainable on principle. A rate on a particular class of goods which is unreasonable or discriminatory in itself, cannot be justified on the ground that the same rate is given another

class of goods and as so applied is liberal and advantageous. The benefit to the one is no proper offset for the injury done the other. If a party were engaged in shipping both classes of traffic, the question whether or not the average result would be advantageous to him, would depend upon the quantities shipped of each. In the present case, it appears that the bulk of the complainant’s shipments consists of the unfinished cheap bedroom sets. Moreover to sustain the application of the same rate to two articles of widely divergent values and tonnage per car on the ground of reasonable “general average,” is to imply that it is too low on one and exorbitant on the other.

Conclusions.

The action of the roads in reducing the rate on the finished cheap bedroom sets specified in their tariff, below that on greatly more valuable finished furniture was, in our opinion, correct, and must be sustained. The same reason, however, that justified this action in reference to the two classes of finished furniture would seem to apply to them in their unfinished condition. We can, furthermore, find no ground for making the unfinished cheap bedroom sets an exception to the general rule recognized by the defendants that unfinished furniture should have a lower rate than the finished of the same grade. Our conclusion is, that the cheap bedroom sets described in the tariff when transported in an unfinished condition as shipped by the complainant, should have a lower rate than such sets when finished, and, also, than the more costly unfinished furniture. The question is, how much lower or what proportion should the rate on unfinished cheap sets bear to that on the finished. As before stated, the complaint is not that the existing rate is unreasonable in itself, but that the same rate is given the two classes of freight. It appears from the statement of rates furnished by complainant that for the four years preceding Sept. 21, 1891, the rates on shipments of unfinished furniture from complainant’s factory at Lansing varied from \$1.02 to \$1.85 per hundred pounds. During the last three years of that period, the average was over \$1.22 per hundred pounds. It must be borne in mind, however, that these rates applied to expensive as well as cheap unfinished furniture and must have been fixed with regard to that fact. If they had covered cheap furniture alone, it is reasonable to suppose they would have been less. Taking into consideration the difference in value of the unfinished and finished furniture involved in this inquiry and the greater tonnage per carload which can be hauled of the former, and having in view the

interest of the carrier as well as the shipper, our opinion is that the rate on cheap unfinished bedroom sets should not exceed 85 per cent of the rate on such sets in a finished condition. While the rate on finished sets remains as at present \$1.80, this will give a rate within a fraction of \$1.10 on the unfinished sets.

Our attention is called by the defendants to the fact, that the freight on the shipments of complainant, The Potter Manufacturing Co., from Lansing to Oakland is paid by the consignee, The Michigan Furniture Co. Whether freight is paid by the shipper or consignee, it is equally a charge on the commodity in the hands of the shipper, and if excessive, or discriminatory, or otherwise in violation of law, may be made the subject of complaint before this Commission on the part of the shipper as a party in interest. Moreover, the two corporations, while distinct in law, are substantially under the same ownership and are operated in unison, the one as supplementary of the other. No order of reparation, however, will be granted in this case as asked for in the complaint, requiring repayment to complainant of the difference between the rate complained of and that determined by us to be reasonable.

The complainant further asks in the brief filed in its behalf for "an adjudication that freight charges upon complainant's goods may be based upon weights at the point of shipment, as per original bill of lading, and that all sums heretofore collected on said goods in excess thereof were unlawfully taken and shall be repaid to the Michigan Furniture Co. who paid the same." It appears that the weights of complainant's carloads as taken at Oakland, the point of delivery, and on which the freight charges are based, are greater than the weights given at Lansing, the point of shipment. It is not shown by whom or how the weights are determined at either point and there is nothing in the record to indicate which set of weights

is correct. There is no proof, therefore, of an overcharge by means of false weights upon which we can act, and nothing upon which to base "an adjudication that freight charges upon complainant's shipments must be based upon weights at point of shipment." If the weights at point of shipment are furnished by the shipper, the roads would have the right to verify them by reweighing and if found to be incorrect, to charge and collect freight on the true weight. The question is one of fact to be determined in a manner just to both parties and as to which the *ex parte* action of either cannot conclude the other.

It is also made a ground of complaint that complainant's shipments are carried by Emory, where the factory of the Michigan Furniture Company is located, about a mile to the 16th St. Station, Oakland, and is brought back from that station to Emory at a charge of 25 cents per ton. The complainant alleges that Emory is a regular station of the Southern Pacific Co., but the weight of the evidence is that it is not a station at which transcontinental freight is delivered. It further appears that the factory of the Michigan Furniture Co. is not located on the main line at Emory but on a local track, and that complainant's carloads are hauled from the regular station in Oakland over this local track to Emory by switch engines and that the charge for this service is reasonable.

Our order is, that the rate on cheap unfinished bedroom sets, such as are described in the item of the tariff under consideration, shall not exceed from Michigan points to California points 85 per cent of whatever rate may be fixed for such sets in a completed condition and that the defendants forthwith cease and desist from charging or collecting a higher rate on the former than that above indicated and also make such alterations in their tariff of rates as will bring it into conformity with the conclusions herein arrived at.

THE CHAMBER OF COMMERCE OF MINNEAPOLIS, MINNESOTA.

THE GREAT NORTHERN R. CO.; THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY; THE NORTHERN PACIFIC RAILROAD COMPANY; THE CHICAGO & NORTHWESTERN RAILWAY COMPANY; THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY; THE MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY; THE ST. PAUL & DULUTH RAILROAD COMPANY Individually, and as Lessee of THE DULUTH SHORT LINE RAILWAY; THE EASTERN RAILWAY COMPANY OF MINNESOTA.

Defendants,

and

THE CHAMBER OF COMMERCE OF MILWAUKEE; THE INTERIOR WISCONSIN MILLERS ASSOCIATION; THE EASTERN MINNESOTA MILLERS ASSOCIATION; THE SOUTHERN MINNESOTA MILLERS ASSOCIATION; THE BOARD OF TRADE OF DULUTH, MINNESOTA; THE JOBBERS UNION OF DULUTH, MINNESOTA; THE CHAMBER OF COMMERCE OF DULUTH, MINNESOTA.

Intervenors.

[No. 329.]

1. When a local rate from a given point is alleged unreasonable, but it appears from the record that such local rate is also a proportion of through rates from that point, and as such is the real subject of controversy, the complaint should be directed against the aggregate through rate, not the share received by any initial carrier, and all the carriers composing the through line are necessary parties.
2. A town favorably situated with respect to one through route, but competing in a common market with another town more favorably located on another through route, should not have a reduction of the local rate over roads connecting the two through routes for the purpose of overcoming the natural advantage which the latter competing town enjoys.
3. A milling town possessing great natural, acquired and improved advantages for the carrying on of that industry, and favorably situate in point of distance to a large grain producing region, is entitled to the benefits arising from its location, and carriers of grain to that point and to a competing town considerably more remote from points of production, and in other particulars less advantageously located, are not justified in making rates on grain to the competing towns which destroy the advantage the former is entitled to enjoy.
4. Rates on wheat from points in North and South Dakota to Minneapolis as compared with the rates charged over considerably greater distances from the same points to Duluth and adjacent Lake Superior ports subject Minneapolis millers to undue and unreasonable prejudice and disadvantage. Defendants ordered to adjust their rates on wheat from said points to Minneapolis and Duluth upon the basis of distance over nearest practicable routes.

Complaint filed February 3, 1892.—Joint answer filed March 19, 1892.—Amendments to complaint allowed March 24, to May 14, 1892.—Answer to amended complaint filed April 15, 1892.—Petitions for leave to intervene filed and allowed April 19 to June 21, 1892.—Hearing at Minneapolis, Minnesota, May 25-27, 1892.—Hearing at Washington, D. C., July 7-9, 1892.—Briefs filed August 12, to September 12, 1892. Decided January 3, 1893.

RELATIVE rates on wheat; local rate as part of through rate on flour.

Messrs. Britton & Gray and Flannery & Cooke for Complainant.

M. D. Grover for Great Northern Railway Company and Eastern Railway Company of Minnesota.

J. T. Fish & Burton Hanson for Chicago, Milwaukee & St. Paul Railway Company.

Jas. McNaught; J. C. Bullitt, Jr., and Garland & May for Northern Pacific Railroad Company.

W. C. Goudy for Chicago & Northwestern Railway Company.

4 INTER S.

J. H. Howe & S. L. Perrin for Chicago, St. Paul, Minneapolis & Omaha Railway Company.

A. H. Bright & M. B. Koon, for Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

Lusk, Bunn & Hadley for St. Paul & Duluth Railroad Company.

Hugh Ryan for Milwaukee Chamber of Commerce.

Chas. Espenschied for Southern Minnesota Millers Association.

Wm. W. Billson for Board of Trade, Chamber of Commerce, and Jobbers Union of Duluth, Minnesota.

S. A. Thompson for Duluth Chamber of Commerce.

REPORT AND OPINION OF THE COMMISSION.

McDill, Commissioner:

The petition in this proceeding states that complainant is a corporation created and existing under and by virtue of the laws of the state of Minnesota, and that a main purpose of its organization is to advance the general prosperity and business interests of the city of Minneapolis. The other important allegations in the petition are as follows:

That the Great Northern Railway Company is a common carrier by railroad between points in North and South Dakota and Minnesota, to and from Minneapolis, Minnesota, and to and from Duluth, Minnesota, and to and from West Superior, Wisconsin, over its own line. Substantially the same allegation is made with reference to the other defendants, except the St. Paul & Duluth Railroad Company, which is stated to be a common carrier over its own line of railroad between Minneapolis and Duluth, Minnesota, and West Superior, Wisconsin.

That each and all of the defendants are engaged in the transportation of wheat and flour over their own separate lines, or in combination with the lines of each other under a common control, management or arrangement, by continuous all-rail carriage from common points, or from a common belt of wheat producing territory, situate and lying southwest, west and northwest of the state of Minnesota, and in the western part of the state of Minnesota, to Minneapolis, Minnesota, or through or around Minneapolis to Duluth and other Lake Superior ports in the states of Minnesota and of Wisconsin, and thence to eastern points in combination with various eastern rail and vessel lines, and therefore subject to the Act to Regulate Commerce.

That the rates established and charged by defendants for the transportation of wheat from competitive and intermediate points in North and South Dakota and Minnesota to Minneapolis are unreasonable and unjust.

That by said rates as compared with rates charged by defendants from the same points to Duluth and other Lake Superior ports,

Minneapolis is unjustly discriminated against and subjected to undue and unreasonable prejudice and disadvantage, and undue and unreasonable preference and advantage is given to said Lake Superior ports.

That the rate on flour from Minneapolis to Duluth which defendants, the Great Northern, Northern Pacific, St. Paul and Duluth, and Chicago, St. Paul, Minneapolis & Omaha, have increased from five to seven and a half cents per hundred pounds is unjust and unreasonable as against Minneapolis, and in connection with the wheat rates aforesaid, subject Minneapolis to further undue and unreasonable prejudice and disadvantage. That this rate of seven and a half cents on flour from Minneapolis to Duluth, while rates on wheat are, from a large section of country, the same to both of those points, imposes upon Minneapolis flour a cost of fifteen cents for each barrel when put upon Lake Superior shipboard over and above the cost of transportation involved in the manufacture of flour at Duluth or the other Lake Superior points; and that the effect thereof is to make milling at Minneapolis unprofitable.

That the Great Northern, the Northern Pacific, the Omaha, and Duluth companies now own and control wharves, docks, elevators, lands and other facilities at Duluth and other Lake Superior ports, and are also by ownership or control or by traffic arrangements with lines of boats reaching eastern markets *via* the lakes, largely interested in developing the traffic to and from such lake ports; and that this increase in the flour rate is intended to foster and build up their interests in manifest disregard of the interests of Minneapolis.

The complainant prays that defendants be ordered to cease and desist from charging more for the transportation of wheat to Minneapolis than 75 per cent of the rate charged by them for carrying said commodity from the same points to Duluth and other adjacent Lake Superior ports, and from charging more for the transportation of flour from Minneapolis to Duluth and said other ports than 34 cents

per hundred pounds; or that said defendants be ordered to so adjust their charges that the rate on wheat from points of shipment to Minneapolis added to the rate on flour from Minneapolis to Duluth and said other ports shall not exceed the rate charged by them for carrying wheat from the same points of shipment to Duluth and the other lake ports aforesaid.

For convenience, the defendant carriers will hereinafter be called by the following titles: Great Northern—for the railway company of that name; St. Paul—for the Chicago, Milwaukee & St. Paul Railway Company; Northern Pacific—for the railroad company of that name; Northwestern—for the Chicago & Northwestern Railway Company; Omaha—for the Chicago, St. Paul, Minneapolis & Omaha Railway Company; "Soo"—for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Duluth—for the St. Paul & Duluth Railroad Company; Eastern of Minnesota—for the Eastern Railway Company of Minnesota.

The Great Northern, the Northern Pacific, the St. Paul, the Northwestern, the Omaha and the "Soo" companies, filed a joint answer to the petition in which they state:—

That the Great Northern road in the direction of Lake Superior points terminates at Hinckley in Minnesota, and there connects with the Eastern of Minnesota, a line which extends from Hinckley into Superior and Duluth.

That the St. Paul does not own or control a line extending to Lake Superior points, but that it and the Northwestern reach Lake Superior points by connecting lines.

That the Duluth road does not extend east of St. Paul or west of Minneapolis, and its line between St. Paul, Minneapolis and Duluth is wholly within the state of Minnesota.

They deny that the rates demanded and collected for traffic named in the petition are unreasonable or unjust, or that they unlawfully discriminate against the wheat or milling or any industries of Minneapolis, or occasion undue preference to lake traffic under similar conditions and circumstances at Lake Superior points, and allege that rates for the carriage of wheat to Minneapolis have never been lower, at least relatively lower, than at the present time, and that for years past the rates have been relatively the same from North and South Dakota to Minneapolis and Lake Superior as at present. They also deny that the wheat, milling or business interests in Minneapolis have been injuriously affected in any way by the maintenance of existing rates.

The Omaha, Duluth, Northern Pacific and Great Northern Companies admit that they have an interest in docks and transfer facilities at Lake Superior points; but deny that they or either of them have made and maintained

rates with a view of building up the interests of Lake Superior points at the expense of Minneapolis.

They admit that the rate on flour of five cents per hundred pounds was for a time maintained, but allege that it was unreasonably low and the result of unfair competition, and deny that the rate of seven and a half cents per hundred now charged on flour from Minneapolis to Lake Superior points is unreasonable.

The joint answer states that the distances from Minneapolis to Duluth are, *via* the line of the Great Northern, 187 miles; *via* the Duluth, 158 miles; *via* the Omaha, 188 miles; and *via* the Northern Pacific, 287 miles. That the rate from Minneapolis to Duluth, though it is named as a local rate, is in fact part of a through rate on shipments destined to points east of Buffalo or to points on the seaboard. That the reduction of the rate on flour from Minneapolis to Lake Superior points while apparently a reduction of a local rate, would be in fact a reduction made for the purpose of affecting the through rate from Minneapolis to eastern points, and the practical effect of such reduction would be to fix only the proportion between Minneapolis and Lake Superior points of the through rate to New England points, Canadian points and the Atlantic seaboard.

The St. Paul Company and the Northwestern Company allege in the joint answer that along their lines between Minneapolis and Lake Michigan points there are flouring mills, which, in the aggregate, produce a quantity equal to if not in excess of the entire product of Minneapolis, and which find their principal markets at eastern points or on the seaboard. That the rates from Minnesota and North and South Dakota for the carriage of wheat to Minneapolis and Duluth are adjusted with reference to through rates to such eastern and seaboard points from Minnesota, and territory west of the Mississippi river. That the reduction of the rate on flour from Minneapolis to Lake Superior points would necessitate a corresponding reduction of the rate from mills and points where flour is produced along the lines of the respondents last named and be injurious to such respondents, as rates now in force are so low as to be barely remunerative. That if present rates *via* Lake Michigan from other points to the seaboard should be maintained while the reduction asked by complainants is granted, milling interests at those points would suffer and in many instances be destroyed.

On the 24th of March, 1893, the complainant asked and obtained leave to amend the petition by adding the Eastern of Minnesota Company as a party respondent, and on the 14th of May, 1893, the petition was further amended by designating the Duluth Company, already a defendant to the proceeding, as "The St. Paul & Duluth Railroad Company,

individually and as lessee of the Duluth Short Line Railway."

The Eastern of Minnesota answered that it is organized as a railway corporation under the laws of the state of Minnesota, and has a line extending from a connection with the Great Northern at Hinckley in the state of Minnesota to West Superior in the state of Wisconsin, at which point it has a number of tracks and convenient terminal facilities. That from West Superior its trains run into Duluth in the state of Minnesota, over the tracks of other railroad companies to stations and yard tracks owned by it in Duluth. That it has a contract right to and does run its trains from St. Paul over the tracks of the Great Northern Railroad Company to Hinckley. That it runs through freight and passenger trains from St. Paul to West Superior and Duluth, and its rates and charges are in all respects just and reasonable. For further answer it adopts the joint answer filed by its co respondents.

Various parties have been allowed to intervene, namely, the Chamber of Commerce of Milwaukee; the Jobbers Union of Duluth; the Chamber of Commerce of Duluth; the Board of Trade of Duluth; the Eastern Minnesota Millers Association representing mill owners at Winona, Wabasha, Red Wing, Hastings, La Crosse, Hokah, Houston, Minnesota City, Dundas, Northfield, Faribault, Owatonna, and Lanesboro; the Wisconsin Milling Companies at Centralia, Watertown, Wassau, Berlin, Fond du Lac, Janesville, and Stoughton, Wisconsin; also the Southern Millers Association of Minnesota.

They claim that to give Minneapolis millers the rate of flour asked (8½ cents per hundred pounds) would seriously cripple them in the prosecution of their business, discriminate against them in favor of Minneapolis, and subject them to undue disadvantage in the markets, unless a corresponding reduction in rates should be granted to them on lines over which they ship their flour.

With reference to Milwaukee and points not directly connected with the Duluth and Lake Superior route, it was claimed that the relative rates, adjusted after long discussion between Lake Superior and Lake Michigan routes, were now so arranged as to give the above named milling interests a very narrow margin of profit, and if Minneapolis secured the rate sought on flour from that city to Duluth, it would in effect drive them out of the market, unless accompanied by corresponding rate reductions on flour to Chicago and the seaboard from points on the lines leading to Lake Michigan; and that present rates on flour from Minneapolis to Duluth and Lake Superior points are fair and reasonable and in proportion to other rates. It was further claimed

that the prevailing rate on flour from Duluth to the seaboard being (at the time the answers were filed) 17½ cents per hundred pounds, the reduction asked would give Minneapolis a rate of 21½ cents per hundred pounds by that route; whereas the rate on flour from Minneapolis to Chicago being (at that time) ten cents, and from Chicago to the seaboard 15 cents per hundred pounds, the prevailing through rate on flour to the seaboard *via* Chicago was 25 cents per hundred pounds. The disadvantage of four cents on the hundred pounds or eight cents on the barrel of flour would, it was claimed, injure intervenors seriously, as ten cents per barrel is an unusually large profit upon the barrel of flour produced.

The Duluth Association says that local shipments of wheat from Minneapolis to Duluth are mixed and inferior grades, not used in milling, and of no benefit to the mills of Duluth; that Minneapolis is 160 miles farther from the seacoast than Duluth; that Minneapolis mills are unduly capitalized, are older and less thoroughly modern in equipment, are compelled to incur double cost for both steam and water equipment, and therefore are at a disadvantage as compared with Duluth mills.

As stated above the complaint in this case is three fold: 1. That wheat rates to Minneapolis are unreasonable and unjust. 2. That said rates as compared with rates from the same points to Duluth and other Lake Superior ports, subject Minneapolis to undue and unreasonable prejudice and disadvantage, and give undue and unreasonable preference and advantage to said lake ports. 3. That the rate on flour from Minneapolis to Duluth is unreasonable and unjust to Minneapolis, and in connection with the wheat rates aforesaid, subjects Minneapolis to further undue and unreasonable prejudice and disadvantage.

The specific grievance, as developed, is that the millers at Minneapolis are required to pay the same for the transportation of wheat from a large territory in North and South Dakota and Minnesota to Minneapolis as the millers at Duluth and other Lake Superior points are required to pay from the same territory to those places, although Minneapolis is considerably nearer that territory than Duluth and other Lake Superior points; that Minneapolis millers in order to get their product to Duluth and other Lake Superior points from which it goes east by water, have to pay a large additional charge for transportation; and that to the extent of this additional charge the Minneapolis millers are handicapped in competition with millers at Duluth and other Lake Superior points in the eastern and export markets.

There is no evidence to show that there are milling interests at any Lake Superior point, except Duluth, which, by reason of the existing adjustment of railway charges, enjoys an

advantage over Minneapolis millers injuriously affecting the interests of the latter. It appears that there is a mill at Superior, but its capacity is not given, and it seems to have been mentioned as showing that Minneapolis is menaced, though it may not yet be actually injured, by the competition of mills other than those at Duluth. The question of the flour rate from Minneapolis is therefore principally important in connection with the transportation of that product to Duluth.

Duluth and Minneapolis are both in the state of Minnesota. There are three rail routes connecting these cities; one of them, the Duluth road, is entirely in the state of Minnesota and the others, the Omaha road, and the Great Northern in connection with the Eastern of Minnesota, are partly in the state of Wisconsin.

The decision of the Supreme Court of the United States in the case of *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, seems to be to the effect that railway traffic beginning and ending in the same state is not under the authority of the Federal government, even though in the course of transportation it passes through another state. Where the entire transit is within the limits of a single state Federal regulation is excluded by the provisions of the Act to Regulate Commerce. The termination of the shipment from a point in a state at another point within the same state without the contemplation of any further movement seems, under that decision, to stamp and characterize the movement as purely state as distinguished from interstate commerce.

If, then, the transportation of flour from Minneapolis to Duluth be considered as local business, it is contended that the Commission has no jurisdiction over it. But without passing upon this question, for the reason that in the view taken of the case its determination is unnecessary, we remark that the testimony of the witnesses, the arguments of counsel, and the whole record, show that the attack upon the rate of seven and a half cents per hundred pounds on flour from Minneapolis to Duluth and adjacent ports is made on the ground that it is a part of the through rate on flour to the seaboard and interstate rates to intermediate points, yet necessary parties are absent from the complaint; moreover its justice and reasonableness could not be considered except by an investigation of the entire through rate.

The case has not been prepared and presented by the complainant in such manner as to enable the Commission to determine this question. We desire to say, however, in regard to the flour rate between Minneapolis and Duluth, that it is apparent that Duluth has some natural advantages over Minneapolis

with reference to the seaboard and export trade. Among these are shorter distance from the seaports and its location at the head or beginning of a water way. On the other hand, Minneapolis is considerably south of the line passing through the country east and west *via* Duluth to the seaboard, and the expense of transportation to Duluth necessarily represents largely the cost of carriage or portage from a location naturally on the Lake Michigan route across to the Lake Superior route to the seaboard. This additional expense Minneapolis should always be willing to pay. Such evidence as the record contains indicates that in adjusting the rates to the seaboard from the northern and western wheat region Chicago and Duluth have been the points of comparison, the one a Lake Michigan and the other a Lake Superior point; and treating the question as one of through rates to the seaboard, it is made quite plain that any reduction of the rate on flour between Minneapolis and Duluth would, if seaboard rates are now relatively adjusted in proper proportion, be accompanied by similar reductions on the Chicago or Lake Michigan route. On the other hand, Minneapolis has natural advantages to which she is entitled, namely, nearness to the wheat fields and a large outgoing or westward moving business which must entitle her to some advantage over Duluth in these particulars.

That portion of the complaint in this case which relates to the flour rate from Minneapolis to Duluth and adjacent ports having thus been disposed of, we have next to consider the railroad rates for the transportation of wheat to Duluth and Minneapolis, respectively, from points west of those cities; and in this connection careful consideration must be given to the probable effect of any change in the present adjustment of those rates upon business dependent on interstate rates from points in the Dakotas, Minnesota, Iowa and Wisconsin to Milwaukee and Chicago.

In considering the rates to Duluth and Minneapolis the field of inquiry and the jurisdiction of the Commission is further limited to territory outside the state of Minnesota. Both these cities being in that state the Commission has no authority over rates from any Minnesota point to either of them, if the shipment terminated and was intended to terminate at either point. The evidence does not enable us to determine whether any and, if so, what portion of the wheat shipped from points in Minnesota west of Minneapolis and Duluth is destined in its movement to points outside the state, but the scope of the arguments upon the record, and the record itself, favor the conclusion that a very large portion of it at least, is consigned and destined to Minneapolis or Du-

luth for manufacture into flour, thus being presumably a local shipment and the rate a domestic rate.

The inquiry is then, in fact, practically limited both by the complaint and the testimony to rates from points in North Dakota and in South Dakota to Minneapolis and Duluth, and to the effect of a change in those rates upon interstate transportation of wheat and flour to Lake Michigan ports.

A vast amount of testimony has been submitted in this case. Much of it relates to the reasonableness of the rate on flour from Minneapolis to Duluth, and this for reasons above given may be left out of consideration.

An immense mass of figures and statements has also been submitted, giving not only the distances and the rates on wheat by various routes and from various places to Minneapolis and Duluth, but also in great detail, (though with considerable conflict between complainant's and defendants' testimony) the average receipts and the average cost per ton per mile on all freight and on wheat over the lines of the defendants, and over lines elsewhere.

In the view we take of the case, it is not necessary to consider all these details; to do so it is believed would only tend to confusion.

A few prominent facts stand out in the record, or may be clearly deduced therefrom, which in our judgment afford a solution of the questions involved; and their significance is not materially affected, one way or the other, by the incidental mass of details from which the respective disputants seek to draw variant conclusions.

These leading facts, a proper understanding of which will be assisted by reference to the accompanying map, are as follows:

The line between the two Dakotas and Minnesota, to points west of which the inquiry is confined, coming southward from the national boundary line, passes just east of Grand Forks, Fargo and Wahpeton, and a few miles east of Fairmount—all in North Dakota. Then deflecting, first westward and then eastward, it passes just west of Brown's Valley and Ortonville, both in Minnesota. And from Ortonville, or a point a little west thereof, it runs due south, passing not many miles east of Sioux Falls, South Dakota.

The following table shows the distances and routes to Minneapolis and Duluth, respectively, from some of the principal points in the two Dakotas which have the same rates to either place:

Fargo <i>via</i> Northern Pacific to Duluth, 257 miles, <i>via</i> Great Northern to Minneapolis, 281 miles.	
Casselton " " " 277 "	" " " 259 "
Wahpeton " " " 227 "	" " " 208 "
Davenport " " " 276 "	" " " 243 "
Edgley " " " 366 "	N. P. & Soo " 305 "
Ellendale G. N. " 361 "	G. N. " 290 "
Boynton S. & G. N. " 368 "	Soo " 288 "
La Moure N. P. " 345 "	N. P. & Soo " 284 "
Oakes S. & G. N. " 339 "	Soo " 264 "
Oakes N. P. " 355 "	" " 264 "
Aberdeen G. N. " 376 "	C. M. & St. P. " 288 "
Redfield C. & N. W. & G. N. " 386 "	C. & N. W. & G. N. " 295 "
Doland " " " 365 "	" " " 264 "
Elrod " " " 359 "	" " " 288 "
Hankinson G. N. " 281 "	Soo " 206 "
Rutland G. N. " 312 "	G. N. & Soo " 236 "
Andover { C. M. & St. P. & G. N. (about) " 365 "	C. M. & St. P. " 259 "

Fargo and Casselton are points of junction of the Northern Pacific main line with the Great Northern, and Wahpeton is a junction point of the Milnor branch of the Northern Pacific with the Great Northern. These junction points and all points west of them on the main line and the Milnor branch of the Northern Pacific, are nearer to Duluth over that road than over the Great Northern or any other line, by 40 or 45 miles, and it seems proper, therefore, that the rates to Duluth should in all cases be fixed by the Northern Pacific. On the other hand, the distance from Fargo and Casselton and all points north and west thereof is less *via* the Great Northern to Minneapolis than *via* the Northern Pacific to Duluth by about 20 miles, or from 7 to 8 per cent of the 4 INTER S.

distance *via* the Northern Pacific (the shortest line) to Duluth. So Wahpeton and points west thereof, as far as Milnor and north as far as the main line of the Northern Pacific, are nearer *via* the Great Northern to Minneapolis, than *via* the Northern Pacific to Duluth by about 28 miles, or about 10 per cent of the distance *via* the Northern Pacific (the shortest line) to Duluth.

Hankinson, Rutland, Ellendale, Boynton and Oakes are about 75 miles nearer to Minneapolis than to Duluth by the shortest practicable routes, there being about 20 to 23 per cent difference in favor of Minneapolis. By the route actually taken from Boynton and Oakes the difference is much greater in favor of Minneapolis.

Aberdeen is about 88.5 miles nearer to Minneapolis than to Duluth by the shortest routes, or nearly 25 per cent in favor of Minneapolis.

Andover is about 106 miles nearer to Minneapolis than to Duluth by the nearest practicable route, or about 80 per cent in favor of Minneapolis. By the routes actually taken from Andover the difference is greater in favor of Minneapolis.

Redfield, Doland and Elrod are about 101 miles nearer to Minneapolis than to Duluth by the shortest practicable routes, or about 27 per cent in favor of Minneapolis. By the routes actually taken from Redfield, Doland and Elrod, the difference in favor of Minneapolis is greater than this.

From Huron, Watertown, Sioux Falls and other points in South Dakota, Minneapolis has rates on wheat less than the rates to Duluth by from 2 to 5 cents per hundred, but complainant contends that this differential is not sufficiently great. The difference in distances from these points to Duluth and to Minneapolis is on an average about 25 per cent in favor of Minneapolis by the nearest practicable routes, and is more than this by the routes actually used from most of these points.

Edgley, the terminus of one of the Northern Pacific branch lines, is very near to Boynton on the "Soo," though these lines do not actually intersect at either place. Oakes, the terminus of another Northern Pacific branch line, is also on the "Soo," and La Moure at the intersection of the Oakes and Edgley branches is only some 20 miles from Oakes and the same distance from Edgley. So that wheat might be routed from either Edgley or La Moure over the Northern Pacific to Oakes and thence over the "Soo" to Minneapolis; and the distance from either place by this route to Minneapolis would be less by more than 60 miles than the distance *via* the Northern Pacific to Duluth. Treating Edgley and Boynton as practically one place, as for the purposes of rate making they are, Edgley is nearer by 60 miles to Minneapolis over the "Soo" than it is to Duluth over the Northern Pacific. And from Oakes, which is a point of actual intersection, the distance is less by about 90 miles to Minneapolis over the "Soo" than it is to Duluth over the Northern Pacific. Edgley, Oakes and La Moure are then on an average nearer to Minneapolis than to Duluth over the nearest practicable routes by about 70 miles, or 20 per cent of the distance to Duluth, over the Northern Pacific.

Jamestown is about the same distance from Minneapolis by the line of the Northern Pacific alone, or by the lines of the Northern Pacific and the "Soo" *via* Oakes, as it is from Duluth *via* the Northern Pacific.

Davenport, the point of intersection of the Edgley branch of the Northern Pacific with
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the Great Northern, is about 38 miles nearer to Minneapolis by the Great Northern than to Duluth by the Northern Pacific, and this is about 12 per cent of the distance to Duluth.

Where reference is made in this statement to the "nearest practicable routes" it is meant that the initial road connects at some point between the point of origin of the freight and its final destination, with some other road over which the shipment might be made, though in fact it may actually go by a longer route. Thus from Boynton and Oakes, the actual routing of wheat consigned to Duluth is over the "Soo" road to Minneapolis and thence by another road to Duluth. But the same shipment might be transferred from the "Soo" to the Great Northern at Hankinson, and go *via* the last named road through St. Cloud to Duluth, thus saving a very considerable distance in the haul. So from Andover to Duluth the actual routing is probably by the St. Paul road to Minneapolis and thence by the Duluth road to Duluth. But the routing might be northward over a branch of the St. Paul road to its intersection with the Great Northern and thence over the last named line *via* St. Cloud to Duluth, thus effecting a considerable saving in distance. From Redfield, Doland and Elrod, while the actual routing is probably over either the St. Paul, or the Northwestern, through Minneapolis and thence to Duluth, a great saving in distance might be gained by routing over the Northwestern to Watertown, and then over the Great Northern *via* St. Cloud to Duluth.

The difference in distance from most of these places to Minneapolis and to Duluth respectively, is much more by the routes actually taken, than by the nearest practicable routes. Therefore no injustice can be done either the carriers or the commercial interests of Duluth, by taking the nearest practicable routes as a basis of comparison of railroad rates to the two cities.

The railroads which serve this territory in the two Dakotas and transport their wheat product to Minneapolis and Duluth are,

1st. The Northern Pacific, the main line of which from Fargo extends westward through Casselton and Jamestown, and a branch of which extends southwestward through Davenport and La Moure to Edgley, with another branch from Carrington, a point north of the main line running southeasterly through Jamestown and La Moure to Oakes. Another branch of the Northern Pacific leaving the main line at Wadena passes westerly through Wahpeton to Milnor. All points on the main line and the above mentioned branches of the Northern Pacific are practically the same distance from Minneapolis as from Duluth *by the Northern Pacific road*.

Staples is the point of divergence on that road of freight consigned to Minneapolis from that consigned to Duluth.

2d. The Great Northern, the northwestern branches of which intersect the main line of the Northern Pacific at Fargo and Casselton, and intersect the Edgley and Milnor branches of the Northern Pacific at Davenport and Wahpeton respectively. The Great Northern also has a line extending from Ellendale eastward through Rutland and Hankinson, the last named place being a point of junction with the "Soo" road; and it has a branch running southwesterly from Rutland to Aberdeen. Other branches of the Great Northern extend northwestward from Sioux Falls and from Huron through Watertown.

3d. The St. Paul Company, which has a direct line from Aberdeen eastward through Andover, Milbank and Ortonville to Minneapolis, with a branch northward from Aberdeen through Ellendale to Edgley; a branch south from Aberdeen to Redfield; a branch northward from Andover to Harlem, intersecting the Great Northern and the "Soo" roads; a branch southward from Andover through Elrod, intersecting the Northwestern and the Great Northern; a branch from Sisseton to Milbank; and a branch southward from Fargo, through Wahpeton and Fairmount to Ortonville.

4th. The "Soo" line, extending eastward from Boynton through Oakes and Rutland.

5th. The Northwestern, which extends eastward from Redfield through Doland, Elrod and Watertown to a connection with the Omaha road, by which it reaches Minneapolis and Duluth. The Northwestern has a branch extending northward from Redfield through Aberdeen to Oakes, intersecting the St. Paul, the Great Northern and the "Soo." It has another branch extending northward from Doland to Groton a point on the St. Paul road between Aberdeen and Andover.

6th. The Omaha road, which extends from Sioux Falls northeastward to Minneapolis and Duluth.

The Northern Pacific and the Omaha reach both Minneapolis and Duluth with their own lines.

The Great Northern reaches Minneapolis with its own line, but going to Duluth it uses the line of the Eastern of Minnesota from Hinckley to Duluth.

The "Soo" and the St. Paul reach Minneapolis with their own lines, but to reach Duluth they have to use other lines connecting those cities.

The Northwestern road reaches neither Minneapolis or Duluth with its own line, but uses the Omaha from St. Peter to both places.

The lines connecting Minneapolis & Duluth are, first the Duluth, second the Omaha, and 4 INTER 8.

third the Great Northern and Eastern of Minnesota, working jointly by way of Milaca and Hinckley. The Northern Pacific line between Minneapolis and Duluth is too circuitous for practical use, compared with the others.

Upon the theory that the shortest line should make the rate, and that there should be a differential in favor of Minneapolis, proportioned to its shorter distance, the rate to Minneapolis over the Great Northern and the St. Paul roads from points of intersection with the main line of the Northern Pacific, and points north thereof should be from 7 to 8 per cent less than the rates to Duluth; or 15 cents to Minneapolis while the rate to Duluth is 16 cents; and the rate to Minneapolis over the Great Northern and the St. Paul from their point of intersection at Wahpeton, and points north thereof as far as the main line of the Northern Pacific, should be about 10 per cent less than the rates to Duluth, or 14½ cents to Minneapolis while it is 16 cents to Duluth.

On the same theory, Edgley, Boynton, Oakes and Ellendale, and points on the Northern Pacific, the "Soo" and the Great Northern lines in the vicinity of those places, should have a rate to Minneapolis about 20 per cent less than the rate to Duluth, or 16 cents to Minneapolis while the rate to Duluth is 20 cents. From Rutland and points east thereof on the Great Northern, and from stations on the "Soo" immediately north, the rates, if adjusted upon the difference in distance to Minneapolis and Duluth respectively, by the lines of the Great Northern and the "Soo," should be about 25 per cent less to Minneapolis than to Duluth. But this differential should be reduced by the consideration that the Milnor branch of the Northern Pacific runs nearly parallel to and at no great distance from the "Soo" and the Great Northern from Milnor eastward to the state line, and furnishes a route from the intervening territory to Duluth, considerably nearer than the route *via* the Great Northern to Duluth. Where the rate to Duluth is 19, 15 would be about right to Minneapolis from Rutland and the proportion of 16 to 14½ from Hankinson. On the same theory of proportioning rates according to distance by the nearest practicable routes, all points in the two Dakotas lying south of that branch of the Great Northern road which extends from Ellendale eastward through Rutland and Hankinson, should have a rate to Minneapolis less by from 25 to 33 per cent than the rate to Duluth.

In no case, upon this theory, should the differential in favor of Minneapolis from points in the Dakotas south of the said branch line be less than 5 cents per hundred while the rate to Duluth is as much as 20 cents per hundred from the same points.

Assuming that the rates to Duluth remain as

they were fixed from the various points which have been named above at the time of the hearing in this case, a re-adjustment of the rates to Minneapolis upon this theory would give rates to those two cities as follows:

Rates from.	To Duluth.	To Minneapolis.
Fargo,	16	15
Casselton,	17½	16½
Davenport,	17½	15½
Wahpeton,	16	14½
Milnor,	19	17
Hankinson,	16	14½
Rutland,	19	15
Harlem,	20	16
Edgley,		
La Moure,		
Boynnton,		
Oakes,		
Ellendale,	20	15
Aberdeen,		
Andover,		
Groton,		
Redfield,		
Doland,	20	20
Elrod,		
Woolsey,		
Huron,		
Lake Preston,		
Watertown,	Duluth 5 cents more than Minneapolis.	
Sisseton,		
Woonsocket,		
Vilas,		
Madison,		
Sioux Falls,	20	20
Jamestown,		

Since the hearing in this case, the rates from Fargo, Casselton, Davenport and Wahpeton, have been reduced to the extent of one-half a cent per hundred pounds. This is so slight a reduction, that upon the theory here advanced the differential in favor of Minneapolis should still be as above suggested. That is the rates to Duluth from the points above named being, respectively, 15½, 17, 17 and 16 cents per hundred pounds, the rates from the same points to Minneapolis should be respectively 14½, 16, 15 and 13 cents per hundred.

The rate on flour from Duluth or other lake Superior ports *via* lake to Buffalo and thence to New York varies from 17½ cents to 22½ cents per hundred during the season of open lake navigation. The rate on flour from Minneapolis to Duluth is 7½ cents per hundred; on wheat 5 cents per hundred. The rate on flour from Chicago, Milwaukee or other Lake Michigan ports *via* lake to Buffalo and thence to New York varies from 15 to 20 cents per hundred, being always 2½ cents less than the rate from Duluth. The rate on flour destined from Minneapolis *via* Lake Michigan ports by water to Buffalo and thence to points east is 10 cents per hundred from Minneapolis to such lake ports during the season of open navigation.

The rates on flour from Minneapolis to eastern and export markets are thus seen to be the same at any time during open navigation, by

way either of Duluth or of Milwaukee, Chicago, or other Lake Michigan ports; for example, Gladstone or Duluth millers, being on the lakes, have during open navigation the advantage of Minneapolis millers in rates to eastern and export markets to the extent of the railroad charge for transporting flour from Minneapolis to Duluth, which is 7½ cents per hundred or 15 cents per barrel. This advantage applies principally when flour is shipped by lake; that is, during about six months of the year. During closed navigation, when Duluth and Minneapolis send their flour east all-rail *via* Chicago, the rate to Chicago and thence east is the same from both places. But there is a route from Duluth *via* the Canadian Pacific over which the rate is 2 cents less than *via* Chicago. In using this Canadian Pacific route, Minneapolis, even during the season of closed navigation, still has the disadvantage of the 7½ cents per hundred as compared with Duluth. The bulk of the flour, however, goes during open navigation, taking the lake routes, and from Minneapolis goes *via* Duluth or Gladstone,—very little by Milwaukee and Chicago.

From Duluth to New York by lakes and Buffalo is 1414 miles, from Minneapolis to New York by Gladstone, lakes and Buffalo, the shortest lake route is 1478 miles.

The daily capacity of the Minneapolis mills is about 40,000 barrels; the average daily output is less than this by several thousand barrels. The daily capacity of the Duluth mills is about 6,000 barrels and is being rapidly increased. The annual aggregate output of the mills at other points on the St. Paul line alone is as much as the output of the Minneapolis mills. The Minneapolis millers have the advantage over those of Duluth in the matter of cost of power, water power being principally used at Minneapolis and steam exclusively at Duluth. Duluth has the advantage of Minneapolis in the lesser cost and capitalization of plant in proportion to production or capacity.

The rates from the wheat fields to Minneapolis are usually so adjusted that the wheat rate to Minneapolis plus the flour rate from Minneapolis to Lake Michigan ports, Chicago, Milwaukee, Gladstone, is the same as the wheat rate from the fields direct to those ports. From Minneapolis to those ports the flour rate is 10 cents per hundred. This is done apparently to keep Minneapolis on a parity with milling points on Lake Michigan of which Milwaukee is the chief.

Milling points in Central and Southern Minnesota and Wisconsin are kept on a parity with Minneapolis and Milwaukee by giving them the privilege of "milling in transit." That is, the millers at points intermediate between the wheat fields and Lake Michigan, on receipt of wheat at their mills pay the full rate through

to the lake, and are then allowed to forward the product (flour), to the lake without further charge.

While the millers of Minneapolis, Milwaukee and Central and Southern Minnesota and Wisconsin are thus on a parity as regards rates, Duluth has from a considerable territory much the advantage of any of them. This advantage is chiefly over Minneapolis, but it applies against Milwaukee and the country mills as well, in all cases where the wheat rates to Duluth are as low as to Minneapolis.

Minneapolis is a great wheat market as well as a great milling centre, and much of the wheat converted into flour by the Milwaukee and country millers is purchased by them in Minneapolis.

A reduction of the wheat rate to Minneapolis should, if the parity between millers at that city, Milwaukee and interior points is to be preserved, be followed by a corresponding reduction in the rate from the same points to Lake Michigan ports, and in the transit rate to interior mills.

The tonnage going west over the various defendant roads from Minneapolis is usually much greater in amount and also of a higher class, and will therefore bear a much higher freight charge, than that going west from Duluth. More back loading of wheat cars with profitable freight can be had from Minneapolis than from Duluth.

The St. Paul road pays the Duluth road for taking from Minneapolis to Duluth, wheat consigned over its line to Duluth about 4 to 5 cents per hundred. Similar payments are made by other roads reaching only to Minneapolis, but billing to Duluth. Before the Great Northern road was built there was no direct rate to Duluth. The charge to Duluth was simply that to Minneapolis with the local thence to Duluth added.

The general prosperity of Minneapolis is largely dependent on the prosperity of the milling interests of the city. The lumber and milling interests, both of which are very great are especially helpful to each other. Cars coming in from the west with wheat are largely loaded back with lumber, and the lumber is often paid for by elevator receipts for wheat, or drafts on millers who have purchased wheat. The general jobbing trade of the city, notably in the line of agricultural implements, is also largely influenced by the volume of the wheat and flour trade.

It can hardly be doubted, in view of the testimony, that under the present adjustment of rates on wheat the milling interests of Minneapolis, and with them its general prosperity, and possibly its population, must decline. So far as such a result would be attributable solely to the greater natural advantages of Duluth as a point for manufacture and ship-

ment of flour, nothing perhaps could properly be done to avert it. Duluth is nearer to the markets than Minneapolis, and to this extent its advantages can not and ought not to be denied or taken from it. But on the other hand Minneapolis is nearer to the wheat fields than Duluth and to this extent it is entitled to the advantage over Duluth which on that account should naturally belong to it. This natural advantage is denied to Minneapolis in the present adjustment of railroad rates, as between it and Duluth, from the wheat fields.

As a general proposition it is conceded that the shortest line should fix the rate, and several railway experts have testified in this case that the rates to Minneapolis and Duluth should be adjusted according to mileage, taking the shortest route to each place as the basis of comparison. As a general rule it is probably true that rates should not be proportioned strictly to mileage, the more distant point should usually have a greater actual rate, but a less proportionate or ton mile rate than the nearer point. This is due largely to the fact that the terminal expenses which do not vary with distance constitute a considerable part of the entire charge in either case and operate to reduce ton mile rates on the longer haul.

But this consideration in the present case seems to be fully balanced, perhaps more than balanced, by the fact that *back loading*, which is also a powerful element in the establishment of rates, is so much more certain, and the west bound traffic so much more profitable, from Minneapolis than from Duluth.

While it is true that from points on the main line and the Edgley and Milnor branches of Northern Pacific, Duluth and Minneapolis are equidistant by that line, yet these points are accessible to Minneapolis by routes composed in part of other roads which are decidedly shorter than the route *via* the Northern Pacific alone, and we are clearly of opinion that Minneapolis should have a differential in the wheat rate from the territory in dispute proportioned to its lesser distance as compared with the distance to Duluth by the nearest practicable routes in either case.

Should this principle be varied by the fact that from some points in this territory there is one road over the lines of which the distances to Duluth and Minneapolis are the same? It does not seem necessary to decide this question. Certainly that road (the Northern Pacific) could not be held to discriminate against Duluth, by charging a greater rate to it than to Minneapolis from points having a much shorter line to the latter place. The Northern Pacific can therefore meet the lower rate to Minneapolis, which the equities of the situation plainly demand of the other lines, without lowering its rates to Duluth.

One other step the Northern Pacific might

possibly take, and that is to bring down its rates to Duluth to the level of the reduced rates ordered over the other lines to Minneapolis. Should it do so the other lines would either immediately have to reduce their Minneapolis rates again, or go out of the Duluth business from points accessible to the Northern Pacific. They would probably adopt the former alternative and thus frustrate any advantage the Northern Pacific might seek to derive by inaugurating the original reduction to Duluth. The result of any such proceeding would manifestly be highly injurious to all the roads, and it can hardly be supposed that the Northern Pacific will undertake it. At all events, the anticipation of such a course on its part should not prevent an effort on the part of the Commission to abolish the discrimination which Minneapolis now suffers at the hands of other lines. It is believed that the readjustment of rates about to be ordered will still leave Duluth an advantage in rates over Minneapolis, considering the additional price the latter must pay to get its flour to Duluth, and from all points on and naturally tributary to the Northern Pacific and its branches, the advantage of Duluth will be very decided, securing apparently its full share of the business to the Northern Pacific. We are of opinion that

while the rates to Duluth remain as they now are, the rates *via* the St. Paul, the "Soo," the Great Northern, the Northwestern, and the Omaha roads should be adjusted as follows:

From and including Fargo, Casselton and Sidney and points north of them, the rates should be 1 cent per hundred less to Minneapolis than to Duluth. From and including Wahpeton and points north as far as the main line of the Northern Pacific and south to Fairmount the rates to Minneapolis should be 1½ cents per hundred less than to Duluth. From and including Fairmount and all points west thereof on the "Soo" and the Great Northern lines, including Harlem and Edgley, the differential in favor of Minneapolis should be not less than 2 cents, and as much more as may be necessary to reduce the maximum rate to Minneapolis from any point to 16 cents per hundred, and from Rutland and points east thereof to not exceeding 15 cents per 100. From all points in the two Dakotas south of lines extending eastward from Ellendale through Rutland, Hankinson and Fairmount (and east of the Fargo branch of the St. Paul road) there should be a differential in favor of Minneapolis at not less than 5 cents per hundred.

TEXAS SUPREME COURT.

MISSOURI PACIFIC R. CO., *Appt.*,

v.

SHERWOOD, THOMPSON & CO., for the Use of the Insurance Company of North America.

1. The burning of cotton while awaiting compression as provided by a bill of lading, in a compress not owned or operated by the carrier, is within a clause in the bill exempting the carrier from loss by fire while the property is on deposit in place of transshipment or depots or landings or at points of delivery.
2. A shipment is not within the provisions of a statute forbidding carriers within the state to limit their common-law liability where the contract provides for the carrying of the goods to a foreign port by means of the carrier's own line, its connecting lines in another state, and an ocean steamship company.

3. A statute forbidding common car-

NOTE.—Shipments within a state as part of interstate or foreign transportation.

The general doctrine that an agency in transportation which is entirely within the limits of a state may be regarded as engaged in interstate or foreign commerce has been long established. Thus a steamer running entirely within the limits of a state is an instrument of interstate commerce when engaged in receiving and transporting goods in the course of transportation from one state to another. The *Daniel Ball v. United States*, 77 U. S. 10 Wall. 557, 19 L. ed. 999.

So any railroad which forms a part of or constitutes a link in a through line extending into several states is engaged in interstate commerce so far as it transports goods bound from one state to another. *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 304.

And vessels engaged in towing or lightering in 4 INTER S.

aid of vessels which are engaged in foreign or interstate trade and commerce are themselves to be regarded as engaged in such commerce. *Moran v. New Orleans*, 112 U. S. 69, 23 L. ed. 653; *Sinnot v. Davenport*, 63 U. S. 22 How. 227, 16 L. ed. 243; *Foster v. Davenport*, 63 U. S. 22 How. 244, 16 L. ed. 243; *Harmon v. Chicago (Ill.)* 84 Am. & Eng. Corp. Cas. 149.

While the above cases do not directly decide any question of shipments but questions as to license, taxation or other control and regulation of the agencies of commerce, they involve questions as to the nature of transportation within a state when it is only a part of transportation beyond the limits of the state.

So the regulation of charges for transportation within a state by a railroad which is only a part of a through transportation between states is beyond the power of the state. *Wabash, St. L. & P. R. Co.*

riers within the state, on land or in boats or vessels on the waters entirely within the body of the state, to limit or restrict their liability as it exists at common law, applies to shipments purely domestic beginning and ending in the state.

4. A clause limiting the liability of a railway company to its own line which is wholly within the state will not convert into a domestic bill of lading an instrument which purports on its face to be a through bill of lading to a foreign port, providing for the transportation of the goods to their foreign destination and fixing the through rate of freight.

5. A written notification to the consignee by a carrier's freight claim agent of the destruction of property received for transportation is not admissible

against the carrier to prove the loss of the property until it is shown to have been made in discharge of the agent's duties or within the scope of his powers and while the obligation of the carrier with reference to the property yet continued.

6. That a witness did not see the fire will not preclude his testifying that it consumed certain property where he states that he knows of his own knowledge that it did so. To exclude the evidence it must appear that his knowledge was founded so entirely on hearsay as to be inadmissible.

7. Evidence of the value of an entire lot of cotton, while not sufficient to prove the value of a portion of it, in the absence of facts showing the average weight, value, and quality, is admissible as tending to show such value.

Decided March 22, 1892.

APPEAL by defendant from a judgment of the District Court for Dallas County in favor of plaintiffs in an action brought to recover the value of certain cotton burned while alleged to have been in defendant's possession for transportation. *Reversed.*

The facts are stated in the commissioner's opinion.

Messrs. Leake, Shepard & Miller, for appellees:

The bill of lading, though nominally a through bill of foreign shipment, is in reality domestic, because, by its terms, the liability of the railway company is limited to its own line and ends with the delivery of the cotton to the steamship company at Galveston, within the limits of the state of Texas where its bill of lading was to be taken up and another given by the steamship company whose liability then attached. This contract limiting its liability to its own lines entirely within the state of Texas, being one permitted by the laws of said state (see *Gulf, C. & S. F. R. Co. v. Baird*, 75 Tex. 256), notwithstanding the guaranty of fixed through rate and delivery as specified in the bill of lading, said bill of lading is strictly local and domestic—one wholly to be performed within the state in so far as the Missouri Pacific Railway Company is concerned.

Heisermann v. Burlington, C. R. & N. R. Co. 63 Iowa, 732; *Stone v. Farmers Loan & T. Co.* 116 U. S. 333, 29 L. ed. 645.

The law is a regulation of the contract merely, and is controlled by the law of the place where made.

Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Talbot v. Merchants Despatch Transp. Co.* 41 Iowa, 247, 20 Am. Rep. 589; *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 539, 39 Am. Dec. 398; *Arayo v. Currell*, 1 La. 528; *Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 18, 57 Am. Rep. 589; *Cantu v. Bennett*, 39 Tex. 303.

The statute of Texas is within the police power of the state and is not a regulation of interstate commerce as such.

Chicago & N. W. R. Co. v. Fuller, 84 U. S. 17 Wall. 560, 21 L. ed. 710; *Sherlock v. Ailing*, 93 U. S. 99, 23 L. ed. 819; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co. supra*; *Cardwell v. American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Gulf, C. & S. F.*

v. Illinois, 118 U. S. 557, 30 L. ed. 244; *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, 19 Fed. Rep. 679.

But when two carriers act independently though concurrently in making reduced rates, and no through bill of lading or freight receipt is given, and neither is interested in or liable for the carriage of goods beyond its own line, the transportation by one carrier entirely within the limits of a state is not interstate commerce although the transportation by the other carrier extends into another state and the Interstate Commerce Act does not apply to the former carrier unless the goods are shipped directly to or from a foreign country. *Ex parte Koehler*, 30 Fed. Rep. 867.

When the products of the farm or the forest are collected and drawn, floated, or otherwise brought in to a town or station, whether on a river or a line of railroad, they are not exports or in process of exportation until committed to a common carrier

for transportation out of the state or started on such ultimate passage. *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715.

Where transportation of goods destined for a point without the state has been actually begun temporary stoppage within the state without the intention of abandoning the original movement which is ultimately completed will not deprive the transportation of the character of interstate commerce. *Delaware & H. Canal Co. v. Com. (Pa.)* 1 L. R. A. 232, 2 Inters. Com. Rep. 222.

Neither can the character of transportation to another state be destroyed by shipping to an agent within the state by a local bill of lading and re-shipment by him without unloading, breaking bulk or delay to the ultimate consignees in another state, and the shipment to the agent is not subject to the regulation as to rates by the state railroad commission. *Cutting v. Florida R. & Nav. Co.* 46 Fed. Rep. 641.

R. Co. v. Dwyer, 75 Tex. 572; *Providence Coal Co. v. Providence & W. R. Co.* 2 New Eng. Rep. 505, 15 R. I. 303, 26 Am. & Eng. R. Cas. 42; *Western U. Teleg. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692; *Western & A. R. Co. v. Exposition Cotton Mills*, 2 L. R. A. 102, 81 Ga. 522.

It was not error to permit plaintiff to read in evidence the memorandum of the cotton burned which had been furnished by the freight claim agent of the defendant for the information of the consignees.

Morse v. Connecticut River R. Co. 6 Gray, 450; *Burnside v. Grand Trunk R. Co.* 47 N. H. 554, 93 Am. Dec. 474; *Adams Exp. Co. v. Harris*, 7 L. R. A. 214, 120 Ind. 73.

Messrs. Alexander & Clark for appellant.

Tarleton, J., delivered the opinion of the court:

Appellees, as plaintiffs, brought this suit September 29, 1888, in the district court of Dallas county, to recover from appellant, as defendant, the sum of \$13,770, besides interest, the alleged value of 270 bales of cotton, which defendant failed to deliver, according to its contract, at Liverpool, England. The petition avers that the defendant is a corporation created under and by virtue of the laws of the state of Texas. It alleges that on November 14, 1887, Martin, Wise & Fitzhugh, of Paris, Tex., purchased 500 bales of cotton on account of plaintiffs, which they delivered to the defendant at Greenville, Tex., to be by it carried on its lines in Texas and forwarded to the city of Liverpool, England; that defendant received the cotton, and undertook and promised, in consideration of \$1.86 per 100 pounds, to carry upon its lines in Texas, and to have carried by its connecting lines, the 500 bales of cotton, and deliver them to Martin, Wise & Fitzhugh or their assigns at Liverpool; that thereupon defendant executed to Martin, Wise & Fitzhugh, plaintiffs' agent, five bills of lading, by which it acknowledged the receipt of the cotton, and agreed to carry the same upon its lines and deliver it to its connecting lines, to be carried to the city of New Orleans, La., there to be delivered to the West India Pacific Steamship Company, and to be transported to Liverpool and delivered to Martin, Wise & Fitzhugh, or their assigns; that the bills of lading, which contained the written direction, "Notify Sherwood, Thompson & Co., Liverpool, England," were duly assigned and delivered to plaintiffs; that of the 500 bales so shipped the defendant failed to deliver 270 bales, which plaintiffs charge were lost or destroyed while in the possession of defendant within the limits of Texas, or converted by it to its own use. The defendant pleaded a general demurrer, general denial, and specially as follows: That it is a corporation duly and legally incorporated under the laws of the state of Missouri; that it is a railway, and that its line of railway, and especially that part of it on which said cotton was to be shipped, does not now, and at the time of the alleged shipment did not, lie wholly within the state of Texas, but partly within said state and partly without said state; that, as alleged by plaintiffs, it delivered said five bills of lading to Martin,

Wise & Fitzhugh, which were duly assigned and delivered to plaintiffs; that plaintiffs received and accepted the same, subject to the terms and conditions thereof; that under and by virtue of the terms of said five bills of lading the same were foreign shipments from the town of Greenville, Tex., to the city of Liverpool, England; that they were not shipments wholly within the state of Texas; that in said five bills of lading, and in each of them, it was expressly agreed and stipulated that this defendant should not be liable for loss or damage of said cotton by fire or other casualty while in transit, or while in deposit or place of transshipment or depots or landings, or at the points of delivery; that if said cotton was destroyed, as claimed by plaintiffs, it was destroyed by fire at Greenville, Tex., while in transit, while in the Greenville compress, in no wise owned or operated by this defendant, while awaiting to be compressed, as provided by said bills of lading; that, if it was destroyed in said compress, it was by fire without fault or negligence on defendant's part, or on the part of its servants or agents. Plaintiffs, by supplemental petition, demurred to defendant's said plea, setting up said exemption from liability for loss by fire as a stipulation of said bills of lading, on the ground that the same is unreasonable, contrary to public policy, and prohibited by the laws of the state of Texas. Plaintiffs also replied specially that the defendant's railway at the time of the contract was wholly within the state of Texas, and that in order to carry the plaintiff's cotton from Greenville to its destination the defendant would have been compelled to deliver the same on the boundary of Texas to some other carrier: that the contract of shipment or bill of lading, by its express terms, stipulates, and said stipulation is permissible by the laws of Texas, that "for all loss or damage occurring in the transportation of said cotton the legal remedy shall be against the particular carrier, only, in whose custody the cotton may be at the time of the happening thereof;" that it is further expressly provided in the contract "that the liability of the defendant is limited to its own line of railway, and is to cease upon delivery to the next succeeding carrier of the freight specified in said bill of lading," etc. The bill of lading, read in evidence, shows that the cotton was received at Greenville, Tex., to be carried from that point to Liverpool, England. It also provides that the Missouri Pacific Railway Company, and its connections which received said property shall not be liable for loss or damage by fire or other casualty. It further provides that, in the case of loss or damage, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss or damage. It is also provided that the loss shall be computed at the value or cost of the goods and property at the place and time of shipment. It is further agreed that the Missouri Pacific Railway Company has the liberty to forward the property to the port of destination by any other steamer or steamship company than that named, and that the liability of the Missouri Pacific Railway as a common carrier terminates on the delivery of the property to the steamship or its

agent at Galveston, when the responsibility of the steamship company commences, and not before. Further, the property shall be transported from Galveston, Tex., to Liverpool, England, by the steamship of the West and Pacific Steamship Company. It is provided also that the bill of lading, duly indorsed by consignees, is to be given up, on demand of the agent of the steamship, in exchange for the ship's copy and order of delivery. It is further provided that the liability of the Missouri Pacific Railway Company is hereby limited to its own line of railway, and is to cease upon delivery to the next succeeding carrier. The bill of lading is signed for the railway company by A. L. Downer, who signs as agent, severally but not jointly, for the railway and steamship companies. The court sustained plaintiffs' exception to defendant's plea setting up its exemption from liability for loss by fire, and trying the case without a jury, September 10, 1890, rendered judgment for the plaintiffs in the sum of \$16,498.36 principal and interest. From this judgment, defendant appeals.

The first question to be considered is, Did the court err in sustaining the special exception addressed by plaintiffs to defendant's answer? The defendant seeks to shield itself under the stipulation that it should not be liable for loss by fire while in transit, or while on deposit in place of transshipment or depots or landings, or at points of delivery. By such loss we understand a loss due to fire which is not directly traceable to the negligence of the carrier or his servant. Porter's Law of Bill of Lading, § 223, pp. 161, 162, note 1. It is alleged in the defendant's answer that, if the cotton was destroyed, it was destroyed by fire at Greenville, Tex., without fault or negligence of defendant or its servants, while in transit while in the Greenville compress, in no wise owned or operated by defendant, while waiting to be compressed as provided by the bills of lading. Fire occurring under such circumstances, in view of the exemption clause in the bill of lading pleaded by defendant, is not to be ascribed to the negligence of the carrier. *Lancaster Mills v. Merchants Cotton Press & S. Co.*, 89 Tenn. 1. That a common carrier may, unless forbidden by statute, so contract as to exempt itself from liability for loss by fire, unless caused by the negligence of itself or its servants, is well settled. Such a limitation is reasonable. *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Well. 107, 18 L. ed. 170; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556; *Hart v. Pennsylvania R. Co.* 112 U. S. 838, 28 L. ed. 720. Appellees, however, claim that the restriction here pleaded is forbidden by our statute, (article 278, Rev. Stat.) which reads as follows: "Railroad companies and other common carriers of goods, wares, and merchandise for hire, within this state, on land, or in boats or vessels on the waters entirely within the body of this state, shall not limit or restrict their liability, as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other man-

ner whatever; and no special agreement made in contravention of the foregoing provisions of this article shall be valid." Appellant holds that appellees cannot invoke the provisions of this statute, because (1) the shipment here involved is not a domestic, but is a foreign or interstate shipment; (2) the statute applies only to domestic shipments; (3) if the statute be intended to apply to foreign shipments, and to annul a contract of foreign shipment exempting a carrier from liability for loss by fire not chargeable to its negligence, the statute is a regulation of interstate commerce, and as to such regulation is void.

1. Is the contract of shipment set out in the petition of appellees a contract of domestic or a contract of foreign or interstate shipment? By a contract of domestic shipment is understood such a contract as contemplates the shipment of goods from one point in a state to another point therein. By a contract of foreign or interstate shipment is understood such a contract as contemplates the transportation thereunder of goods from a point within a state to a foreign country, or to a point within another state. Transportation is only domestic when confined to the boundaries of the state in which the contract of shipment is entered into. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, 19 Fed. Rep. 679. Applying these definitions to the contract set out in plaintiffs' petition, the conclusion is inevitable that the shipment there described is a foreign shipment. The petition alleges an undertaking on the part of the carrier, defendant, to carry the cotton upon its lines, and to deliver it to its connecting lines, to be carried to the city of New Orleans, La., there to be delivered to the West India Pacific Steamship Company, to be transported to Liverpool, and there delivered to Martin, Wise & Fitzhugh, or their assigns.

2. Does the statute referred to apply to an interstate or foreign shipment? This question has been several times suggested to our supreme court, but the disposition of the cases in which it was presented did not require a solution of it. *Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 13, 57 Am. Rep. 589; *Missouri Pac. R. Co. v. Harris*, *supra*; *Missouri Pac. R. Co. v. China Mfg. Co.* 79 Tex. 26. We are of opinion that the question must be answered in the negative; that the statute applies to shipments purely domestic, beginning and ending in the state of Texas. Our conclusion is founded upon the language of the statute itself. "Railroad companies and other common carriers . . . within this state, on land, or in boats or vessels on the waters entirely within the body of this state, shall not limit or restrict their liability, as it exists at common law." Railroads and other common carriers within this state, on land, are put, as to transportation, upon the same plane, so to speak, as boats or vessels on the waters entirely within the body of this state. As to transportation within the state, they are forbidden to limit their liability as it exists at common law. The limitation prescribed by the statute, if it be more extended as to railroads than to boats or vessels, is so only in the sense that, as to the former, it is not confined to carriers operating

exclusively within the state, while, as to the latter, it is restricted to carriers plying on waters wholly within the state. The track of a railroad company may extend beyond the limits of the state; yet, if the goods be carried by it from one point to another within this state, such carriage constitutes transportation within this state, and such railroad is a "carrier within this state." But if the railroad, whether by itself, or by its connecting lines, its agents, transports goods from a point within this state to a point in another state, it is a carrier, not "within this state," but within and out of this state into another. In the latter event, it is engaged in interstate commerce. With reference to its domestic character, we do not think that any discrimination was intended by the legislature between a shipment by water and by rail. The scope of the limitation is logically the same whether applied to the carrier as a railroad or as a steamboat. Transportation "within this state" is, in either case, the subject-matter of the legislation. Our legislature seems to have had in mind, in the adoption of the statute, article 1, § 8, of the Federal Constitution, investing Congress with the power to regulate commerce among the states.

3. Having concluded that article 278 applies only to domestic shipments, and that the shipment described in the plaintiffs' petition is not a domestic shipment, it becomes unnecessary to discuss, and we consequently refrain from considering, the third question presented by appellant, viz: the validity or invalidity of this statute as a regulation of interstate or foreign commerce, provided it was intended to apply to such commerce. Appellees seem to contend that, without reference to the action of the court on their demurrer, the judgment is nevertheless proper, because the bill of lading, though nominally a through bill of lading, is, so far as the Missouri Pacific Railway Company is concerned, in reality domestic; that it is a domestic bill, "because, as they contend, by its terms the liability of the railway company is limited to its own line, and ends with the delivery of the cotton to the steamship company at Galveston, within the limits of the state of Texas, where its bill of lading was to be taken up, and another given by the steamship company, whose liability then attached." The bill of lading described in plaintiffs' original petition provides for a transportation of the cotton from Greenville, Tex., by the Missouri Pacific Railway Company, and its connecting lines, through Louisiana to New Orleans, and thence to Liverpool. It is silent as to a limitation by the company of its liability to its own line. The bill of lading described in the plaintiffs' supplemental petition (in which it is alleged that the defendant's railway was at the time wholly within the state of Texas) provides "that the liability of the defendant is limited to its own line of railway." The bill introduced in evidence purports on its face to be a foreign bill of lading. It provides for the transportation by the Missouri Pacific Railway Company of the cotton at the rate of \$1.36 per 100 pounds from Greenville, Tex., to Liverpool, England. It provides that the liability of the company is limited to its own line of railway, and is to cease on the delivery of the

goods to the steamship company or their agent at Galveston, when the liability of the steamship company commences, and not before. The bill is signed for the railway company by A. L. Downer, who signs as agent, severally but not jointly, for the railway and steamship companies. It will be seen that the bill of lading introduced in evidence differs from that described in the original petition, though it is perhaps supported by the averments of the supplemental petition. Does the provision limiting the liability of the company to its own line, terminating at Galveston, so affect the character of the instrument as to make of it a domestic bill of lading? We think not. The instrument on its face purports to be a foreign bill of lading. It constitutes, as we view it, an undertaking on the part of the carrier, defendant, to transport and have transported from Greenville, Tex., to Liverpool, England, the cotton in question. It provides for a rate of freight between these points of \$1.36 per 100 pounds. It contemplates a continuous transportation from Greenville, Tex., to Liverpool, England. These are all features of a "through" contract of shipment. Porth. Bill Lad. §§ 323, 324, 326, 331. In *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 401, 32 L. ed. 788, a bill of lading providing for a shipment from Nashville, Tenn., to Liverpool, England, and limiting the liability of the connecting carriers to their own lines, was treated by the Supreme Court of the United States as a through shipment. The stipulation referred to was intended, we think, solely to qualify the responsibility of the carrier, without affecting the character of the shipment as a through shipment. We cannot regard the bill of lading in question as a mere receipt by the carrier of goods marked for a destination beyond the terminus of its route. It is more. It is a contract of shipment, and an undertaking to transport from Texas to a foreign country. Our attention is called by appellees, in support of their proposition already stated, to the case of *Heiserman v. Burlington, C. R. & N. R. Co.* 68 Iowa, 782. In that case, while it was true that goods shipped at West Union, Iowa, were destined for Milwaukee, Wis., the contract of the carrier was to transport them from West Union to Postville, Iowa, and no further. The goods, under the contract with the carrier, were to be transported and delivered at Postville, where the freight for such transportation was to be paid to the carrier. This was plainly a domestic shipment; the carrier not having contracted to carry the goods, or to have them carried, to Milwaukee.

One A. H. O'Neal testified by deposition, for plaintiffs, as to the loss of the cotton in question. Attached to his deposition, as a part of his answer, was a statement read in evidence to prove the burning of the cotton. This statement was furnished Martin, Wise & Fitzhugh by C. H. Dent, freight claim agent of the Missouri Pacific Railway Company, to enable Martin, Wise & Fitzhugh to be in position to officially notify the consignees of the cotton that their cotton had been destroyed by fire, in order that they might take such steps as in their judgment might be proper and necessary. The witness testified that he believed the statement was made out personally by

Dent, and was in his handwriting, and that he believed it to be correct. The statement is tabulated showing the names of consignors and consignees, date and number of bills of lading, and marks of cotton, and showed that it was destroyed by fire at Greenville, Tex., November 14, 1887. Objection was made to the introduction of this statement because (1) there was not sufficient evidence to establish that the statement was made by C. H. Dent; (2) if made by Dent, the statement was not *res gestæ*, and there was no evidence showing that he had authority to bind defendant by such statement. The evidence showed that the statement was furnished by Dent, and was sufficient, we think, to constitute it his declaration. But, admitting this to have been the fact, was it binding on the company? The rule is that declarations of an agent, to be admissible, must be within the scope of their authority, and "while the transaction is yet depending." In *Burnside v. Grand Trunk R. Co.*, 47 N. H. 554, 98 Am. Dec. 474, the declarations of a general freight agent concerning goods delivered to him for transportation were held to be admissible against the company, though made eight months after their delivery to him; it appearing that the carrier's duty had not yet terminated. In making the statement here in question, it does not appear whether or not Dent was acting within the scope of his agency. We are nowhere apprised of the extent of his authority, except by the use of the term "freight claim agent," and about the duties and powers of such an agent the record is silent. Until it had been made to appear that such a statement was made in the discharge of the agent's duties, or within the scope of his powers, and while the obligation of the carrier, with reference to the cotton, yet continued, the statement should have been excluded.

The witness O'Neal testified that, at the time of the loss of the cotton in question, he was the general manager of Martin, Wise & Fitzhugh, located at Paris; that the 478 bales of cotton were destroyed by fire on November 14, 1887, at Greenville, and, as far as witness knows, were not delivered; that he knows this cotton

was destroyed by fire at Greenville, Tex., November 14, 1887, of his own knowledge, as far as it is possible for him to know it without actually seeing it burn. Defendant objected to this testimony because it appeared that on November 14, 1887, witness lived at Paris, and was not at Greenville, and that his evidence as to the burning of the cotton is hearsay. We are unable to say that the knowledge of the witness, to the existence of which he swears, was founded on pure hearsay. There are conditions in which one can acquire knowledge without seeing. We cannot adjudicate that the action of the court in admitting the evidence was erroneous. While it appears that the witness was at the time stated located in business at Paris, it does not appear that he was not at Greenville on November 14, 1887; and, while he did not see the fire which consumed the cotton, his statement may have been based on information derived from a source which would bind defendant. The cross examiner did not sufficiently probe the sources of the witness' knowledge to justify us in holding that it was founded entirely on hearsay, rendering his testimony inadmissible.

With reference to the value of the cotton, the witness O'Neal was permitted to testify that the value of 473 bales of cotton, of which the cotton involved in this suit was a part, was in excess of \$23,649.20. This testimony was objected to as irrelevant, immaterial, and incompetent. We think that the evidence tended at least to prove the value of the cotton lost, and that it was admissible. We do not, however, hold that it was sufficient to prove such value; in the absence of facts showing at least the average weights, value, and quality of the cotton, or showing that such average weights, value, or quality could not be ascertained. The judgment should be reversed, and the cause remanded.

Per Curiam:

Reversed and remanded, as per opinion of commission of appeals.

Rehearing denied.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

GEORGE K. TOZER, *Plaintiff in Error*,

v.

THE UNITED STATES OF AMERICA, *Defendant in Error*.

(No. 73.)

1. Comparison on the local freight rate from a terminal to an intermediate point on a carrier's line, with the share which it receives of a joint through rate established with a connecting carrier for hauling freight received from the latter between such points is not a proper method of determining whether or not the local rate is

within the provisions of section 3 of the Interstate Commerce Act which prohibit undue and unreasonable preferences or advantages.

2. A conviction for criminal violation of the section of the Interstate Commerce Act, which prohibits undue or unreasonable preferences or advantages, cannot be sustained upon the finding

of a jury that a certain charge was an unreasonable preference, if no standard of comparison is

established by which such unreasonableness is shown with definiteness and certainty.

IN ERROR to the District Court. Before **Brewer**, *Circuit Justice*, and **Caldwell**, *Circuit Judge*.

Messrs. Thos. J. Porter and Aldace F. Walker for plaintiff in error.

Messrs. Geo. D. Reynolds and Chas. Claflin Allen for United States.

Opinion by **Brewer**, *Circuit Justice*:

Plaintiff in error was indicted in the District Court for an alleged violation of the Interstate Commerce Act. There were five counts in the indictment. The court sustained a demurrer to the fourth; and the defendant was found not guilty under the first and fifth, but guilty under the second and third counts. The judgment for conviction rendered thereon was brought to this court for review, by writ of error.

The facts in the case were these: Tozer was the agent of the Missouri Pacific Railway Company at Hannibal, Missouri. That company operated a line of road extending from Hannibal to Hepler, Kansas. At Hannibal it connected with the road of the Chicago, Burlington & Quincy Railroad Company. The two companies by agreement established a joint tariff. By the joint tariff sugar was shipped from Chicago to Hepler at 51 cents a hundred pounds. The local tariff of the Missouri Pacific Railway Company from Hannibal to Hepler was 46 cents per hundred. The joint tariff was divided between the two companies by giving to the Missouri Pacific Company 34, and to the Chicago, Burlington & Quincy Company 17 cents. The Hayward Grocer Company, a firm doing business in Hannibal, shipped sugars from that place to Hepler, upon which shipment the regular local rate of 46 cents was charged and collected. They also ordered a Chicago firm to ship sugar from Chicago to the same point. This shipment was made over the Chicago, Burlington & Quincy Railroad, and upon it the joint rate, 51 cents, was charged and paid. It was agreed in the trial court that the Chicago, Burlington & Quincy Railroad Company made a contract to carry the sugars from Chicago to Hepler, and that after carrying them over its own line to Hannibal, it employed the Missouri Pacific Company to carry it for the balance of the way, and paid it 34 cents; or, to state it in another way, the Missouri Pacific Company charged the Chicago, Burlington & Quincy Company only 34 cents for carrying the sugars from Hannibal to Hepler, while it charged the Hayward Grocer Company, and others living in Hannibal, 46 cents for doing a like work; and it was held that this constituted a giving to one person an undue and unreasonable advantage, and subjected one to unjust and unreasonable disadvantage, within the denunciation of section three of the Interstate Commerce Act. In other words, a comparison was drawn between the local rate of the one company and the share which it received by agreement of the joint through rate of the two companies, and the two being unequal the agent was found guilty of violating the Act.

The decision of the court of appeals of this circuit, just announced, in the case of the *Chicago & N. W. R. Co.*

go & N. W. R. Co. v. Osborne, post, 257, precludes the necessity of any extended discussion. It was there held that each company established its own tariff; and that the reasonableness of the tariff of one is not determined by that of any other. It was also held, that two connecting companies forming by agreement a joint through tariff, create thereby, as it were, a line new and independent of that of either of the connecting companies; and hence, that, such joint tariff or the share that either takes of such tariff, is not the basis by which the reasonableness of its local tariff is to be determined. It is true, that in that case the question arose under section four, with reference to long and short hauls, while in this it arises under section three, prohibiting undue or unreasonable preferences or advantages; but still the questions there decided are controlling here. If the joint through tariff of two connecting roads is not a standard by which the local tariff of either can be declared in violation of section four, neither can it be the standard by which the question of undue preferences is determined under section three. Because the local rate is in excess of the share of the joint rate, it does not follow that an undue preference or advantage has been given. The trial court seemed to recognize this proposition, for it charged: "Now conceding that some difference between the local rate and the Missouri Pacific Railway Company's proportion of the through rate is permissible, owing to the different conditions affecting the two shipments—the question that I submit to you under the second and third counts is whether the difference shown in this case between the two rates of twelve cents per hundred pounds—is under all the circumstances of the case a reasonable difference or an undue and unreasonable difference, not justified by the different circumstances under which through shipments from Chicago and local shipments from Hannibal are made."

"If you find that the difference in rate of twelve cents per 100 pounds is an undue and unreasonable difference, and, as before explained, that defendant as agent of the Missouri Pacific Railway Company knowingly and willfully gave the Chicago, Burlington & Quincy Railroad the advantage of such difference in the shipment of the two barrels of sugar mentioned in the indictment—then you may return a verdict of guilty on the second and third counts although you acquit on the first count."

"In determining the last question submitted to you as to the reasonableness or unreasonableness of the difference between the local rate and the Missouri Pacific Company's proportion of the through rate, I give you full liberty to consider all the facts, circumstances and reasons, adduced by the various witnesses

in justification of the difference shown, and I ask you to consider the same carefully and fairly without any prejudice or bias whatsoever."

But in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In case of the *Chicago & N. W. R. Co. v. Dey*, 2 Inters. Com. Rep. 325, 1 L. R. A. 744, 35 Fed. Rep. 866, 876, I had occasion to discuss this matter, and I quote therefrom as follows: "Now the contention of complainant is that the substance of these provisions is, that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable charge. If this were the construction to be placed upon this Act as a whole, it would be certainly obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may

and what he may not do under it. In *Dwarris*, Stat. 652, it is laid down 'that it is impossible to dissent from the doctrine of Lord Coke, that the acts of parliament ought to be so plainly and clearly, and not cunningly and darkly penned, especially in legal matters.' See also *United States v. Sharp*, Pet. C. C. 122; *The Enterprise*, 1 Paine, 34; Bishop, Stat. Crimes, § 41; Lieb. Herm. 156. In this the author quotes the law of the Chinese penal code, which reads as follows: 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows.' There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate. See another illustration in *Ex parte Jackson*, 45 Ark. 158."

Applying that doctrine to this case, and eliminating the idea that the through rate is a standard of comparison of the local rate, there is nothing to justify a verdict of guilty against the defendant.

Judgment will therefore be reversed, and the case remanded for further proceedings.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

UNITED STATES v. C. S. MELLEN ET AL.

(No. 3692.)

1. The fact that two carriers have established a joint tariff rate between two points will not, under the provisions of the long and the short haul clause of the Interstate Commerce Act, prevent each from charging its local rates upon shipments to and between intermediate points, although the combined local rates exceed the through rate for the longer haul.
2. Officers of an interstate railroad company may be indicted, under section 4 of the Interstate Commerce Act, for fixing and charging a local freight rate upon the same kind of merchandise under substantially similar circumstances and conditions greater in amount between two points on the main line than that fixed between one of them

and a point also on the main line lying in the same direction but farther away than the other.

3. The objection that an indictment under the long and short haul clause of the Interstate Commerce Act is an attempt by the government to interfere with the revenues of the railroad, contrary to the terms of the contract under which it was built, cannot be raised upon a motion to quash.
4. Collecting and receiving freight charges does not subject one who had nothing to do with fixing the rates to indictment under the long and short haul clause of the Interstate Commerce Act, although the rates are within the prohibitions of that Act.

Opinion by Foster, District Judge:

The defendants, C. S. Mellen, J. A. Monroe, J. G. Woodworth and W. S. Barr were indicted in this court on the 27th day of April, 1892, for violating the provisions of section 4 of the Interstate Commerce Act by charging more for a short than for a long haul, it being charged in the indictment that the four defendants first named were officers and persons acting for and employed by the Union Pacific Railway Company, and were the officers who had authority to make and establish

rates and charges for the transportation of property and freight over the lines of said company, and that W. S. Barr, the last named defendant, was the agent of said railway company at Salina, Kansas, a station on its line 186 miles west of Kansas City, Missouri. The case is before the court on a motion to quash.

The first count of the indictment charges that on the 20th of April, 1891, the Union Pacific Railway Company was a common carrier of passengers and property through and among and between the states and territories of the

United States, between the city of Ogden in the territory of Utah and the city of Kansas City, Missouri.

It is further alleged in the indictment that upon that day, to wit: the 20th of April, the Union Pacific Railway Company had entered into an agreement and arrangement with the Southern Pacific Railway Company, also a common carrier (both of which said companies were then and there subject to the provisions of the Act of Congress, entitled, "An Act to Regulate Commerce") establishing a certain joint tariff or rate for the shipment and transportation of refined sugar in carload lots by continuous line upon the railways of the Union Pacific and Southern Pacific from the city of San Francisco in the state of California, to the city of Kansas City, Missouri, and that this joint tariff and rate was in force on the 20th of April, 1891, and that at that time the said joint tariff and charge had been filed with the Interstate Commerce Commission created by the Act of Congress, approved on the 4th day of February, 1887; that the rate and price under said joint tariff was 65 cents for each 100 pounds of sugar in carload lots transported by the Union Pacific and Southern Pacific companies over their railroads by continuous line and route from San Francisco, California, to Kansas City, Missouri, and of the said rate of 65 cents per 100 pounds fixed by said joint rate for the transportation of sugar between the points last mentioned, the Union Pacific received the sum of 32.4 cents per 100 pounds and the Southern Pacific received 32.6 cents per 100 pounds.

It is further charged in the first count of the indictment that the city of Selina, in the district of Kansas, is a station upon the main line of the Union Pacific Railway Company in Kansas, and is located 186 miles west of Kansas City, Missouri, and is a shorter distance from San Francisco, California, by 186 miles than Kansas City, Missouri.

The indictment then proceeds to charge the defendants, Mellen, Monroe, Campbell and Woodworth (they being officers authorized to fix and establish rates for the Union Pacific) with willfully establishing a rate of 94 cents for each 100 pounds of refined sugar in carload lots transported over the lines of the Union Pacific and Southern Pacific railways from San Francisco, California, to the city of Salina, Kansas, notwithstanding they had fixed a rate of 65 cents per 100 pounds to the city of Kansas City, Missouri, which was a greater distance than the distance to Salina.

It is further alleged that a shipment was made from San Francisco to the H. D. Lee Mercantile Company of Salina, Kansas, for one carload of sugar consisting of 76 barrels, for which the rate of 94 cents per 100 pounds was charged, and that said shipment was made under substantially similar circumstances as the shipments made to Kansas City, Missouri, and that Barr, as the agent of the company demanded and collected the said rate which is alleged to be illegal and which had been fixed by the four defendants first above named.

The first count of the indictment charges that a joint rate was established of 65 cents from San Francisco, California, to Kansas

City, Missouri, said rate being established under an agreement or joint traffic arrangement with the Southern Pacific Company.

The question now to be determined is whether or not the fact that they charged a higher rate to Salina, which was a shorter distance, is a violation of section 4 of the Act to Regulate Commerce. The language of the section is: "It shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance." It will be noted from a careful examination of this section that it applies to each separate common carrier for its violation of the long and short haul clause on its own line.

In construing this section, *Mr. Justice Brewer*, in the case of the *Chicago & North Western R. Co. v. Osborne*, post, 257, said, "Where two companies owning two connecting lines of road unite in a joint tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two companies by agreement make a joint tariff over their lines or any part of their lines such joint tariff is not the basis by which the reasonableness of the local tariff of either line is determined. To illustrate, on the defendant's road the distance from Turner to Chicago is 80 miles. On the Lake Shore line from Chicago to Cleveland is 200 or 300 miles. Defendant company may charge 15 cents for transporting grain the 80 miles from Turner to Chicago, providing that it be in fact only a reasonable charge for the services, although the Lake Shore Company charges no more for transporting it from Chicago to Cleveland, and the fact that the rate on each line is 15 cents for the distance named, will not prevent the two companies from making a joint tariff for grain shipped from Turner to Cleveland of 12 cents; less than the local tariff of either. We do not mean to intimate that the two companies or a joint line can make a tariff from Turner to Cleveland higher than from Turner to Buffalo or for any other intermediate points between Cleveland and Buffalo for when the two companies by their joint tariff make a new and independent line, that new and independent line may become subject to the long and short haul clause. But what we mean to decide is that the through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned."

There is no allegation in the first count of this indictment that the tariff and rate to Salina, Kansas, was a joint tariff made pursuant to agreement between the Union Pacific and Southern Pacific roads. The allegation is that they had a joint tariff to Kansas City, Missouri, which was in fact less although a longer distance, than the rate charged to Salina, Kansas. If the rate charged to Salina was the local rate

of each company, and the presumption is, in the absence of allegation that it was a joint rate, that it was the local rate and the fact that, they had a joint rate to Kansas City, which constituted a new line, would not furnish a basis upon which either company would be bound to adjust its own local tariff, but within the principal announced in the decision just quoted both might insist upon charging its local rates for all transportation over its lines to intermediate points.

The second count of the indictment charges the facts substantially as set forth in the first count alleging the joint rate between the Union Pacific and Southern Pacific railways to Kansas City, and then charging that, notwithstanding the joint rate to Kansas City, these defendants for and on behalf of the Union Pacific charged and received the price of 61.4 per 100 pounds for transporting the sugar from Ogden, Utah, to Salina, Kansas. The suggestions as to the first count are equally applicable to the second count. The joint rate is made the basis of discrimination, the allegation is, that they charged the local rate from Ogden to Salina, which was less than their part of the joint rate to Kansas City, although Salina was the shorter distance. This I think they may do for the reasons already suggested. The joint rate does not in any sense effect or govern the local rate to intermediate points. While, as stated by *Mr. Justice* Brewer, the two companies could not make a joint rate from San Francisco to Kansas City which was less than a joint rate from San Francisco to Salina, yet they may make a joint rate to Kansas City, Missouri, and that fact would not affect the local rate of either company to Salina.

The third count of the indictment charges the defendants with conspiring and agreeing together to commit an offense against the laws of the United States, in that they charged, collected and received a greater compensation in the aggregate for the transportation of refined sugar in carload lots under substantially similar circumstances and conditions for a shorter than for a longer distance.

It is alleged that they charged, collected and received a greater compensation for hauling sugar in carload lots under substantially similar circumstances and conditions from Ogden, Utah, to Salina, Kansas, than was charged and received for hauling sugar in carload lots from Ogden, Utah, to Kansas City, Missouri. In this count of the indictment there is no allegation of a joint rate to Kansas City, Missouri, and the joint rate is not made the basis by which the reasonableness of the local rate

is to be determined, hence does not come within the principle announced in the case of the *Chicago & N. W. R. Co. v. Osborne*, post, 257.

The fourth count of the indictment alleges a joint rate to Topeka, Kansas, which was less than the rate charged to Salina. This count is bad because of a typographical error in drafting it. In that portion of the count which alleges that the shipment was made under substantially similar circumstances, Kansas City is named as a point for the joint rate, whereas it should have been Topeka.

It was urged by counsel for the defendants that the prosecution of the defendants under this indictment was an effort on the part of the government to interfere with the revenues of the Union Pacific which could not be done until the revenue of that company should exceed 10 per cent upon the cost of the road.

I cannot concur in the views expressed by counsel, but even if their contention is true, I think the question would not arise upon a motion to quash. It is therefore unnecessary to discuss it here.

As to defendant Barr, the allegation is that he was the agent who collected and received the rates which had been fixed by the other defendants. There is no allegation that he had anything to do with making the rate, and indeed, the allegation as to the position he occupied would, I think, exclude that idea. I think so far as the case applies to him it comes within the principle announced in the case of the *United States v. Michigan Cent. R. Co.* 43 Fed. Rep. 26, and the motion to quash will be sustained as to the defendant Barr. The motion will also be sustained as to the other defendants to the first, second and fourth counts of the indictment, and will be denied as to the third count. If, however, upon the trial of the cause it should be made to appear by the evidence that the joint rate to Kansas City was made the basis of adjusting the local rates, charged in this count of the indictment, the defendants would be entitled to acquittal.

Indictment No. 8091 is against the four defendants first named, and for the reasons herein suggested in relation to the third count in indictment No. 8092, the motion to quash will be overruled as to the first count. The motion will be sustained as to the second count for the reason that the same typographical error of inserting Kansas City, Missouri, instead of Topeka, Kansas, which occurred in the fourth count of indictment No. 8092 occurs in the second count of this indictment.

UNITED STATES CIRCUIT COURT, DISTRICT OF OREGON.

OREGON SHORT LINE & UTAH NORTHERN R. CO.

v.

NORTHERN PACIFIC R. CO.

(See S. C. 51 Fed. Rep. 465.)

1. A railroad company is not, as a carrier of freight and passengers, under any obligation to
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take freight from a connecting road in the cars of the latter and transport it in such cars while

- its own cars are not in use, in the absence of any controlling custom among railroads.
2. A railroad company which accepts freight in the cars of a connecting road, and transports it therein when it has cars of its own not in use, is not liable for mileage upon such cars, in the absence of an arrangement to that effect; but the existing custom that when a railroad takes the freight in the foreign cars because it has none of its own out of use, or because the freight would be injured by the transfer it shall pay certain mileage on the cars used, is reasonable and will be enforced.
 3. A railroad company receiving freight from a connecting road is under no obligation to advance to the latter the charges due it for transportation, although if it does so it has a lien for payment on the goods.
 4. A railroad company is under no obligation to honor tickets for passage over its line issued by another company, in the absence of an arrangement between them.
 5. No obligation to transport freight over its line in the cars of another company, when it has cars of its own not in use, to pay the charges thereon of the other company, or to honor tickets for passage over its line issued by the other company, is imposed upon a railroad company by the Interstate Commerce Act, § 3, providing that carriers shall give no undue or unreasonable preference, and shall afford all reasonable, proper, and equal facilities for the interchange of traffic.
 6. The provision of the charter of the Northern Pacific Railroad Company, that it shall permit any other railroad company to form running connections with it, imposes no obligation upon it to run the cars of another company over its road, except when the transfer of the freight contained therein would injure it.
 7. The "running connections" which the Northern Pacific Railroad Company is required by its charter to make with other railroads include only such arrangements as to the time of trains and as to stations, platforms and other facilities, as will enable companies desiring to connect to do so without detriment or serious inconvenience.

(Deady, J., dissents from propositions, 5-7.)

June 15, 1892.

SUIT to restrain defendant from discriminating against complainant in the facilities afforded for receiving and forwarding freight and passengers tendered to it for transportation. *Bill dismissed.*

Statement by Field, Circuit Justice:

The complainant is a corporation formed under the Act of Congress of August 2, 1882, entitled "An Act Creating the Oregon Short Line Railway Company, a Corporation in the Territories of Utah, Idaho, and Wyoming, and for Other Purposes," (22 Stat. at L. chap. 372, p. 185), and by the consolidation with it, under the authority of the general incorporation acts of those territories and of the state of Nevada, in force on the 27th of July, 1889, of the following corporations, namely: The Oregon Short Line Railway Company, the Utah & Northern Railway Company, the Utah Central Railway Company, the Ogden & Syracuse Railway Company, the Nevada Pacific Railway Company, the Idaho Central Railway Company, and the Salt Lake & Western Railway Company. The defendant, the Northern Pacific Railroad Company, is a corporation created under the Act of Congress of July 2, 1864, entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route," (13 Stat. at L. chap. 217, p. 365), and the various acts amending and supplementing the same. The complainant owns a line of railroad extending from Granger, in the former territory, now state of Wyoming, to the boundary line between the states of Idaho and Oregon, and is the lessee of the lines of the Oregon Railway & Navigation Company, a corporation organized and existing under the laws of Oregon, extending from that boundary line to the city of Portland, Or. Its railroad connects with the Union Pacific Railway at Granger, and forms a part of the Union Pacific system.

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The lines of the Oregon Railway & Navigation Company and of the defendant are connected at Portland by the tracks of the Portland Terminal Company. The defendant owns a line of railroad extending northwardly from the tracks of the Terminal Company to Tacoma, Seattle, and other points on Puget sound, and thence eastwardly to Minneapolis, Minnesota Transfer, St. Paul, and other points. The lines of the two companies,—of the complainant and of the defendant,—connecting as stated at Portland, have been used as continuous lines for the carriage of a large amount of passenger and freight traffic. The complainant charges that the defendant has for some time past and still continues to unlawfully discriminate against it in the facilities afforded for receiving and forwarding freight and passengers tendered to it at that place. This suit is brought to enjoin the defendant from continuing in such alleged unlawful discrimination against the complainant. That discrimination consists in the difference of conditions under which the defendant will receive freight and passengers tendered to it at Portland by the complainant.

(1) The discrimination in receiving and forwarding freight is charged to be this: That it has at various times refused to transport freight tendered to it by the complainant, originating at points east of the ninety-seventh meridian, and destined to points on the lines of its railway north of Portland, when such freight was in cars other than those of its own, unless the complainant would assume to pay to the company owning such foreign cars the usual car mileage for their use, or transfer such freight from the foreign cars in which it was trans-

ported over its lines to cars owned by the defendant; and, in cases where the charges on such freight were not prepaid at the point of origin to destination, the defendant has refused to receive and transport such freight, unless the complainant would prepay the charges for transporting it from Portland to destination, and has refused to pay to the complainant, on receiving such freight, the charges due to it and connecting lines for transporting the same to Portland. The complainant alleges that such action on the part of the defendant is contrary to the custom and practice in force among railways generally, and contrary to the custom and practice in force between the complainant and defendant as to all traffic originating on lines of the complainant and connecting lines west of the ninety-seventh meridian. It also alleges that during the time of such action the defendant has, except in a few instances, received and transported, and at the present time professes to be willing to receive and transport, to points on the lines of the defendant and lines connecting therewith north of Portland, freight originating west of the ninety-seventh meridian on the lines of the complainant, or other lines connecting therewith, when tendered to the defendant by the complainant at Portland, and has paid car mileage for the use of foreign cars in the transportation, and transported the freight in such foreign cars; and in cases where the charges on the freight were not prepaid to destination has not demanded or received from the complainant the charges for transporting the same from Portland to destination, and has paid to the complainant back charges due to it and connecting lines for transporting the freight from the point of origin to Portland. The complaint also alleges that during the same time the defendant has received and transported for the Southern Pacific Railroad Company freight originating both east and west of the ninety-seventh meridian without making against the company the discriminations complained of by the complainant.

(2) The discrimination in receiving and forwarding passengers is charged to be this: That the defendant has refused to transport passengers destined to Puget sound and other points on its lines, and on lines connecting therewith, when they have presented through tickets issued by the complainant, or by other railway companies operating over its lines *via* Portland, issued at points east of the 105th meridian. The complaint alleges that during the time of such refusal the defendant has received and transported passengers destined to like points presenting through tickets issued at points west of the 105th meridian by the complainant or by lines connecting therewith passing over its lines *via* Portland, and that the defendant at the same time has received and honored tickets of all kinds issued by the Southern Pacific Railway Company, connecting with it at Portland, or by railways connecting with it at St. Paul. The complainant charges that the refusal of the defendant to receive and transport freight in the cars in which it is tendered and to honor tickets as mentioned is an unreasonable and unjust discrimination against complainant and against its traffic originating east of the 97th and 105th meridians, and destined to points

on Puget sound *via* Portland, and in favor of traffic originating east of the 97th and 105th meridians, and destined to points on Puget sound *via* Minnesota transfer, at which latter point complainant alleges that defendant furnishes better facilities to connecting lines for the interchange of traffic than at Portland; and that the discrimination is in violation of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," commonly known as the "Interstate Commerce Act," (24 Stat. at L. chap. 104, p. 879) and is in violation of section 5 of the defendant's charter, namely, of the Act of Congress of July 2, 1864, (13 Stat. at L. 385) which requires it to permit any other railroad to form running connections with it on fair and equitable terms.

The answer of the defendant denies all the averments of the complaint, except the one that it has usually refused and continues to refuse, to transport, in the cars in which it is tendered by complainant at Portland, freight originating at points east of the 97th meridian, destined to points on Puget sound, unless complainant waives on its own cars, and assumes to pay on the cars of other companies, the current rate of mileage for the number of miles they are run over its road. It denies that the defendant has refused to receive and transport freight tendered by complainant to it at Portland for transportation to points on Puget sound without prepayment of freight charges to points of destination, except certain classes of freight which it is the custom of railroads to carry only upon prepayment of charges; and that the terms and conditions desired by complainant for the interchange of traffic at Portland are fair and equitable; or that they are as fair and equitable as the terms and conditions upon which the defendant interchanges traffic with other companies at Portland and at other points. As a further defense the defendant avers that the lines of the Oregon Railway & Navigation Company were, at all times mentioned in the bill of complaint, operated and controlled by the Union Pacific Railway Company as a part of its system; that the Union Pacific Railway Company and the Oregon Railway & Navigation Company, and the complainant and defendant, were at all times mentioned in the bill members of what is known as the "Transcontinental Association," and as members thereof they entered into an agreement and issued the necessary tariffs and instructions, under the terms of which the freight traffic originating east of the 97th meridian, and all passenger traffic originating east of the 105th meridian, destined to points on Puget sound, north of Portland, was to be routed *via* Minnesota Transfer and the Northern Pacific Railroad, and that in pursuance of that agreement the general freight agent of the Union Pacific system, including complainant's lines, issued the following circular:

"UNION PACIFIC RAILWAY COMPANY, GENERAL FREIGHT DEPARTMENT.

"Circular No. 685.

Omaha, January 16, 1889.

"To Agents of the Connections: Notice is hereby given that this company will not receive any freight for Puget sound points, or

points of the Northern Pacific Railroad north of Portland, when originating at or east of the Missouri river. All such freights shall be routed by way of Minnesota Transfer.

"J. A. Monroe, General Freight Agent."

And that by this agreement Portland was made a common terminal point, with points on Puget sound north thereof, and the complainant had not, at the time of filing its bill of complaint or at any other time, any arrangement or contract under which it was authorized to sell tickets to passengers from points east of the 105th meridian *via* Portland, and defendant's line to Puget sound points. The defendant avers that, notwithstanding these facts, the Union Pacific Railroad Company is soliciting business from points east of the 97th and 105th meridians for transportation to Puget sound points *via* complainant's and defendant's lines without authority from the defendant, and is representing that it can send freight and check baggage through without transfer, and has adopted the following system for sale of tickets from eastern points to Puget sound points *via* complainant's and defendant's lines: It sells and delivers to passengers tickets coming from such eastern points to the city of Portland, and delivers to the passengers an order on the exchange ticket agent of the Oregon Railway & Navigation Company at Portland, for a ticket over the defendant's road from the city of Portland to the city of Tacoma, or other points on said road in the territory, now the state, of Washington, and the passenger, upon his arrival at the city of Portland, is furnished by the agent with either tickets or a sum of money sufficient to transport him to destination; and the price the passenger pays for such transportation, including that over defendant's line, is complainant's rate from the eastern points to the city of Portland. And the defendant avers that at the dates in the bill of complaint mentioned the complainant was, and is now, discriminating in the way stated, in favor of passengers traveling over its lines from eastern points to points north of the city of Portland.

Issue being joined upon the answer, evidence was taken, and upon the pleadings and proofs the cause was argued in the circuit court for the district of Oregon in June last. During the argument it was stipulated that the annual report of the Union Pacific Railroad Company should be deemed admitted in evidence. Counsel for the defendant then asked leave to amend its answer by averring the insolvency of the complainant and of the Union Pacific Railroad Company. Whereupon the court directed that the answer should be considered as though such amendment was made. After argument, counsel for the complainant requested 60 days' time to prepare briefs in the cause, which was given, with a similar time to the defendant to answer such briefs. By mutual arrangement between counsel, time for the preparation and furnishing of the briefs was extended so that they were not presented to the judges of the court until after the commencement of the October term of the Supreme Court of the United States at Washington, and during the session of that court the presiding justice of the circuit court was constantly occupied, and was unable to take up the cause and give it proper consideration. This is the

reason for the long delay in disposing of the cause.

Messrs. W. W. Cotton and Zera Snow for complainant.

Messrs. Dolph, Bellinger, Mallory & Simon and James M. Naught for defendant.

Mr. Justice Field delivered the opinion of the court:

The oral arguments of counsel on the hearing of this case were extended and able, and their elaborate briefs since filed, covering 350 pages of printed matter in octavo form, touch upon nearly every question relating to the receipt, transfer, and forwarding of freight and passengers by connecting lines of railway, and the respective rights and liabilities of the parties. To give proper consideration to the questions thus brought forward would extend this opinion into a treatise on the subject, which we have neither the disposition, time, nor necessary information to undertake and adequately perform. We shall therefore confine what we have to say to the consideration of the main proposition of the complainant, deeming that its determination will be sufficient for the disposition of the case before us. Its chief contention is that the defendant, as a common carrier by railway of freight and passengers, is obliged (1) to receive freight tendered to it by the complainant at Portland, Or., that being a point where it connects with the road of the complainant, in the cars in which it is tendered, and transport the same to point of destination in such cars, over its roads, and pay to the company owning the cars the current rate of mileage for their use, and also pay the charges for transportation from point of origin to Portland; (2) to honor tickets or coupons for passage over its lines north of Portland, issued by the complainant. This obligation of the defendant is asserted on three grounds: (1) The alleged established custom between railroad companies operating connecting lines; (2) the 8d section of the Interstate Commerce Act; and (3) the 5th section of the defendants charter, that is, of the Act of Congress of July 2, 1864, creating the Northern Pacific Railroad Company.

1. The complaint avers that it is the custom of railroad companies operating connecting lines to receive and transport freight tendered to them in the cars in which it is tendered, and to pay the usual car mileage on such cars, and to advance the charges for the transportation of the freight from point of origin to the point of connection. This averment is denied by the answer, and numerous witnesses were examined on the subject, called both by the complainant and defendant, who had been or were connected with railroad companies as managers or superintendents, and who had had large experience in conducting traffic between connecting lines. Their testimony differs only in immaterial matters. It agrees in the main points, and is to this purport: That whether or not the freight received by one company shall be transported in the cars in which it is tendered, or be transferred to the cars of the receiving company, is, as a general rule, dependent upon contract be-

tween the connecting companies, and is not a matter in which there is any established custom applicable to all cases. Exceptions to the general rule arise when the cars of the receiving company are all in use; then the freight is usually received and transported in the cars in which it is tendered, that there may be no unnecessary delay in the transportation. Sometimes also the cars are received where the freight is of such a character that it may be injured by transfer from one car to another. There can be no usage founded in reason requiring the receiving company to transport the freight in the cars in which it is tendered, when its own cars are not in use. The receiving company is not under any obligation to allow its own cars to remain idle in order to transport those of another company; in such cases, that is, where it has sufficient cars for the purpose not in use, it may properly refuse to receive the freight unless it is transferred to them. The testimony establishes beyond controversy the position thus stated, namely, that, except where the cars of the receiving company are all in use, or engaged for the time of the desired transportation, or where the freight is of such a character that it will suffer by being transferred to other cars, the receiving and transporting of the freight in the cars in which it is tendered is a matter of conventional arrangement between the connecting companies. In determining which of these modes shall be adopted many circumstances are to be taken into consideration, such as the condition of the cars, the wear to which they have been subjected, their ability to stand the speed of the company's trains, their equipment with air brakes, proper couplings, and the like, and also the condition of the road over which they are to be transported, and the arrangements made for side-tracking the cars for the passage of meeting trains, in relation to which several matters no specific direction applicable to all cases can be given. The testimony shows that in some cases, where there is a large business at connecting points, nearly one half of the freight is transferred to the cars of the receiving company, and the remainder is taken in the cars in which the freight is tendered. The amount received in one way or the other constantly varies.

The receiver of the Minneapolis & St. Louis Railway Company, and president of the Minnesota Transfer Company, testified that from his experience and observation the question of transferring cars received by one railway company from a connecting line, containing freight for transportation from a receiving line, was determined more or less by the nature of the freight, and the question whether the receiving line has or not plenty of cars of its own in which to load and forward the freight; that in some cases companies decline to allow their cars to go beyond the terminal point on their own line, and in such cases the freight is, of course, transferred. One of the vice presidents of the Chicago, Milwaukee & St. Paul Railway Company testified that, when there is no agreement between the connecting companies on the subject, the question whether the freight tendered shall be transported to destination in the original cars, or be transferred into the cars of the receiving company,

rests with the latter company. The general manager of the Northern Pacific Railroad Company, in answer to the question, "What is the custom or method obtaining among railroads concerning the handling of cars?" testified as follows:

"The method of handling through business interchanged between railroads is controlled by various circumstances, in some cases by traffic contracts, which provide for cars going through without transfer or breaking bulk. In many cases it is controlled by conditions of what we might term the car market; that is, by the car supply. There are times when railroads east of St. Paul give orders at the transfer to permit none of their cars to go beyond St. Paul. There are times when they permit their cars to go through without breaking bulk. On the other hand, there are times when the railroads north and west of St. Paul do not take through cars, even when the roads tendering them are willing to have them go through, because they have sufficient of their own cars, and, under the general agreement and understanding between the railroads of the United States to pay a certain rate per mile on all cars of other railroad companies used over their lines, it would become a burden to take a foreign car, and permit its own car to lie idle, and pay a mileage rental for the foreign car. The receiving road determines for itself whether to take the cars of a connecting line or to transfer the freight to its own cars. This [said the witness] is the universal practice all over the country [meaning, of course, in the absence of special contract on the subject]."

It follows that the complainant has failed to show the existence of a controlling custom as to the manner of receiving and forwarding freight in the cars in which it is tendered. A controlling custom can only be established by long usage, and must be certain, reasonable, and uniform, to have the force of law.

As the receiving company is under no obligation to take the freight in the cars in which it is tendered, and transport it in such cars, when it has cars of its own, not in use, to transport it, there can be no custom that it shall pay the owner of such cars, should it receive them in such case, car mileage for their use. The car mileage in that case must be upon an arrangement between the parties. But when the receiving company takes the freight in the foreign cars because it has none of its own out of use to transport it, or because it would injure the freight to transfer it to its own cars, it is the general practice for the receiving company to pay the usual mileage on the cars taken and used, and such practice is a reasonable one, and should be enforced.

There is no law or custom requiring a railway company receiving freight from a connecting line to advance or assume the payment of the charges due thereon for the transportation from its point of origin to the connecting line. If it does thus advance or assume the payment of such charges, it can retain a lien upon the property transported for their payment as well as for the transportation rendered by itself. A railway company, like any other common carrier, has a right to demand that its charges for transporting goods shall be

paid in advance, and is under no obligation to receive the goods for transportation unless such charges are paid, if demanded. The general practice, it is true, is to collect the charges upon delivery of the goods transported to the consignee, and, where goods are received without the payment in advance being demanded, it becomes the duty of the railway company to complete the carriage. Its right to payment in advance is thus waived. It holds, however, a lien upon the goods for payment, and in case the goods are delivered previous to payment it can hold the consignee responsible. The same law applies where the goods are received from the original consignor or from an intermediate carrier. The railway company, in the absence of any contract on the subject, is under no obligation to take the carriage in the one instance, or to continue the carriage in the other, without prepayment of its charges, if demanded.

As to the alleged obligation of the defendant to honor tickets or coupons for passage over its lines north of Portland, issued by the complainant, it is sufficient to say there is no evidence in support of it. The practice of railway companies, operating connecting lines, to honor tickets or coupons for passage over their respective lines issued by a connecting company, which is very general, is founded entirely upon arrangements between the connecting companies. In the absence of such arrangements, there is no obligation on the part of either company to honor tickets issued by the other. All the witnesses examined on this point concur in their statements in this respect.

2. But it is also contended that the obligation alleged of the defendant to receive freight tendered to it by the complainant at Portland, and to transport it to the point of destination without breaking bulk, in the manner mentioned, and to pay the charges stated, and honor the tickets of connecting companies for passage over its road north of Portland, is imposed by the third section of the Interstate Commerce Act. 24 Stat. at L. chap. 104, p. 380. That section is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The first subdivision of this section does not make all preferences or advantages which

may be given by a common carrier unlawful; only those which are undue or unreasonable are forbidden. The second subdivision is similarly guarded in its provisions. Common carriers are there only required, according to their respective powers, to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and are forbidden to discriminate in their rates and charges between them. And even this provision is subject to the limitation that it shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. As justly said by the circuit court of the United States in the case of *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 102, 37 Fed. Rep. 824:

"No provision of the Interstate Commerce Act confers equal facilities upon connecting lines under dissimilar circumstances and conditions. On the contrary, even as to interstate commerce itself, the distinction is recognized throughout between discriminations and preferences which are just and reasonable and those which are unjust and unreasonable, according as they are made or given under similar or dissimilar circumstances and conditions. All discriminations and preferences are not forbidden or made unlawful, but only such as are unjust or undue or unreasonable are prohibited. In each and every case, therefore, the question whether a discrimination is unjust or a preference is undue or unreasonable, either as to the common carrier or the commerce it may transport, involves a consideration of the circumstances and conditions under which such discrimination or preference is made or given."

It does not appear from the testimony produced in this case that the defendant has, as against the complainant, made or claimed the right to give any undue or unreasonable preferences or advantages to any person, company, firm, or corporation, or locality, in receiving and transporting freight in the cars in which it is tendered. It has claimed the right in all cases to refuse to take freight and transport it in foreign cars, when it has cars of its own in which it can be carried, except only where the freight is of such a character that its transfer to another car would be injurious to it. The answer of the defendant impliedly admits that it has usually refused to transport freight in foreign cars, where the freight has originated east of the 97th meridian, unless the complainant waived on its own cars, and assumed to pay on the cars of other companies, the current rates of mileage for the distance run over defendant's road; but such refusal can in no respect be deemed an unreasonable discrimination against the complainant, if made when the defendant's own cars were not in use, but were free to be employed in the transportation desired, or was made when to transfer the freight would not have been injurious to it. Nothing of this kind being shown, there was no foundation for the allegation of any unjust or illegal discrimination in favor of other companies, as against the complainant, upon which this suit proceeds.

The alleged discrimination against freight originating east of the 97th and 105th meridi-

ans, in favor of freight originating west of those meridians, is not shown to have been made under conditions which rendered it unreasonable or a denial of equal facilities afforded to others. Proof to that effect must be produced to authorize a court to interfere with the conduct of a railroad company in the interchange of traffic with connecting lines, upon charges of giving undue or unreasonable preferences to some of them over others, and thus unlawfully discriminating between them. The provision in the second subdivision of the 3d section of the Interstate Commerce Act, that a common carrier shall not be required to give the use of its tracks and terminal facilities to another carrier engaged in like business, is a limitation upon or qualification of the duty [declared of] affording all reasonable, proper, and equal facilities for the interchange of traffic; and the receiving, forwarding, and delivering of passengers and property to and from the several lines and those connecting therewith. It was so expressly held in the case above cited of *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 102, 37 Fed. Rep. 571.

It follows from this, as it was decided in that case, that a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The Act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated. As said in the case of *Chicago & A. R. Co. v. Pennsylvania R. Co.* 1 Inters. Com. Rep. 357, 360, 1 I. C. C. Rep. 86, 95:

"The right of ownership of railroad property, with the power of control over employes and management of the property, is as absolute under the Act as before its passage. The regulation of commerce between the states, which is all that the Act contemplates, does not involve community of property or joint control of subordinates among the several companies that honor through tickets. The corporate powers of every company for all administrative and governing purposes within its prescribed sphere remain unimpaired. With the legitimate exercise of these powers another company has no concern and no right to intermeddle."

3. The 5th section of the defendant's charter, that is, of the Act of Congress of July 2, 1864, creating the Northern Pacific Railroad Company, making it the duty of that company to permit any other railroad company which should be authorized to be built by the United States, or by the legislature of any territory or state in which the same may be situated, to form running connections with it on fair and equitable terms, does not impose any obligation upon the company to carry freight in the cars in which it may be tendered by a connecting line when its own cars are not in use, except where the transfer of the freight

to another would be injurious to it. In all other cases the receipt and transport of the freight tendered in foreign cars is a matter of conventional arrangement between it and the connecting company. The running connections which must be permitted by the defendant are not, as contended by complainant's counsel, a running over its line, but only in connection with it; a provision intended to secure the transportation and exchange of freight between connecting lines, and not the use of each other's road by the cars of such companies. Whenever an intention has been manifested, in the creation of railway charters, that a connecting company shall have the power to run its cars over the line of another, or to require one company to haul over its line the cars of another, such intention has been expressed in unequivocal terms, such as is found in the constitutions or statutes of several of the states respecting railway companies, which is substantially in these terms: "And they shall receive and transport each other's passengers, tonnage, and cars, loaded or empty without delay or discrimination." In some of the English charters of railway companies it is provided that all companies and persons shall be entitled to use the railway with engines and carriages, properly constructed, subject to the provisions of the "act for the better regulation of railways and for the conveyance of troops, and regulations to be from time to time made by the company."

The terms "running connections," as used in the Act of July 2, 1864, in incorporating the defendant, apply to both passenger and freight connections and facilities, and yet they do not require the defendant to haul special cars of other companies, such as excursion cars, sleeping cars, or cars designed for accommodation in certain particulars, in the absence of specific contract to that effect. *Worcester Excursion Car Co. v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 793, 3 I. C. C. Rep. 581. Section 5 of its charter requires it to furnish the equipment to be used on its road. As justly observed by counsel, a running connection which should require the defendant to receive in its freight and passenger trains, composed of cars equipped with automatic couplers, air brakes, steel tires, and other improvements tending to facilitate the safe and economical operation of the train and lessen the probability of accidents, cars without such equipment, and not adapted to the service and facilities furnished by the defendant, cannot be regarded as fair and equitable. We are of opinion that a running connection of one road with another, within the meaning of the defendant's charter, only includes such arrangements as to the time of arrival and departure of trains, and as to stations, platforms, and other facilities, as will enable companies desiring to connect to do so without detriment or serious inconvenience.

We do not deem it essential to inquire into the arrangements alleged to have been made by the Transcontinental Association, and how far those arrangements should be regarded as binding upon the parties as to traffic in freight originating east of the 97th meridian, and in the passenger traffic originating east of the 105th meridian, as the material questions which must govern the interchange of freight and passen-

gers at points of connection in their respective lines, from whatever quarter they may come, are considered so far as there is any difference in the contention between the parties to this suit.

Upon a consideration of whatever we deem material in the controversy before us, and the proofs which have been produced as to the course of business pursued by the defendant, we do not perceive anything against which the complainant can make any valid objection. It is not shown that the defendant has, at any time, refused to make proper connections with the complainant seeking to send freight or passengers over its lines north of Portland, or has, in that respect, given any undue or unreasonable preferences or advantages to other companies over the complainant. It was under no obligation, by custom or law, to receive the freight of the complainant or of other companies in the cars in which it was tendered, and transport it over its own road in such cars, when its own cars were not in use, but were free to be employed in the transportation desired, unless it would be injurious to the freight to have it removed from one car to another. Nor is it shown that in any cases it has unlawfully discriminated in its charges against the complainant in the transportation of its freight in favor of other companies. It therefore follows, without further consideration of the numerous matters touched upon by counsel, that the bill cannot be sustained. It will therefore be dismissed, and the mandatory injunction heretofore issued be dissolved; and it is so ordered.

Deady, District Judge, dissenting:

I am sorry I am not able to concur in the foregoing opinion, and, although I do it with some hesitation, I think it proper to give briefly my reasons therefor. It is admitted by counsel for the defendant that the second clause of section 3 of the Act entitled "An Act to Regulate Commerce," (24 Stat. at L. 380) is new, and imposes obligations and restraints upon common carriers, "subject to the provisions of the Act," unknown to the common law; and this is apparent independent of such admission. The question is, what are these obligations and restraints? The plaintiff contends in this case, that the duty imposed upon defendant is at least that of hauling car loads of freight, without breaking bulk, when tendered it by the plaintiff, over its line, from Portland to points on the sound, charging therefor its local rates, and paying therefor, for the use of the car, the customary rate of one fourth of a cent per mile. The defendant denies this obligation, and contends it is only bound to carry freight in its own cars, and that the plaintiff must unload its cars at Portland, and tender the freight thus unloaded, to be railroaded on the defendant's cars as if it originated at that point. This much it was bound to do at common law,—to carry all freight tendered to it in the order in which it was received. But the section goes beyond the common law, and therefore it must impose a duty beyond that of merely receiving freight from the plaintiff when unloaded from its cars. The language of the second clause of the section in this respect is as follows:

"Every common carrier, subject to the pro-

visions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its track or terminal facilities to another carrier engaged in like business."

The carrier is to afford these "facilities" for what purpose? The Act says, "For the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith." To exchange freight in bulk, by car loads, is certainly a "reasonable and proper facility" for that purpose. It is a general custom, except in some special instance like this, where the carrier disobeys the injunction of the law for the purpose of injuring a competing line in its own interest. To exchange freight by the car load is a "reasonable and proper facility" for the interchange of traffic between these lines, and it is such a facility to enable them to receive and forward passengers and property to and from their respective lines and those connected with them. On the other hand, to require the plaintiff to unload its cars with freight destined for points on the sound, at Portland, and there reload the same on the defendant's cars as freight originating at the latter point, is to afford no facilities for such purpose at all. Such a construction of the statute renders it altogether nugatory, and leaves the matter as at common law. The proviso to the section strongly supports the plaintiff's contention. It was evidently inserted out of abundance of caution, lest the very general and unqualified language of the preceding clause might be "construed" to authorize or require one "carrier" to give the use of its tracks or terminal facilities to another. But, short of this, all facilities known to the railway business, whether the result of contract or custom, must be regarded as "reasonable and proper," in the interchange of traffic, or the receiving, forwarding, and delivering of passengers and property to and from connecting lines, such as those of the plaintiff and the defendant.

The cost of unloading freight from the plaintiff's cars to the defendant's, at this point, operates as a hindrance, if not a bar, to the transport of freight by the former, originating east of the 97th meridian, to be delivered at points on the sound. The defendant has no more natural right to a monopoly of this business than it has to that originating west of said meridian. To compel the plaintiff to submit to this exaction is to require it to build a competing road between Portland and the sound, when one is amply able to do all the business. The community is thereby taxed to support two roads, where one only is necessary. The defendant should be required to haul the plaintiff's cars, and also pay the back charges on the freight to this point, and collect the same from the consignee on the sound. This

is a "reasonable and proper facility" for the transaction of business, and is customary and usual as well. There may be exceptions to this rule, as in the case of perishable freight. But in all other cases the defendant takes no risk in paying such charges, because the freight is good for them. "All reasonable and proper facilities for the interchange of traffic," and "for the receiving, forwarding, and delivering of passengers and property," to and from connecting lines, includes, at least, such facilities as railways were accustomed to afford one another before the passage of the Act, whether as the result of usage or contract. Nothing less could have been in the mind of the legislature on the passage of the Act. And in my judgment the last clause of section 5 of the Act organizing the Northern Pacific Railway Company (18 Stat. at L. 369) also requires the defendant to afford the plaintiff the facilities in question. It reads:

"And it shall be the duty of the Northern Pacific Railway Company to permit any other railroad which shall be authorized to be built by the United States, or by the legislature of any territory or state in which the same may be situated, to form running connections with it, on fair and equitable terms."

This statute is mandatory. The matter is not left to the pleasure or judgment of the defendant. It shall be its "duty" to permit any other road to form "running connections with it on fair and equitable terms." What are "running connections" but the right to have car loads of freight hauled over the defendant's road, and that "on fair and equitable terms," which means, at least, such terms as are usual in such cases, whether established by custom or contract. Nothing more is asked by the plaintiff in this case, and, in my judgment, the injunction should be made perpetual.

UNITED STATES CIRCUIT COURT OF APPEALS (8th Circuit.)

CHICAGO & NORTHWESTERN R. CO., *Plff. in Err.*, v. JOHN OSBORNE.

SAME, *Plff. in Err.*, H. A. JUNOD.

(See 8. C. 53 Fed. Rep. 912.)

1. The joint through tariff rates established by two or more carriers over their lines or any parts thereof cannot be made the basis by which the reasonableness of the local rates on either line can be determined.
2. No violation of the long and short haul clause of the Interstate Commerce Act which will sustain an action for damages is shown by the mere fact that a larger tariff rate was collected for shipments between points on a carrier's road than the proportion of a joint through rate which such carrier received for hauling over its road similar commodities billed to points beyond its

road a longer distance, which included the shorter one.

3. That a shipper was not informed of the through tariff rates when making shipments between local points will not avail him as a basis for an action for violation of the long and short haul clause of the Interstate Commerce Act of 1887 where he made no inquiry and no false statements were made to him, and the shipping point was a non-competing one where no publication of the joint rate was required, under the order of the Commission made June 21, 1887.

October 17, 1892.

WRITS OF ERROR to the Circuit Court of the United States for the Southern District of Iowa to review judgments in favor of plaintiffs in actions brought to recover damages for alleged violations by defendant of the long and short haul clause of the Interstate Commerce Act. *Reversed.*

Statement by **Brewer, Circuit Justice:**

The defendant in error, plaintiff below, recovered a judgment in the Circuit Court of the United States for the Southern District of Iowa for the sum of \$225 for alleged overcharges on corn shipped from Scranton, Iowa, to Chicago. The action was brought under the Interstate Commerce Act of February 4, 1887 (24 Stat. at L. p. 379). The facts material to the inquiry are as follows:

The defendant owns and operates a railroad from Missouri Valley, a town on the western border of Iowa, to Chicago, Ill. Scranton is a town in Iowa on the line of this road, 88

miles east of Missouri Valley, and therefore so much nearer Chicago. The Fremont, Elkhorn & Missouri Valley Railroad Company owns a railroad running east and west through Nebraska, and connecting with the defendant's road at the town of Missouri Valley. Blair, Neb., is a point on that road, 13 miles west of Missouri Valley. While the Fremont, Elkhorn & Missouri Valley Railroad Company is an independent corporation, a majority of its stock belongs to the defendant company, and thus the defendant company controls its operations.

During the month of January, 1888, there

was in force a local tariff of rates charged on the defendant's road. This local tariff was duly published in Scranton. In accordance with it, the rate from Scranton to Chicago on corn was 18 cents per 100 pounds. All shippers shipping simply to Chicago paid that rate. The plaintiff, among others, made sundry shipments, and was charged and paid such sum. There was, so far as appears, absolute uniformity of rate as to all such local shipments. At the same time the tariff on corn shipped through from Blair, Neb., to New York city was 88½ cents; to Boston, Philadelphia and Baltimore, sums slightly above and below this figure. This through rate was made up in this way: By agreement between the defendant and eastern companies, corn was shipped through to New York from Turner and Rochelle, two small stations on the defendant's road, one 30 and the other 70 miles west of Chicago, for 27½ cents, 3¼ cents of which went to defendant, and the balance to the eastern companies; and by agreement between the defendant and the Fremont, Elkhorn & Missouri Valley Railroad Company, the rate from Blair to Turner and Rochelle, on corn shipped to New York, Boston, Philadelphia, or Baltimore, was 11 cents. In other words by these agreements of the several companies a through rate was fixed on corn shipped from Blair to New York and other eastern cities; and of that through rate the defendant company received, for carrying the whole line of its road, less than the local tariff of 18 cents, charged from Scranton to Chicago. This joint tariff was not published at Scranton, and no knowledge of it was given to or possessed by the plaintiff until February 24th; and until that time he made no application for shipment beyond Chicago. Thereafter he shipped to Boston, and received the benefit of the through tariff.

W. C. Goudy and N. M. Hubbard for plaintiff in error.

C. C. Nourse and C. L. Nourse for defendants in error.

Before Brewer, Circuit Justice, and Caldwell and Sanborn, Circuit Judges.

Brewer, Circuit Justice, delivered the opinion of the court:

This case must be determined exclusively by the provisions of the interstate commerce law, as it was originally passed and before any amendment. No question was submitted to the jury, and no evidence was offered, as to whether 18 cents was or was not in fact a reasonable rate for carrying corn from Scranton to Chicago. The theory of the plaintiff's case was that the defendant company had violated the fourth section of the Act, by charging more for a short than for a long haul; and, of course, if it had, it is liable to the plaintiff.

We do not care to enter into any extended discussion of the Interstate Commerce Act. It was the first effort of the general government to regulate the great transportation business of the country. That business, though of a quasi public nature, and therefore subject to governmental regulation, has, as a matter of fact, been carried on by private capital through corporations. The fact that it was a quasi public

business always prevented the owners of capital invested in it from charging, like owners of other property, any price they saw fit for its use. A reasonable compensation was all that they could exact, and he who felt aggrieved by a charge could always invoke the aid of the courts to protect himself against it. With him, however, lay the burden of proving the fact that the charge was unreasonable; a burden which all experience shows was onerous, and therefore seldom undertaken; the party aggrieved preferring to submit to the overcharge, rather than go to the expense and time of contesting it. Hence the efforts by state and nation to establish limits of charges, and means of evidence of easy and accurate ascertainment. While it is the duty of the courts to see that the provisions established by Congress are not frittered away on technical or trifling grounds, yet it is also equally their duty to see that such a legislation is not carried beyond its clear scope, and that the owners of private capital invested in the business of transportation be not deprived of their liberty of contract and right of control any further than the lawmaking power has intended that they should be.

With these preliminary observations, we remark:

First. That Congress has not attempted to require that the tariffs on all roads be uniform; nor has it attempted to place a limit in figures beyond which no company may go in its charges. The laws of business and of competition have, as yet, been deemed sufficient restraints in that direction. The Rock Island is, between Chicago and the Missouri river, a parallel and competing road with the defendant company; yet there is nothing in the commerce Act which compels either company to charge for through or local transportation the same as its competitor. Either company may reduce its rates as far as it pleases below what is reasonable and a fair compensation for the service without violating the Act; and such reduction compels no change by its competitor or any other company. This is obvious from a mere reading of the Act.

Secondly. That, where two companies owning connecting lines of road unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make it joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two companies by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the reasonableness of the local tariff of either line is determined. To illustrate: On the defendant's road, the distance from Turner to Chicago is 30 miles; on the Lake Shore line, from Chicago to Cleveland it is two or three hundred miles. The defendant company may charge 15 cents for transporting grain the 30 miles from Turner to Chicago, providing that be in fact only a reasonable charge for the service, although the Lake Shore Company charges no more for transporting it from Chicago to Cleveland; and the fact that the rate on each line is 15 cents for the distance named will not

prevent the two companies from making a joint tariff for grain shipped from Turner to Cleveland of 12 cents; less than the local tariff of either. That we may not be misunderstood, we not mean to intimate that the two companies, with a joint line, can make a tariff from Turner to Cleveland higher than from Turner to Buffalo, or any other intermediate point between Cleveland and Buffalo; for when the two companies, by their joint tariff, make a new and independent line, that new and independent line may become subject to the long and short haul clause. But what we mean to decide is that a through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned.

This proposition may not be as obvious as the former, and yet a careful study of the Act leaves no doubt of its correctness. In the first section a definition is given of the term "railroad," which, in addition to bridges and ferries includes "also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease." A joint tariff does not bind road to road in the sense that the two are used or operated by either corporation. There is neither unity of ownership nor unity of operation, but only a singleness of charge, and a continuity of transportation over connecting roads. Neither is there any mandate to connecting companies to surrender any control over their own roads, or to unite in a joint tariff. "Reasonable, proper and equal facilities for the interchange of traffic" are commanded by the third section; but with the proviso: "This shall not be construed as requiring any such common carrier to give the use of its track or terminal facilities to another carrier engaged in like business." No power existed at common law, and none is given by the Act to court or commission, to compel connecting companies to contract with each other, to abandon full control of their separate roads, or to unite in a joint tariff. *Memphis & L. R. R. Co. v. Southern Exp. Co.* ("Express Cases.") 117 U. S. 1, 29 L. ed. 791; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. Rep. 567; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.* 2 Inters. Com. Rep. 768, 41 Fed. Rep. 559. The whole matter is left to the voluntary action of the companies; and, in forming by agreement any joint tariff the basis of division and the proportion of moneys each shall take is also a matter left to their determination.

The denunciation of the fourth section is against each separate common carrier, for its violation of the "long and short haul" clause on its own line. The language is:

"That it shall be unlawful for any common carrier, subject to the provisions of this Act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, in the same direction; the shorter being included within the longer distance."

The use of the word "line" is significant. Two carriers may use the same road, but each has its separate line. The defendant may lease

trackage rights to any other railroad company, but the joint use of the same track does not create the "same line," so as to compel either company to graduate its tariff by that of the other.

Further, by section 6, every common carrier is required to print and publish at every depot along its own road schedules showing its rates and fares and charges. There is a prohibition against advancing rates without giving notice, and, in case of a reduction, notice thereof must be immediately posted; whereas, in reference to joint tariffs, the requisition is simply that each common carrier furnish to the commission a copy of all contracts therefor, as well as copies of the joint tariffs; and power is given to the commission to determine the amount of publication that shall be required.

Again, at the time of the passage of this Act joint through tariffs were well known, as well as the fact that they were generally less than the sum of the local tariffs, and not distributed between the several companies making them according to the mere matter of mileage. In this Act joint tariffs are recognized; and if Congress had intended to make the local tariff subordinate to or measured by the joint tariff, its language would have been clear and specific.

It is worthy of note that in the debates which attended the passage of this bill through the two houses, and while this matter was under discussion, it was again and again said by those participating in the debates that the line formed under the joint tariff of connecting companies was one separate and independent from that of either of the connecting companies; and also worthy of note that in the actual administration of affairs by the Interstate Commerce Commission the same thing has been constantly recognized.

Applying these propositions to the case at bar, a conclusion is easily reached. There is no pretense that any shipper at Scranton, or other point on the defendant's line further from Chicago than that, was charged less for shipping grain to Chicago than the plaintiff. In other words, there was no violation of the "long and the short haul" clause by the defendant, in respect to its own line; nor did the defendant, acting with eastern companies, on the line made by its road in connection with theirs, charge or receive for grain shipped from Scranton or any point west, to any eastern point, less than the through tariff. In other words, the defendant did not, separately or in connection with other companies, violate section 4. It avails the plaintiff nothing that he was unaware of this through joint tariff at the time he made the shipments which are the basis of his cause of action. No false statement was made to him. He made no inquiry in respect to its existence. The matter of publication was by the Act, as it then stood, left to be determined by the Commission. The provision of the statute, section 6, is as follows:

"Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall, from time to time, prescribe the measure of publicity which shall be given to such rates, fares

and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published."

And the order of the commission made June 21, 1887, provided that—

"Such joint tariffs shall be so published by plainly printing the same in large type of at least the size of ordinary 'pica,' copies of which shall be kept for the use of the public in such places and in such form that they can be conveniently inspected, at every depot or station upon the line of the carriers uniting in such joint tariff, where any business is transacted in competition with the business of a carrier whose schedules are required by law to be made public as aforesaid."

Scranton was no competing point. No other line, so far as appears, touched the place; and hence no publication of the joint tariff was

there required. Of course the defendant was under no common law or statute obligation to advise the plaintiff where or how he had better ship his grain. It fulfilled its legal obligation when it published its local tariff, and advised him truthfully in respect to any rates in respect to which he made special inquiry.

For the reasons above stated, on the facts as they appeared in evidence, the jury should have been instructed to find a verdict for the defendant.

The judgment of the court below will be reversed, and the case remanded for further proceedings in accordance with this opinion.

Case No. 68. *Chicago & Northwestern Railway Company, Plaintiff in Error, v. H. A. Junod* and R. Y. Culbertson, Defendants in Error*, involves the same questions, and the same judgment of reversal will be entered.

*See S. C. 3 Inters. Com. Rep. 668.

TEXAS COURT OF CIVIL APPEALS.

BATEMAN BROS. *et al.*, *Appts.*, *v.* WESTERN STAR MILLING CO.

(.....Tex. App.)

A statute denying the right of a corporation of another state to bring an action within the state until it has filed its articles of incorporation therein is inoperative as to an action brought

for the purchase price of goods sold within the state by commercial agents or drummers, as this constitutes interstate commerce.

October 11, 1892.

A PPEAL by defendants from a judgment of the District Court for Tarrant County in favor of plaintiff in an action brought to enforce payment of certain acceptances. *Affirmed*. The facts are stated in the opinion.

Messrs. Greene & Humphreys for appellants.

Messrs. Camp & Camp and J. P. Hutchinson for appellee.

Tarleton, Ch. J., delivered the opinion of the court:

January 5, 1891, in the district court of Tarrant county, appellee, as plaintiff, brought this suit against appellants, as defendants, upon certain acceptances in the aggregate sum of \$1,422.82. From a judgment in behalf of appellee for this amount, rendered June 25, 1891, appellants prosecute this appeal. There is in the record an agreed statement of the facts proved. The terms of this agreement, with reference to the interstate character of the transaction involved and herein below referred to, are to some extent vague and indefinite. As interpreted by us, however, and by the parties in their briefs, the agreement shows substantially as follows: That at the date of the acceptances, and of the institution of this suit, and of the rendition of the judgment, the plaintiff was a foreign corporation for pecuniary profits, organized under the laws of the state of Kansas, and that at said dates it was, and had been, through its commercial agents and

otherwise, soliciting business in the state of Texas, and as such had sold goods to the defendants in this cause and to various other persons and firms in Texas; that it had no general office or special place of business in this state; that at said dates it had failed to file its articles of incorporation with the secretary of state of the state of Texas, for the purpose of procuring a permit under the provisions of the act of the legislature of the state of Texas, approved April 8, 1889; that the acceptances sued on were executed in consideration of certain goods and merchandise purchased by the defendants in Ft. Worth, Tex., from plaintiff, through its commercial agent or drummer; that, in pursuance of said purchase, the goods in question were shipped by the appellee in the state of Kansas, thence transported and delivered to the appellants in Ft. Worth, Tex. The act of the legislature referred to requires that corporations (save in certain specified cases) desiring to transact business in this state, or solicit business in this state, or establish a general or

special office in this state, shall file with the secretary of state a duly certified copy of their articles of incorporation. It further provides that, on failure to so file such articles of incorporation, no such corporation can maintain any suit or action, either legal or equitable, in any of the courts of this state upon any demand, etc. It further provides that in order to procure such permit such corporation shall pay a fee ranging from \$25 to \$200, according to the amount of its capital stock. The contention of appellants is that the failure of plaintiff to comply with the act of the legislature above referred to defeats its right to maintain this suit. The contention of appellee is that to it, as a foreign corporation engaged in interstate commerce, this statute is inapplicable, or, if sought to be applied, that it is unconstitutional and void; that it is repugnant to the "commerce clause" of the Federal Constitution. The principle is well established that it rests purely within the discretion of a state to recognize or to repudiate a foreign corporation; that it can, if such be its pleasure, exclude such a corporation entirely, or admit it conditionally. This principle, however, is not of universal application. A very emphatic and well fixed instance in which it does not obtain is where a foreign corporation is engaged in interstate or foreign commerce. *Horn Silver Min. Co. v. New York*, 4 Inters. Com. Rep. 57, 143 U. S. 314, 36 L. ed. 167. That provision of the Federal Constitution which provides that "Congress shall have power to regulate commerce with foreign nations, and among the several states," constitutes such regulation a domain of legislation peculiarly within Federal prerogative. The question then arises, was the corporation plaintiff in this case engaged in "interstate commerce," within the meaning of the Federal constitution? The record, as we understand it, discloses that plaintiff corporation shipped from its domicile in Kansas goods and merchandise to Ft. Worth, Tex., and there delivered them, or caused them to be delivered to appellants, for which the indebtedness sued on was contracted. Their goods were commodi-

ties of barter and sale,—the essence of commerce; and the business in which the corporation plaintiff was engaged consisted in transactions of this character. It must be held, therefore, that the sale, transportation, and delivery of merchandise under such circumstances, and in the transaction of such business, from one state to another, constituted an "interstate commercial transaction," within the meaning of the "commerce clause" in question, which applies as well to commerce carried on by corporations as to that carried on by individuals. *Paul v. Virginia*, 75 U. S. 8 Wall. 181, 19 L. ed. 360; *Robbins v. Shelby County Tazing Dist.* 120 U. S. 489, 30 L. ed. 694; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158. See also opinion of Matthews and Blatchford, *Justices*, in *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1187; *Crutcher v. Kentucky*, 141 U. S. 47-62, 35 L. ed. 649, 654. We are constrained, therefore, to hold, by virtue of an unavoidable construction of the authorities cited, that the statute invoked, if applied to the corporation plaintiff in this case, and to its transactions would impose conditions and restraints upon interstate commerce; that it would regulate interstate commerce. So understood and so applied, it is in conflict with the constitutional provisions referred to and must be deemed inoperative and void. *Singer Mfg. Co. v. Hardee*, 4 New Mex. 175; *Ware v. Hamilton Brown Shoe Co.* 92 Ala. 145. The opinions in the cases last cited from the supreme courts of New Mexico and of Alabama, respectively, are peculiarly pertinent here. There are doubtless, however, cases in which the statute in question would be effective, and beneficially so; but it must be held not to be applicable in this case. Appellants addressed to the plaintiff's petition a special exception, the overruling of which they have assigned as error. We lay no stress upon this assignment, as, in the light of the facts subsequently fully developed, any error committed in reference to the special exception was rendered wholly immaterial.

The judgment is affirmed.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF TENNESSEE.

LITTLE ROCK & MEMPHIS R. CO.,

v.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO. *et al.*

(See S. C. 47 Fed. Rep. 771.)

1. Diversity of citizenship of the parties is not necessary to give jurisdiction to United States circuit courts of suits arising out of alleged violations of the Interstate Commerce Act.
2. That the remedies prescribed by the Interstate Commerce Act are not applicable to a particular case arising under its provisions does not deprive the United States circuit court of jurisdiction, since by the Judiciary Act such courts are given jurisdiction of all controversies arising under any Act of Congress.

4 INTER S.

3. No unlawful discrimination against a railroad is effected by the traffic arrangement of a rival road running parallel with it for a considerable distance from their common initial point by which through tickets are sold to points on the rival road beyond the point of divergence exclusively over the latter without granting the former any facilities for securing a share of the traffic to such points for the distance which it could carry it.
4. In making contracts for through transporta-

tion of passengers the initial carrier may lawfully prefer a road going through to the point of destination to one going only part of the way, an

arrangement with which would necessitate further arrangements to reach the desired point.

Decided September 16, 1891.

SUIT in equity to enjoin alleged discrimination against plaintiff in certain through traffic arrangements and rates which had been established by defendants. On demurrer to bill. *Demurrer sustained.*

Messrs. U. M. Rose and G. B. Rose, for plaintiff:

The complainant demands nothing unreasonable. It simply asks that it be put upon an equal footing with its adversary, and that every one be left free to choose between them. Owing to its shorter line and its better connections it has hitherto enjoyed the greater part of the business. Now it is sought to force the public to take a different route, a route which it does not willingly adopt, passage over which subjects them to annoying delays and failures of connections.

This question is one of life and death for the complainant. It is a short and a weak road. Its western outlets are all in the hands of its adversary, and if the system which is now sought to be put in force is to be allowed, it must perish. Will it be for the good of the public that it should do so? When it has been devoured will the public be better served? When the Iron Mountain has a monopoly will it consult the interest of the public? Will it improve its rolling stock and its track? Will its servants be more polite and considerate?

All the decisions that have been rendered since the passage of the Act enforce the construction for which we contend.

When the case now before the court was before the Interstate Commerce Commission that tribunal decided that the action of the defendant companies was clearly in contravention of the Act, but that the Commission was not invested with the power to remedy the grievance.

Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co. 2 Inters. Com. Rep. 458, 8 I. C. C. Rep. 10. See also *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.* 8 Inters. Com. Rep. 205.

Mr. W. G. Weatherford also for plaintiff.

Messrs. Morgan & McFarland, Poston & Poston and William M. Baxter for defendants.

Hammond, J., delivered the opinion of the court:

The Little Rock & Memphis Railroad extends from Memphis, Tenn., to Little Rock, Ark., where it has a physical connection with the St. Louis, Iron Mountain & Southern Railroad, extending from St. Louis, Mo., by way of Little Rock, to Texarkana, at the junction of the boundaries of the states of Texas, Arkansas and Louisiana, where it connects with other railroads running into Texas and across the continent. The East Tennessee, Virginia & Georgia Railroad, with its leased line of the Memphis & Charleston Railroad, extends east-

wardly from Memphis to the eastern boundary of the state of Tennessee, and with its connections runs into many states and to the seaboard. The Iron Mountain road has a branch of its road running from Bald Knob, Ark., to Memphis. At Memphis the eastern and western connections are made by rail through the streets of the city, and by railroad transfer ferries across the Mississippi river; but it is alleged in the bill that as to passengers the connection with the Iron Mountain road must be made by ordinary vehicles, through the streets, transferring them from one railway car to another from the stations of each road, while the connection with the Little Rock road may be made by rail through the city and across the river; wherefore the bill alleges the traveling public prefers the Little Rock & Memphis road, and would largely patronize it, but for the alleged discriminations against it which it is the purpose of the bill to remove. These discriminations consist, as appears from the averments of the bill, of a traffic arrangement made between the Iron Mountain road and the East Tennessee, Virginia & Georgia system, whereby through ticketing of passengers is made to points beyond Little Rock over the Bald Knob branch of the Iron Mountain road, which is refused to the Little Rock road, and, coming this way, the Iron Mountain refuses to sell through tickets over the Little Rock road to Memphis or beyond. This arrangement is carried out by the East Tennessee, Virginia & Georgia declining to sell through tickets over the Little Rock, and the Iron Mountain refusing to recognize such tickets on its road; and the bill states specifically the facts and figures which show how hardly this discrimination bears upon the Little Rock road, and deprives it of travel which, before the Bald Knob branch was built, it enjoyed as a monopoly, and would yet enjoy, the bill states, if the choice of the traveling public was allowed to operate in favor of its better facilities and shorter route. The bill avers that this discrimination is in violation of the Interstate Commerce Act of Congress, and prays for a mandatory injunction and other process to compel the defendant roads to sell and recognize through tickets over the plaintiff road, and for general relief.

It may be observed here that the bill does not complain of any discrimination to Little Rock or points on the plaintiff road between Little Rock and Memphis, and it is stated in the argument that the East Tennessee, Virginia & Georgia system still sells tickets over the plaintiff road to Little Rock, if desired, as well as over the Iron Mountain; but the trouble arises over points beyond Little Rock west, and beyond Memphis east. To this bill there has been a demurrer filed, because—*First*, there is no equity in it; *second*, there is no complaint cognizable under the Interstate Commerce Act, and no conduct is averred violating it; *third*, the matter complained of is not sub-

ject to legislative or judicial control, and can be reached only by mutual agreement; and, *fourth*, not coming within the Interstate Commerce Act, the court has no jurisdiction, a diversity of citizenship not being averred. The bill is based upon the plaintiff's construction of the third section of the Interstate Commerce Act, which reads as follows:

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." 24 Stat. at L. 890.

The questions made about the jurisdiction may be easily disposed of so far as they relate to the authority of the court to adjudicate the issues tendered by the bill. The subject-matter of the suit is one arising under an Act of Congress, and the court has jurisdiction without regard to any diversity of citizenship of the parties. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 851, 2 L. R. A. 289, 37 Fed. Rep. 567, 615. The argument for the demurrer proceeds, however, upon the theory that the jurisdiction of the court here is limited by the provisions of the Interstate Commerce Act prescribing certain remedies which may be taken in this court for its enforcement. It is hardly necessary to decide that question; but, if it be, there can be but little doubt that the plenary jurisdiction of this court to entertain all controversies arising under an Act of Congress, either at law or equity, has not been abbreviated by this Act in relation to controversies arising under it, but the special remedies, so far as they are special, are merely supplementary to the ordinary remedies existing under the subsisting judiciary Act, which governs all our jurisdiction. This is fairly inferable, if not directly decided, from the decision of *Circuit Judge Jackson*, just cited; and in my judgment there can be no doubt of this, whether it has been so decided or not. Whatever jurisdiction a court of equity may entertain of this controversy may be entertained here, if not under the regulations of the Interstate Commerce Act, prescribing certain remedies, then under the Judiciary Act, giving us the powers of an equity court as to all cases and controversies arising under any Act of Congress.

But when we come to consider that branch of the demurrer which denies the equity of

this bill, as in all other demurrers of like kind, it presents for judgment the question whether the bill states an equitable right and asks an equitable remedy, taking the facts averred to be true as stated. It is not so much a question of jurisdiction, often, as it is a question of the sufficiency or merits of the bill; and, that being the case here, we proceed to consider it in that view. If this bill averred that the East Tennessee, Virginia & Georgia Railroad refused to give passengers going over the plaintiff road the same rates and facilities, including through tickets and traffic transfers, that it affords to the Iron Mountain road for passengers going to Little Rock or any other point in the plaintiff road, the court would not hesitate to say that it would be a violation of this section of the Interstate Commerce Act. Whether such violation could be remedied by a court of equity, and by a bill like this, or in a court of law, or could only be reached, as probably many violations only can, by resort to the remedies afforded for criminal prosecution by the Act, would be another matter. But it does not follow, because Congress has not gone far enough to construct the machinery to compel such connections and facilities in the one case as are given by contract in the other case, that it is not a violation of the Interstate Commerce Act; nor, because a court of equity or a court of law cannot redress the violation, as they are now authorized to proceed, that there has been no violation at all. Nor can this prohibition of undue or unreasonable discrimination be evaded by a contract any more than in any other way, if it be undue or unreasonable. It may be that whether the unlawful discrimination be made through the medium of a contract, whether of "through routing," as it is called, or otherwise, or by a refusal of the same rates and same facilities which are given by contract or without a contract, there is at present no redress by resort either to the administrative board which we know as the "Interstate Commerce Commission," or to the ordinary or special remedies prescribed for the courts of law or equity; yet it might possibly be redressed by the criminal courts under the Interstate Commerce Act, or without the criminal provisions of that Act, if the United States had any common law jurisprudence of crime (which it has not), by prosecution as for a misdemeanor. But this bill does not allege any such violation of the Act as that suggested, and it seems to be conceded that the East Tennessee, Virginia & Georgia road does not sell through tickets, and affords the same facilities over the plaintiff's road as over the Iron Mountain to Little Rock; the trouble being not there, but in the refusing to sell through tickets, and affords the same facilities to points beyond Little Rock and not on the plaintiff road, but on the road of the East Tennessee, Virginia & Georgia road's co-defendant, the Iron Mountain road.

Now, reversing the proposition just considered, and coming this way from the west, the court could have just as little hesitation in holding that it cannot be a violation of the Interstate Commerce Act, and it may be even doubtful if Congress could make it so, since it might be taking property for the public use, so to speak, without compensation, or depriving one of property without due process

of law, for the Iron Mountain road to prefer to travel passengers over its own road to Memphis to traveling them over the plaintiff's road, whether they come from Little Rock or beyond on the Iron Mountain road, or some other, and whether they be going only to Memphis or beyond to the eastward or elsewhere; and it cannot be either an undue or an unreasonable discrimination against the plaintiff to afford for passengers superior facilities, such as through tickets, shorter rates or the like, over its own road, in preference to that of its rival, running a road part of the way in the same direction. For illustration, if a passenger wishing to go from Texarkana or further on from some point in Texas to Memphis or beyond desires to travel over the Iron Mountain road, why should it not take him all the way to Memphis, and deliver him to the East Tennessee & Georgia, or some other road wishing to take him on easy terms as to rates, through tickets, and the like, rather than shunt him, at Little Rock, upon the plaintiff's road? It cannot be an unfair or an unreasonable discrimination against the plaintiff for the Iron Mountain to keep him on its own road by offering him superior facilities in the respects mentioned, however undue or unreasonable it might be in other roads to refuse the plaintiff the same facilities in transporting him that it affords the Iron Mountain. In other words, the Iron Mountain would not be violating the statutory prohibition in such a transaction, whatever may be said of other roads. It would be free of such imputation, because it has a line of its own, covering the same distance, and may prefer itself to others, as we all do in obedience to human nature. But even as to the East Tennessee, Virginia & Georgia road, why should it not take this passenger from the Iron Mountain at Memphis on through tickets, easy rates, and whatever terms may be agreed upon, without an imputation of discriminating against the plaintiff. It could only do that by refusing to take the plaintiff's passengers, brought to Memphis, on the same terms as it took the others; and this refusal is not alleged. It is no fault of the East Tennessee road that the plaintiff cannot induce the Iron Mountain to bring passengers over its road from Texas to Little Rock and deliver them for transportation to the plaintiff from Little Rock to Memphis; and we have seen that the Iron Mountain may lawfully refuse this, because it has a road of its own for that service.

Recurring to travel westward from points under the control of the East Tennessee, Virginia & Georgia Road, and we have precisely the same condition; in principle, however, it may seemingly be diverse, for, one desiring to travel from Knoxville, Tenn., let us say, to Texarkana, or beyond into Texas, reaches the Iron Mountain at Memphis, and while he may have a choice of two roads there it is for only a part of the way, and he must at last take the Iron Mountain at Little Rock, and go over that road beyond. It does not depend wholly upon equal or better facilities for transfer at Memphis, but also upon the capacity to transport the passenger to his destination beyond there. Is it not plain that the Iron Mountain may offer him the same facilities to take its road at Mem-

phis that it offered in the other case,—may prefer its own road if it chooses? That it may force him to do that thing by refusing to enter into any arrangement with the plaintiff for a joint transportation of the passenger is equally clear. It is again the right of one to prefer one's self to another, and that cannot be an undue or unreasonable discrimination, however hardly it may bear upon that other, as long as the other is not molested in its business by a refusal to transport its passengers upon the same terms granted to the passengers of other roads. It would be unlawful if the Iron Mountain refused the same rate from Little Rock onward that it offered to other roads feeding it at that point, or to other passengers taking its track there; but it cannot be unlawful to prefer to feed itself from Memphis rather than to have the plaintiff feed it. So the East Tennessee, Virginia & Georgia road, like the passenger we have in hand, may be compelled to route over the Iron Mountain road, rather than over the Little Rock road, by this exercise of its lawful right of preference of its own road by the Iron Mountain. The East Tennessee might violate the statute, if the plaintiff's road ran parallel with the Iron Mountain all the way our passenger is going, if it refused him a choice of routes on the same terms; but that is not this case, and the Iron Mountain has the advantage in reaching points not reached by the plaintiff, and which can only be reached over its own road. The sum of it is that the whole merit of this bill must be tested solely by the right of the Iron Mountain to prefer its own road to that of the plaintiff; and that right being lawfully exercised, there can be no wrong in other roads yielding a compulsory adjustment to it; and the plaintiff is without remedy, unless Congress adopts the suggestion of the Interstate Commerce Commission, and interferes to make rates and routes through some agency appropriate to the process, if Congress has the power in a case like this, which may be doubtful. *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 2 Inters. Com. Rep. 458, 3 I. C. C. Rep. 10. In that case the Interstate Commerce Commission clearly declares that that which was complained of by this bill is in violation of the section of the Act which has been quoted, and refused relief only because Congress has not authorized the Commission, or the courts, or any other governmental agency to correct the violation by adjusting the rates and facilities to the situation; and, in the absence of such legislation, like that found in the English act to accomplish a similar purpose, the object can only be accomplished by agreement. It is alleged in the argument here that there is no power anywhere to coerce such an agreement until Congress enlarges the legislation. If this be so, then, indeed, a criminal prosecution would be the only remedy; but it is possible, if the court found the transactions complained of to be a violation of the Act, that at least partial relief might be afforded through this bill by mandamus, or injunction, or both, not to make a contract for the parties, or rates of carriage, or the like, but by forbidding and enjoining the execution of any contract which is unlawful until it be made lawful by conformity to a regulation of commerce established by

Congress under its authority. We do not quite agree that the courts would be powerless in such a case to redress the violation of an Act of Congress. But we are relieved here of any decision of that question by our conclusion that it is not a violation of the Interstate Commerce Act for a carrier to prefer its own road to that of its rival in a case like this, and for the reasons already stated. The Interstate Commerce Commission places its opinion upon the ground that, while there is an apparent justice in the view we have taken, it is subordinate to the public policy manifested in the Act, of facilitating the unrestricted flow of commerce between the states, and designed "to insure to the people every facility of equal choice which franchises granted in the public interest can by any combination of reasonable routes afford." This is true beyond question, but in exercising this, as every other governmental power, legislation is limited in this country, if not in England, where parliamentary power is in a measure supreme, by private right, oftentimes. No one is compelled to apply or to use his property for the public good without compensation. If the public takes it to itself this is clearly so, and, while the compulsory surrender of private right we are considering for a public benefit might not be a taking of property within the constitutional prohibition, it is so nearly akin to it in principle that, even were the power to compel it existing, the exercise of the power should not be implied except by necessity; and certainly it seems to us not from the language of this Act, so equivocal in its relation to the precise point of consideration presented by the facts of this case, however plain it may be in relation to other situations. Moreover, the prohibitions against impairing vested rights or depriving one of his property without due process of law and the like, found in a variety of forms in our American constitutions, state and Federal, may impose some limitation upon such legislation, or upon a construction of general language used in this legislation, to prevent the abrogation of this right in the manner suggested by the Interstate Commerce Commission; and possibly this accounts for the absence of the clauses of the English legislation referred to as wanting in our Act.

On the other hand, until an authoritative adjudication, we could not entirely agree that, by any contract for through routing between carriers, the prohibited discriminations of this Act may be made, or that they would be held to be not prohibited because of any common law right to make such contracts, or that it would be a proper test of the statutory prohibition as to the undue and unreasonable preference or advantage and reasonable, proper, and equal facilities, to apply the common law right of contracting for carriage beyond the carrier's own lines, thereby giving to a line composed of several independent carriers this benefit of the ownership of a continuous road, which we concede to the Iron Mountain in this case; for the common law right to contract, as between independent carriers, is not the same thing as a common and joint ownership, by any means; and the one may be the subject of regulation by Congress, while the other may not; and it is not quite clear why a given car-

rier may afford a preference to a thing carried by one road over that carried or which might be carried by another through the medium of a contract to carry jointly, when it could not do that thing outside of such a contract; nor why the fact of such a contract would make a given discrimination otherwise unlawful a lawful one under this Act. But in this case we have endeavored to show that the discrimination here does not arise at all out of the contract for through routing between the Iron Mountain and East Tennessee roads, but solely out of the right or advantage of ownership possessed by the Iron Mountain of a road parallel to plaintiff's road. If the East Tennessee road should sell the tickets demanded by plaintiff, it would do no good, unless the Iron Mountain would recognize them, which, because of this advantage of ownership, it is not compelled to do under this Act. *Circuit Judge Caldwell* decided this in the case of *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.*, 2 Inters. Com. Rep. 763, 41 Fed. Rep. 559, although he gives other reasons also for his judgment in that case, perhaps. It is quite true that the facts of that case are not precisely like this in some respects, for there the Hot Springs road, which was the co-defendant of the Iron Mountain, had no physical connection at all with the plaintiff road, as the East Tennessee road has here, and the only connection was over the Iron Mountain from Malvern to Little Rock. Yet that fact, in the view we have endeavored to present, becomes immaterial as a distinction in this case, because of this fundamental advantage of ownership all the way from both Malvern and Little Rock to Memphis, which advantage operates as well at Memphis in favor of the East Tennessee road as at Malvern in favor of the Hot Springs road; and the want of physical connection or the fact of physical connection with the plaintiff road does not enter into the question of the reasonableness of the discrimination in one's own favor over one's own road. In either case, as we have endeavored to show, the right of preference growing out of the ownership is paramount to any demand of the public for competing lines in determining the reasonableness of the discrimination made in a case like this. And, as *Judge Caldwell* well remarks, to overthrow this right of preference would be to discourage the building of competing lines, rather than to maintain them. The truth is, the plaintiff is a competing line over only a comparatively few miles with the Iron Mountain system, and to force that road to traffic with it would be to give the plaintiff a share of the profits of the capital invested in the whole Iron Mountain system, just as if it was a part of that road all the way through, instead of a rival road for a part of the distance. This would be an unreasonable discrimination in the plaintiff's favor. It does not seem just that a short road should thus be made equal to a long one in this matter of preserving the public benefit of competition. If the benefit be preserved for the local travel which covers the plaintiff's line, that is all it can justly ask; and it has not the right to become a branch of a trunk line under the pretense of competing for a through travel, which it cannot accommodate. It does not in fact compete for that travel, and cannot com-

plain of discriminations concerning it until it does,—that is, can afford equal facilities, not only for transferring at Memphis, and taking the traveler part of the way, but equal facilities with the Iron Mountain for taking him all of the way that road takes him. This statutory right of equal facilities is reciprocal, and one carrier must be able to furnish equal facilities with the other before it can complain of discrimination. The chief facility is a road reaching the same points with its rival about which the discrimination arises. If the Little Rock had this, I doubt if any combination by contract or otherwise would enable the East Tennessee road to discriminate against it lawfully, although there might be, under existing legislation, no remedy except a criminal prosecution; but, in the absence of this competition in fact for points beyond Little Rock, it cannot be necessary to decide that question.

It may be conceded to counsel for the plaintiff that neither the case of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291, nor that of *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. Rep. 567, 615, controls this. In each of those cases there was a want of physical connection at suitable and properly equipped stations or depots to invoke the requirement of an equal facility for exchange of traffic, which distinguishes it from this case. Moreover, in the Colorado case the supreme court interpreted the constitution of the state as declaring only the common law against discriminations to make it irrepealable, but *non constat* that this third section of the Interstate Commerce Act means no more than the Colorado constitution is interpreted to mean. The language is different, and the historical surroundings of the Act of Congress demonstrate that Congress was exercising its plenary power to regulate interstate commerce, and not declaring the common law to make it fundamental, for, doing only that, it had scarcely any reason to act at all, as the Colorado convention had. And in the Kentucky case it was particularly decided that the plaintiff corporation was not a common carrier at all within the Interstate Commerce Act; and this fact, and the want of reasonable transfer facilities, amply distinguish it from this case. As was said in the *Memphis & L. R. R. Co. v. Southern Exp. Co.* ("Express Cases") 117 U. S. 29, 29 L. ed. 803, the regulation of matters of this kind is legislative, and not judicial, and the courts can go no further than to enforce what Congress has in the exercise of its legislative power declared as a proper regulation of commerce. It has not declared, if it may do so, that a railroad reaching with its own tracks an outlet and inlet for traffic over its own road must share with a parallel road its through traffic to points not reached by its competitor by taking that road's through tickets over its own lines upon equal terms, as to rates or otherwise, with its own traffic. It may be compelled to take up the plaintiff's passengers at Little Rock, and carry them to the points not reached by the plaintiff's road, upon the same terms as other passengers taking its track at Little Rock, but not upon the same terms as passengers taking its track at Memphis for points on its line beyond Little Rock. The

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two things are not equal to each other, and that reciprocity of equal facilities for equivalent services is wanting, and therefore the case does not fall within the statutory definitions of the discrimination which is forbidden; and, if the Iron Mountain road may lawfully decline the tickets which plaintiff would like to issue, the East Tennessee road is not bound to keep them on sale as an equal facility of commerce.

Neither does it seem to me that the case of *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.*, 3 Inters. Com. Rep. 305, cited by plaintiff's counsel, controls this case. I find some difficulty in this report of the case (and I am unable to find it elsewhere reported) in comprehending the facts, but I think the peculiarity of this case is not in that,—the ownership, namely, by the defendant road of a parallel track covering all the ground of the plaintiff, and extending beyond it to points about which the discrimination complained of has been made. It is true that *District Judge Deady* expresses very forcibly his opinion that the law is useless if through routing over an excluded road upon the same terms as the favored road cannot be compelled where the parties cannot agree about it, and if by an agreement for a continuous through freighting the discrimination against competitors thereby effected becomes reasonable simply because of a right so to contract at common law, which right Congress possibly intended to modify or regulate by this Act; and that which he says is reasonable and plausible indeed. Yet he does not hold this as applicable to roads situated towards each other as these are, if I understand the situation in that case.

Again, the case of *New York & N. R. Co. v. New York & N. E. R. Co.*, 4 Inters. Com. Rep. 116, 50 Fed. Rep. 867, seems very analogous to this case, and the judgment there seems somewhat inconsistent with that given by the Interstate Commerce Commission in this case when it was before that tribunal, notwithstanding an apparent struggle to distinguish them. But it is distinguished in both the opinions written in that case, though upon somewhat different grounds. The Interstate Commerce Commission in the former case dismissed a petition almost identical with the bill we have before us, because it had no power, and there was none elsewhere conferred by Congress, to make through rates and through routings where they were denied, as may be done under the English legislation, although the very conduct complained of in this case was there held to be a violation of the Act; but in the latter case, now under observation, in referring to the former it seems to concede that there was in this case no violation of the Act for the reasons stated by *Judge Caldwell*, which are quoted, and have been cited by us here. The opinion, however, further refers to the operation of the right of ownership, and in effect holds that, although the defendant companies in the *New York & N. R. Co. v. New York & N. E. R. Co.*, were jointly stockholders in the favored road, they did not own it. If they had owned it, I do not see that it could have been at all satisfactorily distinguished from this case; for, while it is true that there had formerly been a through rout-

ing between plaintiff and the defendant, and that fact was seized upon to relieve the Commission of the difficulty of making a through route and a through rate for the parties, as they had only to put the old contract "in force again," it is not quite clear how the commission (or the court) has any more power to impose upon an unwilling party an old and abrogated contract than it has to make a new one. Neither is it quite plain how the ownership of all the stock in the favored line by the two defendant companies jointly operating it for their joint benefit is not in the practical operation of the freighting business, the same thing as if they had owned the road, either or both of them, as a part of their corporate belongings, as in this case the Iron Mountain does, although the technical difference in the tenure (if we may use that term somewhat untechnically) is apparent. The truth is that in the careful investigation of the cases on this subject which I have endeavored to make I have been occasionally perplexed to reconcile some of the expressions of opinion and judgments with each other, and all the courts and judges seem to find much difficulty in interpreting and applying this Act of Congress, which is in all its parts a new and experimental chapter of legislation. I desire, therefore, most carefully to limit this judgment to the precise boundaries of the facts in this case. It would be undoubtedly a complete answer to this bill to hold, as counsel for the defendants so strenuously argue we must hold, that the Interstate Commerce Act has not at all interfered with the common-law right of contracting between connecting and independent carriers for a continuous through line, excluding all connecting competitors or rivals per force of the contract, just as if one owner absolutely owned the whole line. But this case does not require such a holding; nor do I think that technically there has been any adjudication to that effect, whatever may be said of expressions of opinion in that direction. It may be that it is a correct doctrine, but certainly that which we

hold here can be, whether the other be or not. That about which I have no doubt on the facts of this case is that the Iron Mountain road, being the owner of a road of its own between Little Rock & Memphis, may prefer itself even to the extent of "crushing out the life of the plaintiff"—to use the language of the bill and of counsel—by that which was done in this case; that, whether done by a contract with other roads or without, it may refuse to through route with the plaintiff to points on its own road not reached by the plaintiff's road, or to recognize tickets issued by the plaintiff or others over plaintiff's roads to such points; and that, having this power of ownership to protect it in doing this, other roads are not at fault in yielding to its refusal to recognize such tickets. It is a misnomer to call that which the Iron Mountain is doing "a discrimination" against the plaintiff under the Interstate Commerce Act, or any other careful use of that word. It is not the case of a road preferring unjustly, unduly, and unreasonably one of two other equally adequate carriers from a given point to a given point, but the case of a competitor or rival so conducting its business and using its powers of ownership as to divert travel from its rival to itself. This is the case as between the Little Rock & Memphis road and the Iron Mountain road. As between the Little Rock and East Tennessee roads the case is that of preferring a road with through facilities to one with only local facilities,—a road that goes all the way to one going only part of the way; and the Interstate Commerce Act does not forbid such a preference. Not having as long a track; the facilities offered by the plaintiff road for its through travel into Texas are not the same nor equal or equivalent to those offered by the Iron Mountain, and the discrimination it makes between the two cannot be, therefore, unjust, undue, or unreasonable in any proper sense, however disastrous to the plaintiff.

Demurrer sustained, and the bill dismissed at the cost of the plaintiff.

INTERSTATE COMMERCE COMMISSION.

THE GERKE BREWING COMPANY

v.

THE LOUISVILLE & NASHVILLE R. CO., THE KENTUCKY CENTRAL RAILWAY COMPANY, THE NORFOLK & WESTERN RAILROAD COMPANY.

1. The rule expressed by the fourth section that distance shall ordinarily limit the adjustment of rates is not rendered inoperative by the existence at one point of converging lines subject to the Act, for the law applies to each of these lines, and neither can put in rates to that point which are lower than shorter distance charges on its line until, upon a showing of special considerations grounded in justice to its patrons and itself, it obtains permission from the regulating authority so to do. This principle applies both to lines between the same points, and to lines reaching the same destination from different points of consignment.
2. Competition with carriers not subject to the statute is based upon natural causes and plain conditions, but the legitimate force of competition with carriers subject to the Act depends upon compliance with the law by each of the competitors and the special circumstances and primarily indefinite conditions in each particular case. *Trammell et al. Georgia Railroad Com. v. Clyde SS. Co.* 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324, cited and affirmed.
3. When rates from any cause are made greater for shorter than for longer distances the difference between such rates must in no instance be unreasonable.

Complaint filed August 1, 1891.—Joint Answer filed September 23, 1891.—Amended Complaint filed November 5, 1891.—Answers to Amended Complaint filed November 23 to December 1, 1891.—Heard at Cincinnati May 6, 1892.—Brief for Complainant filed May 28, 1892.—Decided February 23, 1893.

Messrs. E. P. Wilson and Louis Kraemer for Gerke Brewing Company.

Messrs. Ed. Baxter and Edward Colston for Louisville & Nashville Railroad Company and Kentucky Central Railway Co.

REPORT AND OPINION OF THE COMMISSION.

Veasey, Commissioner:

The complainant, a corporation, is engaged at Cincinnati, Ohio, in the manufacture and sale of beer. The original complaint was against the two carriers first above named, and the Norfolk & Western was brought in as a party defendant in the amended complaint filed November 5th, 1891.

The complaint alleges that the defendants, the Louisville & Nashville Railroad Co. (hereinafter called the Louisville Co.) and the Kentucky Central Railway Co. (hereinafter called the Kentucky Co.) demand, collect and receive for the transportation of beer in carloads from Cincinnati to Middlesborough, Ky., distance 233 miles, an unreasonable and unjust charge of 89 cents per hundred pounds, when compared with rates accepted by said defendants for similar service over other lines or parts of lines jointly or severally owned and controlled by them, and the following places, distances from Cincinnati and rates per hundred pounds on beer in car loads are named:

Knoxville, Tenn.	307 miles	25 cents.
Chattanooga, " "	336 " "	25 " "
Birmingham, Ala.	487 " "	25 " "
Nashville, Tenn.	295 " "	15 " "
Clarksville, " "	287 " "	23 " "
Decatur, Ala.	417 " "	29 " "
Montgomery, " "	600 " "	31 " "
Selma, " "	929 " "	31 " "

That said rate is also unjust and unreasonable when compared with rates on beer in carloads charged by other railroads to points more remote from Cincinnati than Middlesborough, namely:

Kanawha Falls, W. Va.	247 miles	18 cents.
Grafton, W. Va.	239 " "	23 " "
Dennison, Ohio	221 " "	13 " "
Pittsburgh, Pa.	313 " "	15 " "
Chicago, Ill.	305 " "	15 " "
Cleveland, O.	244 " "	13 " "
Kankakee, Ill.	249 " "	15 " "
Youngstown, O.	301 " "	13 " "

That said rate of 89 cents per hundred pounds, charged by the Louisville Co. and the Kentucky Co. for carrying beer in wood from Cincinnati, Ohio, to Middlesborough, Ky., is greater than they together with the other defendant, the Norfolk & Western Railroad Co. (hereinafter called the Norfolk Co.) charge for carrying beer in wood from Cincinnati over the

same line in the same direction through Middlesborough to points beyond in the state of Virginia, that is to say, to Pearisburg, 33 cents, New River, Christiansburg, or Shawville, 31 cents, Salem, Roanoke, or Lynchburg, 23 cents, and that such greater charge for the shorter distance to Middlesborough is in violation of the fourth section of the Act to Regulate Commerce.

The complaint further alleges that the Louisville and Kentucky companies in connection with other railroad companies are parties to through tariffs from Chicago to Middlesborough whereby, during the month of June, 1891, a rate on beer in wood of 59 cents per hundred pounds was lawfully in effect between those points, and that some time during that month the Louisville and Kentucky Companies through their agents did collect and receive as compensation for the transportation of beer in wood from Chicago to Middlesborough a less sum than 59 cents per hundred pounds, thereby violating section six of the Act to Regulate Commerce.

The joint answers of the Louisville and Kentucky companies deny that the rate complained of is an unjust or unreasonable charge for the service rendered. They deny also that the transportation from Cincinnati to Middlesborough is similar to the service rendered over other lines or parts of lines to the points named in the complaint and aver that no just comparison can be made of service rendered under so entirely dissimilar circumstances. They admit that the rates from Cincinnati to Knoxville, Chattanooga, Birmingham, Nashville, Clarksville, Decatur, Montgomery and Selma on beer in wood, in carloads, released, are as set forth in the complaint, but state in regard to those charges that the 25 cent rate to Knoxville, Chattanooga and Birmingham is a special rate made principally to meet the competition of local breweries at those points; that the Nashville rate is also made low for the same cause, and on the further ground of water competition from Cincinnati, Evansville and St. Louis, and that Clarksville rates

are based on rates in effect to Nashville; that at Decatur there is severe competition between Cincinnati, Evansville, St. Louis and Memphis breweries; that at Montgomery there is local brewery competition as well as competition for the carriage of beer to that point by boats on the Alabama river, and that Selma takes Montgomery rates. These defendants say that "in making rate reductions to meet local product, the rail lines have in no case unjustly antagonized the local interests. Their endeavor has been to so adjust rates from the principal brewing points in the west as to permit of reasonable competition."

These defendants state also that they are not engaged in traffic to points named in the complaint as situate in West Virginia, Pennsylvania, Ohio and Illinois, and insist that their rate to Middlesborough has no relation to rates from Cincinnati to points in those states.

They further state that the construction of the Cumberland Valley branch of the Louisville Co., which reaches Middlesborough, was begun in November, 1886; that said branch penetrates a region not previously supplied with rail transportation and practically not then supplied with any transportation facilities; that the road runs through a mountainous region, making its construction peculiarly difficult and exceedingly expensive, it having required three years to build the line of 45 miles from Corbin on the Knoxville division to Middlesborough; that Middlesborough, located at the foot of Cumberland Gap, has only been in existence for a period of about two years, and prior to the construction of the Cumberland Valley branch the section of the Cumberland mountain on the north side of the Gap was dependent for transportation from western points on a wagon haul of 50 or 60 miles from the nearest point on the Knoxville Division of the Louisville Company's system over mountain roads impassable for the greater portion of the year; that the nearest point of distribution on the south side of the mountain was Knoxville, about 75 miles distant, and transportation therefrom was conducted by horses, mules or oxen; that when the Louisville Company completed this branch it extended to a region previously devoid of transportation facilities the benefit of the same local tariff of rates which governs similar traffic in the old and thickly settled portions of Kentucky and Tennessee; that beer in wood in carloads released is put by defendants in class E, and that the rate for that class is not only reasonable in itself, but reasonable as compared with other rates from Cincinnati to Middlesborough, the rates on all classes between those points being:

1	2	3	4	5	6	A	B	C	D	E	H	(per bbl.) F	I	L	M	N
70	60	58	48	43	39	39	39	24	19	39	39	48	29	28	20	15

These defendants further claim that rates for 4 INTER S.

class E or any other classes are dependent upon and fixed with regard to rates received for the transportation of other articles taking other class rates, and that their local classification of ale and beer is in line generally with the classification of those articles throughout the country; and they state that these commodities are placed in the several classifications now in use throughout the country as follows:

ALE, BEER OR PORTER, IN WOOD, CARLOADS RELEASED.

"Official" Class 5	"Southern" E	"Western" 5
"Illinois" Class 5	"Georgia" E	"L. & N. Local" E

It is also averred by these defendants that in the transportation of beer special facilities are furnished by the carrier to the shipper; that it is a perishable product, subject to much risk in transportation, and therefore is given special attention to secure speedy and safe carriage; that they furnish for the shipment of this article refrigerator cars, specially constructed at great expense and weighing much more than the ordinary freight car, and make no freight charge for ice in the same car with ale or beer, in carloads, necessary to preserve it in transit; shippers being permitted to load as much as 4,000 lbs. of ice when necessary for such preservation.

In regard to the long and short haul feature of the complaint these defendants deny that they are under any common control or management with the Norfolk Company, admit they have agreed with that company upon certain through rates for the transportation of property wholly by railroad between Cincinnati and Lynchburg and other points in Virginia, but deny that they are under any arrangement with the Norfolk Co. for continuous carriage or shipment of property between those points. They further state that they carry beer from Cincinnati through Middlesborough to Norton, Va., their eastern terminus, and there deliver it to the Norfolk Co., which transports it to the Virginia points mentioned in the complaint; that it is true that said Virginia points are more remote from Cincinnati than Middlesborough, and also true that between Cincinnati and Middlesborough the transportation is over the same line in the same direction when the beer is destined for Middlesborough as when it is destined for said Virginia points, but they deny that the transportation to these points and to Middlesborough is conducted under substantially similar circumstances and conditions. In support of their claim that such circumstances and conditions are dissimilar these defendants state as follows:

"The line of the Louisville & Nashville Railroad was extended in 1890, from a point in Kentucky, through Middlesborough to Nor

ton, Virginia, where a junction was effected with the Norfolk & Western Railroad. Long prior to the time said junction was effected, certain through rates had been agreed upon by lines which competed with each other for the transportation of property between Cincinnati, Ohio, and Lynchburg, Petersburg, Richmond, and other Virginia cities; and when said junction was effected, respondents agreed to transport property over their lines to Norton, Virginia, for a certain proportion of said through rates. Said rates were not made by respondents. They were the result of active and long continued competition between powerful rival lines. Respondent's offense, if any, consisted exclusively in providing the public with an additional and more direct line of railway, without requiring the public to pay anything additional for the new transportation facility thus afforded."

"Respondents also agreed to transport over their lines to Norton, Virginia, property destined from Cincinnati, to local stations on the Norfolk & Western Railroad for a certain proportion of certain through rates, which were arrived at by adding to the rates in effect between Cincinnati and Lynchburg, the local rates fixed by the Norfolk & Western Railroad Company, to apply on traffic destined from Cincinnati to said local stations. In that way, said local stations also got the benefit of the additional facilities afforded by the extension of the Louisville & Nashville Railroad to Norton."

The answer of the Norfolk Co. admits that it and the other defendants have arrangements for the transportation of property which by reason of its point of origin or destination requires the use of a portion of the railways of each company, but that such arrangements impose no obligation or responsibility upon it when the carriage of the property is wholly upon either one or both of the other defendant roads.

This company admits that it participates in rates for the transportation of beer in wood from Cincinnati, O., to points upon its road, but avers that in the adjustment of said rates to local destinations on its road it is governed by circumstances and conditions dissimilar to those which fix the rates to common and competitive points in the state of Virginia, and it believes that its rates are made in strict accordance with the law.

At the hearing no proof was offered by complainant upon the question whether the rate to Middlesborough is reasonable in itself; neither was any evidence presented by it for the purpose of showing that undue preference or prejudice results from rates to Middlesborough and the other points mentioned in the complaint as not located upon the same line, or in support of the charge of unjust discrimination by defendants in collecting less than established rates on beer from Chicago to Middlesborough.

The small amount of material testimony taken was, on the part of the defendants, mainly a reiteration of their pleading; and it was definitely stated for complainant that it relied principally upon the admission of defendants that they charge more to Middlesborough than for the longer distance over the same line to points in Virginia, and was content to submit the case upon the complaint and answers on file.

There is therefore but a single question to be decided in this case, namely, Is the rate complained of in violation of the fourth section of the Act to Regulate Commerce?

The facts necessary to a decision on this point are as follows:

1. Each of the defendant companies is engaged in the transportation of property between points in different states. The roads of the Kentucky and Louisville companies are now parts of the same system (the Louisville & Nashville) and are operated under a common control or management. The Louisville and Norfolk companies are parties to and have established through rates for the transportation of property from Cincinnati, Ohio, to Lynchburg and other points in the state of Virginia, and under bills of lading issued by the Louisville Company and accepted by the Norfolk Company they carry, by such arrangement, property as a continuous shipment between these points at rates so established and over a line formed by roads which they respectively manage or control; and Middlesborough is an intermediate station on such line from Cincinnati to the Virginia points aforesaid.

The Louisville Co. has established rates for the transportation of property from Cincinnati to Middlesborough aforesaid, and, under bills of lading issued by it, carries property as a continuous shipment between those points at rates so established and over a line which it manages or controls; and said line is part of the above described line between Cincinnati and the Virginia points aforesaid.

2. Rates established and in force for the transportation of beer in wood in carloads, released, over said line from Cincinnati to the Virginia points aforesaid and to various intermediate stations, together with the distances of said points and stations from Cincinnati are as follows, to wit:

To	Rates per 100 lbs.	Distance from Cincinnati.
Livingston, Ky.....	30 cts.	155 miles.
Corbin, Ky.....	35 "	188 "
Barboursville, Ky.....	40 "	208 "
Pineville, Ky.....	40 "	217 "
Middlesborough, Ky.....	39 "	230 "
Shawnee, Tenn.....	39 "	237 "
Ewing, Va.....	45 "	257 "
Hubbard's Springs, Va.....	46 "	263 "
Big Stone Gap, Va.....	44 "	291 "
Norton, Va.....	44 "	305 "
Pearlsburg, Va.....	38 "	440 "
New River, Va.....	31 "	471 "
Christiansburg, Va.....	31 "	481 "
Shawville, Va.....	31 "	491 "
Salem, Va.....	28 "	507 "
Roanoke, Va.....	28 "	513 "
Lynchburg, Va.....	23 "	567 "

These rates apply to shipments of "Beer in wood, carloads, released." The traffic is transported in refrigerator cars and ice necessary for its preservation is carried free.

8. No competition by lines not subject to the Act to Regulate Commerce exists for through beer or any other traffic from Cincinnati or any other interstate point to the places above mentioned. There is competition by the Chesapeake & Ohio Railway, an interstate carrier, for traffic from Cincinnati to Lynchburg, the distance between these points by that route being 470 miles, and the line of this carrier to Lynchburg is shorter than that of the defendants by 97 miles.

All rail lines carry beer to Lynchburg from various brewing points in the east, such as Richmond, Baltimore, Washington, Alexandria, New York and Philadelphia, and from northern cities the traffic can also go as a through shipment by water and rail through Maryland or Virginia ports.

CONCLUSIONS.

The foregoing findings set forth facts sufficient for the disposition of this case.

The defendants transport beer in carloads from Cincinnati, Ohio, to Lynchburg and other points in Virginia, under a condition in the bills of lading releasing them from certain liability as carriers, and according to a common arrangement between them for continuous carriage and shipment within the meaning of the first section of the Act to Regulate Commerce. *Trammell et al. Georgia Railroad Co. v. Clyde* 88. Co. 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 824; *Boston Fruit & P. Exch. v. New York & N. E. R. Co.* 8 Inters. Com. Rep. 498, 4 I. C. C. Rep. 664; *Mattlingly v. Pennsylvania Co.* 2 Inters. Com. Rep. 806, 3 I. C. C. Rep. 592; *Richardson v. The Chouteau*, 87 Fed. Rep. 582; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 37 Fed. Rep. 572; *Harp v. The Grand Era*, 1 Woods C. C. 184. Over a part of the all-rail line to Lynchburg and other points aforesaid, and under a like condition in bills of lading, two of the defendants transport beer in carloads from Cincinnati to Middlesborough, Ky., a shorter distance included within the longer distance to Lynchburg, Va., and over the same line in the same direction, and such transportation is conducted by said defendants under a common control or management within the meaning of the first section of the Act to Regulate Commerce. The defendants and the transportation by them to the interstate points mentioned in the complaint are therefore subject to the provisions of the Act to Regulate Commerce.

Under the construction of the fourth section by the Commission and the courts, as set forth in our decision in the Georgia Railroad Commission cases, 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 824, the defendants are not author-

ized by the statute to establish and charge lower rates to longer than to shorter distance points, mentioned in the complaint and findings, by the fact that other interstate railroads reach those or some of those longer distance points from Cincinnati or from other points of shipment. The rule expressed by the fourth section that distance shall ordinarily limit the adjustment of rates is not rendered inoperative by the existence at one point of converging lines subject to the Act, for the law applies to each of those lines, and neither can put in rates to that point which are lower than shorter distance charges on its line until, upon a showing of special considerations grounded in justice to its patrons and itself, it obtains permission from the regulating authority so to do. This principle applies both to lines between the same points and to lines reaching the same destination from different points of consignment.

It is true that situations frequently arise when one carrier is at an unjust disadvantage as compared with another in the business of carrying to a common point. But the situation at junction or common points is not *uniformly* so oppressive as to justify exceptional action by the carriers in disregard of the rights of places more favorably situated in point of distance.

The term competition as applied to rates is frequently a misnomer. Roads reaching a common point may at first compete by one and then the other giving lower rates to that point until finally they are compelled to combine in fixing a rate by which each will obtain a fair share of the business and derive a profit. Carriers not only determine upon rates between themselves, but rates to important junction or common points are also fixed at meetings of or through associations composed of carriers in common territory. These rates, fixed in the interests of all the carriers, and with reference of course to the general situation in the immediate territory, are intended to be profitable. While rates so made are still competitive in a narrowed sense, the force of natural and unrestricted competition between the carriers is materially modified by their combined action; and though traffic conditions may and usually do limit the amount of increase in charges, yet concerted action by the carriers commonly results in such rates as will yield fair compensation for the service rendered. The disadvantages from which some carriers subject to the statute might suffer under varying traffic situations are, in large measure, removed by agreements among themselves which greatly modify the oppressive force of free competition; and association or action in concert is freely resorted to by such carriers.

The theory sometimes advanced that the Act was intended to eliminate competition as a fac-

tor in transportation is not borne out by the provisions of the statute. Perhaps the ideal reasonable and just transportation charge should be unaffected by the element of competition; but the statute only applies to certain classes of carriers, prohibits only such preferences or discriminations as are undue or unjust and confers upon a regulating body power to relax in the interests of those carriers its general rule that rates shall ordinarily depend upon distance, and was evidently not framed in disregard of the competitive relations existing between common carriers throughout the country.

To preserve legitimate competition between public carriers, that is, competition which is not contrary to the public interest, and to prevent that competition which is illegitimate, or in other words, opposed to the public welfare, is precisely that which, among other things, the law undertakes to accomplish. The clauses prohibiting undue preferences and requiring reasonable, just and non-discriminating rates were designed to abolish the illegitimate practices indulged in by carriers before the Act was passed, and much of the favoritism given to persons and places was unquestionably the result of unfair competition between carriers by rail; besides, to further secure to persons and communities their advantages of location, the law in its fourth section directs that distance shall ordinarily limit the making of rates in the same direction. Conditioned upon faithful and mutual observance of those provisions, the right of carriers subject thereto to compete, not only in rates, but also, and with very much greater freedom, in facilities and accommodations, is clearly recognized in the statute. No qualifying phrases which may be found in such provisions can properly be held to refer to business strife between carriers subject thereto; but Congress did provide a relieving clause for the benefit of such carriers by adding to the distance rule in the fourth section a proviso giving the Commission power to authorize a carrier, upon application and after investigation, to charge less for longer than for shorter distances, and from time to time to prescribe the extent of such relief, that is, to limit the reduction of rates for longer distances. Any person at all familiar with transportation as conducted in this country is aware that the principal ground which a carrier subject to the Act can allege for such relief is competition; and that allegation was the one mainly relied on by carriers in their applications to the Commission for such relief immediately after the law went into effect. Before its enactment, competition between carriers subject to the statute had been shown to result in many illegitimate practices, but it was also apparent that within proper limits such competition is beneficial to the public and a privilege grounded in

fairness to the carriers; it therefore became necessary to provide for the ascertainment and continuance of legitimate competition between such carriers in an authoritative way, and the fourth section proviso was made a part of the law.

Transportation by water or by other agencies not subject to the law presents a wholly different question. As stated in the Georgia Railroad Commission cases, 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324, actual competition with carriers not subject to regulation under the Act to Regulate Commerce is, as a rule, potential in the extreme, for the law places no limitation upon such a carrier as to rates, service or facilities. So far as the statute is concerned such a carrier may charge unreasonable, unjustly discriminating and unduly prejudicial rates to any point, and adopt whatever regulations its private interest may demand. On the other hand, in the application of the law to carriers subject to its provisions their private rights are subordinate to those of the public, and competition between them is not always in the public interest. It is as a broad general rule, against the public interest that artificial circumstances, which at the will or caprice or for the self interest of any man or body of men (individual or corporate carriers) may be swept out of existence as lightly as they were perhaps created, should be permitted to interfere with the natural course of trade. *Liverpool Corn Trade Assn. v. London & N. W. R. Co.* L. R. 1 Q. B. Div. 120, 45 Am. & Eng. R. Cas. 216. If railroad competition should be considered as justifying the exceptional rate in every case where the term is applied, (and the degree or force of such competition is of great variety), any railroad might by its action absolve a competitor from its obligation under the law and be itself absolved in return. The legislature never intended this consequence; it did not intend that carriers subject to the law should at pleasure make the rule of the statute ineffectual. *Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 187, 2 I. C. C. Rep. 231. Besides, a shipper having a choice between competing carriers would only have to refuse to send his goods by one of them unless given exceptional rates to justify that one in making the discrimination in his favor on the ground of the necessity of the situation. *Interstate Commerce Commission v. Texas & P. R. Co.* 4 Inters. Com. Rep. 114. These principles are peculiarly applicable to carriers subject to the same general scheme of regulation; furthermore, it must be remembered that water lines were designedly left free from the operation of the law in order to preserve untrammelled the advantages of such communication to territory reached by "river, sea, canal or lake." The fact of the exclusion of this method of trans-

portation from the operation of the law is in itself a declaration that competition by water should not be confounded with competition by rail. And the same distinction applies to foreign and state railroads where they do not come under the prohibitive clauses of the law. Competition with carriers not subject to the statute is based upon natural causes and plain conditions, but the legitimate force of competition with carriers subject to the Act depends upon compliance with the law by each of the competitors and the special circumstances and primarily indefinite conditions in each particular case.

"The carrier has the right to judge in the first instance whether it is justified in making the *greater charge for the shorter distance* under the fourth section in all cases where the circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers not subject to regulation under the Act to Regulate Commerce. In other cases under the fourth section the circumstances and conditions are not presumptively dissimilar, and carriers must not charge *less for the longer distance* except upon the order of this Commission."

Georgia Railroad Com. v. Clyde SS. Co.
4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324.

The construction of the law as laid down in the Georgia commission cases and here somewhat further discussed was not in any sense an arbitrary ruling; it was arrived at after patient and thorough examination of all the authorities upon the long and short haul question; and that it is clearly in harmony with the obvious intent of Congress, the decisions of Federal and English courts, and the basis of construction originally laid down by the Commission on the subject, is the best proof of its being the correct interpretation of the meaning of the fourth section.

The effect of market competition upon rates for longer distances under the fourth section is, so far as carriers are concerned, a collateral question with that of competition between carriers subject to the statute, and necessarily can only be determined by the same general rule.

"To determine the force and effect of such (market) competition involves consideration of commercial questions peculiar to the business of shippers, such as advantage of business location, comparative economy of production, comparative quality and market value of commodities, all of which are entirely disconnected from circumstances and conditions under which transportation is conducted. Carriers cannot create abnormal situations by making rates which equalize advantages and disadvantages of localities and thereupon claim justification for greater charges on shorter hauls on the ground that the lesser long haul charges which accomplish such equalization are necessary to secure increase in traffic over their lines."

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Georgia Railroad Com. v. Clyde SS. Co.
4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324.

If the application of the theory set forth in the answer of the Louisville and Kentucky companies in this case, that rates on an article to a given point should be lower when the commodity carried is also manufactured at that point, operates to produce an undue preference or prejudice under the third section or a deviation from the rule of the fourth section, it cannot be sanctioned. But it is not important to discuss the general propriety of that theory with reference to the decision of this case, and our only reason for giving it any attention is the fact of its being involved in the general question of market competition.

Questions of market competition and railroad competition are susceptible of simple solution if carriers generally will do willingly that which, under the law, they must do perforce, namely, endeavor to bring about legitimate prosperity and advantage to themselves in conformity with, not in defiance of, the law's provisions. Willing conformity with the statute would necessarily result in narrowing the range of investigations and in eliminating therefrom rate questions which depend for solution upon the lawful action of other carriers. Let that position be taken, and much of the illegitimate force of such competition will have vanished; what remains can be dealt with mainly, under confined and simple situations, and most rapidly and effectively in cases under the proviso clause of the fourth section; while at the same time hardship can be authoritatively relieved.

One fact in this case may properly be noticed. The rate on beer of 28 cents from Cincinnati to Lynchburg, distance 587 miles, affords a rate per ton per mile of a little over 8 mills; but the rate of 39 cents from Cincinnati to Middlesborough, distance of 230 miles, yields a rate per ton per mile of over 3½ cents. We refrain from expressing any opinion as to the character of either of these rates considered by itself, but we do not hesitate to say that a rate per mile for a shorter haul which is more than four times the rate per mile for a longer distance is extortionate if the longer distance rate is remunerative. When rates from any cause are made greater for shorter than for longer distances the difference between such rates must in no instance be unreasonable.

In this case the burden was upon the defendants to show their right to make the greater short haul charge complained of without having first obtained from this Commission an order authorizing them to make the lesser long haul charge with which under the fourth section such greater charge is compared. This they have not done. It appears by the findings that rates from Cincinnati are greater for

shorter hauls to various points on the roads involved in this controversy, and the order will therefore be that the defendants cease and desist, on or before March 20, 1893, from charging for the transportation of beer or other property from Cincinnati to Middlesborough and other points on the same line as far as and including Lynchburg any greater aggregate compensation on similar shipments of like

kind of property for shorter than for longer distances; and that they be required to thenceforth abstain from making any less charge for the longer than for the shorter distances aforesaid except upon the filing by them of an application for relief from the operation of the fourth section and the issuance by this Commission of an order permitting such lesser charge.

JAMES & ABBOTT

THE CANADIAN PACIFIC RAILWAY COMPANY; THE MAINE CENTRAL R. Co.;
THE BOSTON & MAINE R. Co.

[No. 334.]

1. The statute provides that "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant," and defendants are therefore not entitled to a dismissal of the complaint on the ground that the petitioners, being merely commission merchants, can sustain no direct or material damage under the rates in question.
2. When water competition is alleged to justify rates in any case under the statute the carrier must affirmatively show by proof which does more than create a presumption, and which clearly establishes that such competition is a controlling factor in the transportation of traffic important in amount from the point in question.
3. Manufacturing industries should not be deprived, through a carrier's adjustment of relative rates, of advantages resulting from their favorable location in respect of cost of raw material supplied from a common source, or of distance to the common market for the finished product.
4. A departure from equal mileage rates on different branches or divisions of a road is not conclusive that the rates are unlawful, but the burden is on the company making such departure to show its rates to be reasonable when disputed. Citing *Logan v. C. & N. W. R. Co.* 2 Inters. Com. Rep. 431, 2 I. C. C. Rep. 604.
5. When the reasonableness or relative reasonableness of charges is challenged, every material consideration which enters into the making of such charges, including the apportionment thereof to connecting roads in a through line, is pertinent to the inquiry.
6. The "drive" of shingle logs down rivers which flow past the place of cut in Maine to a seaport in Canada where shingle mills are located, and from which the product may go by sea to market ports, affects shingle traffic from competing mills located along these rivers at a place in Canada and a place in Maine, but operates with less force at the latter point. The rail rate from the Canadian mill to market being fixed with especial reference to the effect of the log drive to and water competition for shingle traffic from the seaport, the rate from the Maine mill should be made upon the same basis.
7. Defendants ordered to restore the relation of rates on shingles to Boston which they established after the filing of complaint herein but soon after discontinued, to wit, a rate from Fort Fairfield in Maine of not exceeding 6½ cents above the rate in force from Fredericton in Canada. Complainant's claim for reparation denied.

Complaint filed March 21, 1892.—Answers filed April 12 to May 6, 1892.—Testimony heard at Boston, September 8 & 9, 1892.—Briefs filed October 25 to November 23, 1892.—Decided March 11, 1893.

RELATIVE rates on shingles. See Complaint, *ante*, 45; Answer, *ante*, 110.

Mr. A. B. Paine, for Complainants.

Mr. A. C. Raymond, for Canadian Pacific Railway Company.

Mr. Sigourney Butler, for Boston & Maine Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

Veasey, Commissioner:

It is alleged in the complaint that the defendants are engaged in the carriage of inter-

state commerce under joint traffic arrangements and are subject to the provisions of the Act to Regulate Commerce. That they charge

and receive 16½ cents per hundred pounds on lumber in carload lots and 81½ cents per hundred pounds on shingles in carload lots from Fort Fairfield, Stevens' Siding and Hurd's Siding in the state of Maine to Boston in the state of Massachusetts, a distance of about 484 miles, while they charge and receive only 14½ cents on lumber in carload lots and 16½ cents per hundred pounds on shingles in carload lots from Fredericton, Tracey and Russia-gornish in the province of New Brunswick to Boston aforesaid, a distance of about 438 miles; that said rate of 81½ cents per hundred pounds on shingles from Fort Fairfield, Stevens' Siding and Hurd's Siding is unreasonable and unjust, and that defendants discriminate against the petitioners by exacting from them a greater charge than they do from shippers at Fredericton, Tracey and Russia-gornish for what is practically a similar service.

The prayer of the petition is that the 81½ cent rate on shingles from Fort Fairfield, Stevens' Siding and Hurd's Siding be reduced to a rate that is reasonable and that defendants be ordered to repay all sums which they may have exacted subsequent to the date of the petition in excess of the rate which the Commission shall decide to be just and reasonable.

The answer of the defendant, the Canadian Pacific Railway Company, admits that it is under joint traffic arrangements with the other defendants and subject to the Act to Regulate Commerce; that at the date of the petition, the rates on lumber and shingles set forth therein were in force over the defendant lines, but that before the petition was filed the defendants had in contemplation a readjustment of the rates aforesaid; that the rates now in force are 15½ cents per hundred pounds on lumber in carload lots and 26½ cents per hundred pounds on shingles in carload lots from Fort Fairfield, Stevens' Siding and Hurd's Siding to Boston and 14½ cents per hundred pounds on lumber in carload lots and 20 cents per hundred pounds on shingles in carload lots from Fredericton, Tracey and Russia-gornish to Boston; that these rates of freight are just and reasonable and not in violation of the Act to Regulate Commerce, for the reason that the circumstances and conditions attending the traffic aforesaid from the two groups of places are substantially dissimilar as to value, volume and relation to other traffic over the same line of railway, as to manner and cost of obtaining logs, and as to water competition, which exercises a controlling effect on the rates of freight obtainable from Fredericton to Boston, but which does not exist from Fort Fairfield, Stevens' Siding and Hurd's Siding; that said last named stations are situated upon a branch line originally known as the Aroostook Railroad of Maine; that said line was built by the New Brunswick Railway Company of New Brunswick, Canada, which said

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last named road was in turn leased to the Canadian Pacific Railway Company; that the character and volume of the traffic upon said branch line and the cost of hauling such traffic on said branch line render the rates now in force unremunerative to the lessee, the Canadian Pacific Railway Company, and that any further reduction in said through rates would compel the defendant to operate the said branch line as a local line at local rates of freight to the point of junction with defendant's main line of railway; that the rates of freight from Tracey and Russia-gornish are substantially nominal for the reason that little or no lumber or shingles have been or are likely to be shipped from those points, and said rates are made equal to those from Fredericton to preserve the symmetry of the tariff sheet.

The answers of the other defendants are substantially similar to that of the Canadian Pacific Railway Company; but that of the Maine Central contains the additional averment that the low rates forced upon defendants by the water carriers from Fredericton are not remunerative in themselves, but by meeting rates and holding traffic to the rail which would otherwise seek the water route, a large amount of freight is secured for inland points from new business built up by shippers, the outgrowth of their exclusive patronage of the rail lines.

At the hearing for the purpose of taking testimony, the petitioners claimed that under the readjustment of rates since the petition was brought, the shingle rate from Fort Fairfield, Stevens' Siding and Hurd's Siding was still unjust and unreasonable, and in comparison with the rate from Fredericton subjected them to unjust discrimination; on motion, petitioners were granted leave to amend the complaint accordingly.

It also appeared at the hearing that the defendants had, since the filing of their answers, reduced the rate on shingles from Fredericton from 20 cents to 17½ cents per hundred pounds, and they claimed that the reduction was rendered necessary by the fact that water carriers from Fredericton were taking a considerable portion of the shingle traffic under the 20 cent rate. The defendants were also allowed to amend their answers herein.

At the close of petitioners' testimony, counsel for one of the defendants moved to dismiss the proceeding on the ground that it appears from their own testimony that the petitioners, being merely commission merchants, suffer no particular damage, and that their profits do not depend upon the rates, except to the amount of about one dollar per car.

The petitioners, who are lumber merchants in the city of Boston, sell shingles on commission for manufacturers at Fort Fairfield and other points in the state of Maine, and in order

to obtain the exclusive right to sell such shingles have paid to some manufacturers certain amounts of money in advance of sales. This course appears to have been followed by other lumber commission merchants in Boston because, in order to secure the business of one of the manufacturers at Fort Fairfield, the petitioners were obliged to discharge his liability to a rival commission firm for moneys paid in advance of sales on his account. The commission which petitioners obtain for selling shingles is, according to agreement, either upon the gross amount received for sales or upon the amount remaining after deducting cost of transportation and other items of expense which may attend the shipment of the shingles and delivery in Boston. The petitioners also appear in the light of shippers from Fort Fairfield, as shown by a schedule of shipments put in evidence.

The statute provides that "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant." By advances of money to the shingle makers at Fort Fairfield they have substantial interest in shingle manufacture at that point; besides, while a reduction of rates may not materially increase their commission per carload, they have interest as commission merchants in whatever effect such reduction may have upon the number of carloads consigned to them. It also appears that some shingles in carloads have been sent by them as shippers from Fort Fairfield. The petitioners as commission merchants may be indirectly damaged by the freight rates in this case if found unlawful, and as shippers they in common with other shippers from the points in question have direct interest in such rates. The motion to dismiss must be denied.

The facts material to the decision of this case are as follows:

1. Fort Fairfield, Stevens' Siding and Hurd's Siding, all in the state of Maine, are situated near each other on the same line of railroad, take the same rate, and for the purposes of this report may be considered as one. Fort Fairfield is located upon the Aroostook branch of the New Brunswick Railway, which is operated under lease by the defendant, the Canadian Pacific Railway Company. The Aroostook branch extends from Presque Isle 83 miles to a junction with the New Brunswick Railway at Aroostook, N. B. Traffic from Fort Fairfield destined to Boston is routed from Fort Fairfield easterly to Aroostook, seven miles, thence southerly *via* Debec and McAdam Junctions, 112 miles to Vanceboro, the point of junction with the Maine Central Railroad, in all a distance of 119 miles; thence by the Maine Central Railroad to Portland, 251 miles, and by the Boston & Maine from Portland

land to Boston, 103 miles, the total mileage being 478 miles.

It appears from a statement put in evidence by the defendants that the Aroostook branch does not yield sufficient revenue to pay operating expenses and full interest on fixed charges, the deficit from interest account for the year ending June 30, 1891, being \$12,195.81, and for the 6 months following \$9,728.99. While this branch is operated at a loss to the Canadian Pacific, yet according to the testimony of one of its officers and its principal witness, that company is enabled to continue present rates from points on the branch road on account of the traffic which that road gives to the main line; in other words, the Aroostook road as a separate line does not pay, but as a feeder to the Canadian Pacific system its operation is not unprofitable to that company.

Shingle shipments constitute 29½ per cent of the entire traffic over the Aroostook road, and only 4½ per cent of the whole traffic is lumber, it being cheaper apparently to float logs down the Aroostook and St. John rivers to Fredericton or beyond than to saw them in the Aroostook region and ship by rail at even the comparatively low rates on lumber now in force. The other traffic consists mainly of potatoes, starch, hay, bark and live stock. There is not much return traffic to points on this branch.

The manufacture of lumber and shingles at Fort Fairfield and other points on the Aroostook branch is affected by and is in competition with the manufacture of lumber and shingles at Fredericton and other points on the St. John river. Timber cut on the Aroostook can be floated down that river to its junction with the St. John and thence to any point on that stream, at but little additional expense over the cost of logs at Fort Fairfield. Logs cut on the upper St. John are also driven down to Fredericton and other St. John towns. The points on the Aroostook branch have a population of about 11,000 inhabitants. The manufacture of shingles has been an established industry at those points for a considerable number of years.

2. Fredericton is situated on the St. John river, in the province of New Brunswick, Canada, and traffic by rail therefrom to Boston is routed over the Fredericton branch of the New Brunswick Railway to Fredericton Junction, 22 miles, thence easterly by the New Brunswick road to Vanceboro, 45 miles, in all 67 miles; and from Vanceboro, the route to Boston is the same as above stated for traffic from Fort Fairfield, making the distance from Fredericton to Boston 426 miles. The distance from Fort Fairfield to Boston is therefore 53 miles greater than that from Fredericton to Boston, and such difference arises wholly upon lines operated by the Canadian Pacific Rail.

way Company. There is water communication between Fredericton and Boston, but what, if any, vessels run regularly between these points does not appear. Not much, if any, lumber or shingles are shipped made from Tracy or Russia-gornish, the points which take the same rates as those from Fredericton.

Fredericton has a population of between six and seven thousand, and there is no place of much consequence between it and Vanceboro, Me. While shingle mills have been in operation at Fredericton for some years it did not become an important point for the manufacture of that article until a large shingle plant was established there about five years ago.

3. The defendants are parties to joint traffic arrangements for the transportation of shingles and lumber from Fort Fairfield, Fredericton and the other points mentioned in the complaint to Boston and points taking Boston rates. The rates now in force on shingles in carloads from Fort Fairfield and Fredericton to Boston are respectively 26½ and 17½ cents per hundred pounds. At the time the complaint was filed these rates were 31½ and 16½ cents per hundred pounds. Before the answers were filed the rates were changed to 26½ cents from Fort Fairfield and 20 cents from Fredericton, but between that time and the date of hearing the Fredericton rate was reduced to 17½ cents because, as defendants allege, and there is no evidence to the contrary, some traffic then went by vessel from Fredericton. Five small schooners were loaded with shingles while the 20 cent rate was in effect, but defendants failed to show where the water shipments were destined and complainants did show that they were not carried to Boston. The tonnage of vessels which can reach Fredericton does not appear. It is asserted in the testimony that buyers and dealers prefer to get shingles by rail because they can keep a better assortment of different grades by obtaining their supply in small carload quantities; but if the shipments are by the water-way they have ordinarily to replenish their stock by the cargo.

The rates to Boston on lumber from Fort Fairfield and Fredericton are, respectively, 15½ and 14½ cents per hundred pounds, and the lumber rate from Fort Fairfield is now 1 cent less than at the time the complaint was filed. Lumber and shingles are usually classified alike and take the same rates, but the reason for the difference in rates from Fort Fairfield is stated in the first finding. Not over a dozen cars of lumber are shipped from Fredericton during the year, most of the timber being floated to St. John. The rail rate on lumber and shingles from St. John to Boston, 44 miles farther, is 16½ cents per hundred, but the traffic goes by water. Since the 26½ cent rate

on shingles from Fort Fairfield went into effect an agent of the Canadian Pacific has obtained letters from shippers on the Aroostook branch expressing themselves satisfied with that rate.

4. For the year ending July 31, 1891, there were shipped by rail from Fredericton 284 cars of shingles, and during the year following 400 cars were shipped, making 684 cars for the two years. For the same period about 2,000 carloads were shipped from the Aroostook division; and 541 of these were loaded at Fort Fairfield. Allowing 22,000 pounds to the carload and 200 pounds to the thousand shingles, this gives 75,240,000 shingles from Fredericton, and 220,000,000 from the Aroostook, of which 59,510,000 were sent from Fort Fairfield.

The following rates per hundred pounds have been in effect on shingles in carloads from Fort Fairfield to Boston from 1883 to the present time:

1883 to 1887, 35 cents; 1887 to 1889, 34 cents; 1889 to April 21, 1892, 31½ cents; April 21, 1892 to date, 26½ cents.

There was an understanding between the railroad people and the parties who built the one important mill at Fredericton about 5 years ago that a rate of 16½ cents per hundred pounds would be established from Fredericton in order to protect it from St. John competition. This was done, and with little variation the rate has been maintained ever since, it now being 17½ cents. This rate is not raised during the season of closed navigation, but is uniform the year round.

5. Shingle rates from Fort Fairfield and Fredericton to Boston are divided between the carriers as follows:

Fort Fairfield rate, 26½ cents per 100 lbs. Canadian Pacific, 119 miles, 40 per cent. The balance, 60 per cent, is apportioned between the other lines on the basis of 70 per cent to the Maine Central, 251 miles, and 30 per cent to the Boston & Maine, 108 miles.

Fredericton rate, 17½ cents per 100 lbs. Canadian Pacific, 68 miles, an arbitrary of \$5.00 per car, and then 23 per cent of the remainder. After deducting the share of the Canadian Pacific, the Maine Central gets 69.9 per cent and the Boston & Maine 30.1 per cent of the balance.

These divisions do not bear out the statement of a witness for the Canadian Pacific that that company gets more revenue out of the rate from Fredericton than from the rate from points on the Aroostook branch. It was stated by the witness that this was on account of the \$5.00 per car arbitrary on Fredericton shipments and that the average carload of shingles from Fredericton weighs 25,000 lbs. as against 22,000 lbs. per car from Fort Fairfield; this difference in weight is claimed to exist because Fredericton shingles are thinner and more can

be loaded in a car. A carload from Fort Fairfield of 22,000 lbs. at 26½ cents amounts to \$58.30 of which the 40 per cent share of the Canadian Pacific is \$23.32. A carload from Fredericton of 25,000 lbs. at 17½ cents yields a total revenue of \$43.75 out of which the \$5.00 arbitrary and 23 per cent share of the Canadian Pacific is \$13.91. These divisions and differing carload weights do, however, produce a slightly higher rate per car per mile to the Canadian Pacific from Fredericton (20.76 cents) than from Fort Fairfield (19.60 cents).

The evidence does not clearly support this claim of heavier carloads from Fredericton. It is difficult to understand how one carload of thin shingles can weigh much more than a carload of shingles somewhat thicker in size, unless the shingles are less dry or there is a difference in the size of the cars. It was not contended that the Fredericton shingles are not of standard size, though admitted to be somewhat thinner than the Fort Fairfield article; or that they are shipped in a wetter state; or that any reason exists for furnishing larger cars to Fredericton shippers.

Figuring on an average carload of 22,000 lbs. the rate of 17½ cents from Fredericton yields a gross sum per car of \$38.50, out of which the \$5.00 arbitrary and 23 per cent of the remainder gives the Canadian Pacific for the haul of 67 miles to Vanceboro \$12.71, or 33 per cent of the rate, and 1 cent and 7 mills per ton per mile; while the rate from Fort Fairfield of 26½ cents yields that company, from its 40 per cent share, a rate per ton per mile of 1 cent 7.8 mills for the 119 miles to Vanceboro.

This \$5.00 per car arbitrary allowed to the Canadian Pacific dates back to the time when the Fredericton Junction Railway, being separately operated, received that sum for its share of the service, and it has been continued ever since.

The rate per car (22,000 lbs) per mile which the Canadian Pacific receives under present rates is about 19½ cents from Fort Fairfield and 19 cents from Fredericton.

The rate per car per mile for the whole distance to Boston is about 9 cents from Fredericton and a little over 13 cents from Fort Fairfield.

The rate per ton per mile (produced by the 26½ cent rate from Fort Fairfield to Boston 478 miles, is a little over 1 cent and 1 mill. The rate per ton per mile from Fredericton to Boston, 426 miles, rate 17½ cents, is about 8.2 mills.

6. A considerable portion of the shingle timber used at Fredericton is floated down the Aroostook, but much of it is believed to come from the upper St. John. It is claimed and not disputed, that practically no shingles are made at Fredericton from Canadian lumber. Shingles made at Fredericton from American timber are

admitted into the United States free of duty.

The average value of cedar shingles of all grades in the Boston market is about \$2.50 per thousand, or from 250 to 275 dollars per carload. At Fort Fairfield the value per car is stated to be about \$70.00 less, this sum representing cost of shipping, transportation, delivery, selling commissions, and similar expenses. The value of a carload of shingles at Fredericton is not shown. Assuming milling expenses to be similar at Fort Fairfield and Fredericton and that logs at the place of cut cost each the same, the greater value of a carload at Fredericton can be estimated by considering the difference in rates to Boston in favor of Fredericton less the excess cost of shingle timber at the Fredericton mills.

The following unverified statement was put in evidence by the defense as showing the cost per thousand feet of Aroostook shingle timber in the mill of the principal shingle manufacturer at Fredericton:

Estimate showing cost per M of logs delivered at Phoenix Mills, Fredericton, N. B.

Stumpage on Cedar Logs.....	\$2.50	per M
Hauling Logs to Bank of Stream & River.....	6.50	" "
Driving Logs to Madawaska Log Driving Co's Limits.....	1.00	" "
Tolls Madawaska Log Driving Co.....	19	" "
L. W. Pond's Sheer Boom Tolls.....	11	" "
Tolls St. John River Log Driving Co.....	35	" "
St. John Boom Co. Rafting Charges.....	2.00	" "
Freighting from Booms to Mill.....	42	" "
Total.....	\$13.07	" "

Complainants' principal shipper testified in regard to the cost of shingle logs in his mill at Fort Fairfield, but his testimony was somewhat indefinite as to some items and he was subsequently requested by the Commission to supplement it with an itemized and duly verified statement of such cost. The following items appear in the statement which was thereupon filed:

Statement showing cost of 1000 feet of Cedar Logs at H. Stevens & Co's Mill:

Stumpage—average for 1892.....	2.75
Scaling in woods.....	.08
Landing logs on bank of stream.....	6.50
Driving logs to H. S. & Co's Mill.....	1.65
L. W. Pond, boom fees.....	10
Rafting, sorting and other necessary expenses on logs at mill.....	1.25
Expense of keeping boom, piers and dam in repair.....	50
Total.....	\$12.88 per 1000 ft.

In the latter list the first item is \$3.75 for "Stumpage, average for 1892," and the second is 8 cents for "scaling in woods," while in the statement of the Fredericton shipper the cost of stumpage is put at \$2.50, and there is no charge for scaling. These two statements were made out at different times, the first in August, 1892, and the other in February, 1893, and it may well be that the average stumpage cost to the Fredericton shipper for 1893 was as much as the average stated by the Fort Fairfield manufacturer. The last item in the latter statement is 50 cents per thousand for "keep-

ing boom, piers and dam in repair," but no item in the Fredericton shipper's statement relates to such expense. The difference of 25 cents in cost of stumpage and the items of 8 cents for scaling and 50 cents for repairs, above mentioned, should not therefore be considered in comparing the two lists with a view of arriving at an estimate of the difference in the cost of logs in the respective mills. With those charges excluded the difference between the two statements is \$1.07 per thousand in favor of Fort Fairfield. It does appear, however, and it should be noted, that the river current at Fort Fairfield is much swifter than at Fredericton and that it is more difficult to handle logs and booms in the Aroostook region than at the latter point; that the Fort Fairfield shipper maintains from 16 to 20 piers in the river and also a boom every year, and he distinctly testifies that the expense of handling logs at that point is as much as the boom charge at Fredericton, taking all the expenses into account. Estimating the difference in cost of logs in the mills at the two places at \$1.00 per thousand feet in favor of Fort Fairfield, and as one thousand feet of timber will make an average of ten thousand shingles, each thousand being estimated to weigh 200 pounds, this gives Fort Fairfield the advantage in cost of about 5 cents per hundred pounds. But on the other hand Fredericton has an advantage in rates of 9 cents per hundred, and, therefore, this estimate would give it a net benefit in the matter of cost and rates of 4 cents per hundred pounds, 8 cents per thousand shingles, and (reckoning 22,000 lbs. to a car) \$8.80 per car-load.

Conclusions.

The important question presented for decision is whether rates charged by defendants for the transportation of shingles give undue preference or advantage to Fredericton, or subject Fort Fairfield to undue prejudice or disadvantage in its competition with Fredericton in the shingle industry, the shipment of that commodity, and its sale in the Boston market.

Fort Fairfield is more advantageously located than Fredericton with reference to the place where the timber is cut and the cost of driving logs to and getting them into the mills. On the other hand, Fredericton is more favorably situated as to facilities for the transportation of the manufactured article to the markets, for it is somewhat nearer in point of distance, and being located on the banks of a navigable stream, it can apparently, if pressed by high rail rates, send its traffic by vessel to market ports. We say that water transportation for shingle traffic *apparently* threatens the defendants at Fredericton, for the testimony does not present facts pertinent to this question sufficient to form the basis of a positive opinion.

We only know by the proof that a river runs past Fredericton to the sea, and that five small schooners were loaded with shingles during the short time after this complaint that a 20 cent rate was in effect on that commodity to Boston, and that they did *not* go to Boston. Where did those schooners go? Why was no Fredericton shipper called to testify in this case? Why is it that defendants failed to show the shipment of a single cargo of shingles from Fredericton to Boston or any other *named* point at any time? What draft vessels can navigate loaded from Fredericton, and what is the depth of the channel at different states of the tide? Is the statement incontrovertible which we find undisputed in this case that buyers and dealers prefer their shingles to come by rail because of quick transit, smaller shipments, and ability to keep greater assortment of different grades within the compass of a smaller stock than would be necessary if they received them by sea; and if true, is such preference strong enough to induce the great majority of consignees to pay a considerably higher rate of freight? Were those schooner loadings at a critical time after all nothing but a sharp practice of the Fredericton shingle shipper to induce a return to the old and favorable Fredericton rate? Indeed, for anything we know to the contrary, these schooners might have been destined no farther than St. John. Though answers to these interrogatories are material to a solution of the question "whether water competition of controlling force in respect to traffic important in amount" exists for shingle transportation from Fredericton, they are not answered by the evidence.

When water competition is alleged to justify rates in any case under the statute, the carrier must affirmatively show by proof which has more than the effect of presumption and which clearly establishes that such competition is a controlling factor in the transportation of traffic important in amount from the point in question.

Defendant's principal witness testified that the reason for making the 16½ cent Fredericton rate, when the one important mill was built there, was to protect Fredericton from the competition of St. John, located on the coast, 44 miles from Fredericton, and the eastern terminus of the Canadian Pacific line. At the time this complaint was brought the rail rate on shingles from St. John was 16½ cents, and that rate was also in force at Fredericton. That charge was and is insufficient to hold any shingles to the rail line at St. John, but at Fredericton it was controlling, and under that rate the roads took the traffic. Water transportation being a controlling and even a monopolizing competitor for shingle carriage from St. John, and Fredericton being situate but a short distance from St. John and upon a river which is claimed to

be open from Fredericton to navigation by sea-going vessels, why is it that the rail rate which cannot secure from the water carriers any traffic from St. John, can have such overpowering effect at the near by town of Fredericton as to hold traffic from that point to the rail line? The evidence does not answer this question. Moreover, the 16½ cent rate at Fredericton has, since this complaint was brought, been voluntarily increased by defendants to 17½ cents per hundred pounds, without apparent effect upon the volume of rail traffic from that place.

Although water competition may threaten rail carriage from Fredericton, the case, in our opinion, presents a broader standard of rate adjustment than that of possible water transportation from that point, and this is that which defendants themselves employ in fixing and maintaining the charge from Fredericton. We think that the facility with which Maine logs can be driven down the rivers to St. John, at comparatively slight additional cost above such cost to Fredericton, and the fact that water competition at St. John is so influential as to debar the roads from obtaining any shingle or lumber traffic at that point, are really the controlling reasons for the low Fredericton rate. The interests of Fredericton were identical with the interests of the carriers themselves, for, if putting the nominal St. John rate in force from Fredericton would enable the manufacturers at that point to profitably saw shingles and ship them over the more convenient and preferable rail route, it was not only good business policy on the part of the carriers, but a proper recognition of the shingle interests of Fredericton to establish a low but profitable rate at that point and "protect it from the competition of St. John."

Fort Fairfield shingle makers are likewise affected by the cheap log-drive, and are also active competitors of Fredericton and St. John sawyers for the sale of shingles in the large Boston market. Aroostook river shingle timber is driven down that stream past Fort Fairfield and thence down the St. John river past Fredericton to St. John and the sea. The same carrier serves St. John, Fredericton and Fort Fairfield, and if Fredericton is entitled to protection in its competition with St. John, then Fort Fairfield has also the right to demand, and the carriers have equal advantage in affording to that point, reasonable protection in its competition with Fredericton and St. John.

The defendants contend that the difference in rates is nothing more than the difference in cost of timber in the mills. Even if the evidence fully sustained that contention, it would not be a justification for the disparity in rates. Each locality is entitled to have and retain as against all other localities the benefits which naturally accrue to it by reason of its advantage

location. *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.* 4 Inters. Com. Rep. 65, 5 I. C. C. Rep. 264; *Minneapolis Chamber of Commerce v. Great Northern R. Co.* 4 Inters. Com. Rep. 280, 5 I. C. C. Rep. —. This principle was surprisingly well expressed by a Fort Fairfield shingle manufacturer while testifying in this case. In answer to a question of defendants' counsel during cross-examination he said: "I can't see, if the Fredericton lumber costs 5 cents more a thousand, why you should charge me that extra 5 cents." The higher rate from Fort Fairfield must be justified on some other ground than that of greater cost of production at Fredericton or be reduced. Fort Fairfield, Fredericton and St. John are competing points; the Fredericton rate is fixed, not by relative cost of production, but with respect to the traffic conditions which prevail at St. John; and, according to its situation, Fort Fairfield rates should be made with like reference. Keeping these main points in view, what, under all the circumstances, is a relatively fair and reasonable rate from the latter point?

Fort Fairfield is located on a branch line of one division of the Canadian Pacific System. Fredericton is located on a branch line of a different division of that system. The two divisions join at McAdam Junction, a few miles from Vanceboro, where the Maine Central connects and takes the traffic; the distance of Fort Fairfield from Vanceboro is 119 miles, while that of Fredericton from Vanceboro is 67 miles. There is no definite proof in this case that it costs materially more *per mile* to operate the Vanceboro-Fort Fairfield line than to operate that which reaches Fredericton. We are asked to infer such greater cost from the interior situation of Fort Fairfield and the fact that the short Aroostook branch road does not pay full interest on its bonded indebtedness. There is no testimony showing the financial condition of the line through Vanceboro to St. John and that of the Fredericton branch, or that of the line running north from Vanceboro with which the Aroostook branch connects at Aroostook Junction; nor is there any testimony showing the character of grades or material variation in expense of operation. The Canadian Pacific does not make separate annual reports to this Commission for these different branches or divisions. A departure from equal mileage rates on different branches or divisions of a road is not conclusive that such rates are unlawful, but the burden is on the company making such departure to show its rates to be reasonable when disputed. *Logan v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 431, 2 I. C. C. Rep. 604.

The answer of the Maine Central avers that the Fredericton rate is not remunerative in itself, but that it does afford some profit

above cost to the carriers by holding not only shingle but other traffic to the rail lines which would otherwise be encouraged to seek carriage by water; and that a large amount of freight is secured from new business built up by shippers, the outgrowth of their exclusive patronage of the rail lines. If this portion of the answer was directed to the 16½ cent shingle rate in force when complaint was made, the defendants have added to their profits by the advance of ½ of a cent above that rate; besides, we have seen that they have a nominal rate of 16½ cents in effect for 44 miles longer haul from St. John, and while they do not get business under that rate, they advertise that charge to the public as a rate for which they are *willing* to take shingles from St. John. In the absence of proof to the contrary we must accept the averment that the rate from Fredericton is profitable, if not in itself, then as a factor in developing business at and traffic to and from that point.

Shingles are low grade freight. The rate from Fredericton yields a through rate per ton per mile to Boston of 8.2 mills, and under the divisions between the carriers, a rate per ton per mile to the Canadian Pacific of 1 cent and 7 mills; that is to say, for 67 miles haul this company gets more than double the rate per ton per mile produced by the through rate for the whole distance. It is further observed that after deducting its share of the Fredericton charge, which the findings show amounts to about one third of the whole charge, the other two roads divide the balance in the proportion of 70 per cent to the Maine Central for 251 miles and 30 per cent to the Boston & Maine for 108 miles, and a slight calculation will demonstrate that this division is strictly upon a mileage basis, for 70 per cent of the added mileage is almost exactly 251 miles, and 30 per cent is then of course very nearly 108 miles.

Taking now the Fort Fairfield rate we find that the through rate per ton per mile to Boston is 1 cent and 1 mill, and that under the divisions between the carriers, the Canadian Pacific gets 1 cent 7.8 mills per ton per mile for its distance of 119 miles. This is 8 tenths of a mill more per ton per mile than it gets out of the Fredericton rate for 67 miles. The percentage share of this road out of the total charge is 40 per cent, the other roads dividing the remaining 60 per cent upon the mileage basis shown above. This analysis of the rates per ton per mile and divisions between the carriers shows that if the through rate from Fredericton is not particularly profitable, it is, nevertheless, under the basis of division, much more profitable to the Canadian Pacific than to its connecting roads, and that the basis on which both the Fort Fairfield and Fredericton rates is divided between the carriers is by arbi-

trary (either fixed or percentage) deduction of the Canadian Pacific share, and a pro-rating of the balance on a mileage basis; so that from Fort Fairfield that company for 25 per cent or one fourth of the distance gets 40 per cent or two fifths of the rate, and from Fredericton for about 16 per cent or a little over one sixth of the distance it gets 33 per cent or about one third of the rate.

The apportionment of a rate to different parts of a through line does not determine the charge to the public, but it may be significant on the question of a reasonable rate for the whole distance. *Brady v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 78, 2 I. C. C. Rep. 181. When the reasonableness or the relative reasonableness of charges is challenged every material consideration which enters into the making of such charges is pertinent to the inquiry.

From what has been said it is apparent that the Canadian Pacific receives an extremely liberal share of either through rate as compared with those accepted by the other carriers; and it is also clear that any reduction which may be ordered need not be chiefly borne by the other roads; but how such reduction should be accomplished is matter for the carriers to determine among themselves. *Boston Fruit & Produce Exch. v. Pennsylvania R. Co.* 8 Inters. Com. Rep. 604, 5 I. C. C. Rep. 7; *Georgia Railroad Com. v. Clyde SS. Co.* 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324. This brings us to a statement in the answers of the defendants that if any reduction of the Fort Fairfield rate should be required the Canadian Pacific would be forced to take shipments of shingles from points on the Aroostook branch only at local rates. That company may do this, but if the shipment or carriage is still continuous from Fort Fairfield to Boston, the mere circumstance that it insists on its local rate for its share of the through charge will not avail if the total charge is unreasonable, *Georgia Railroad Com. v. Clyde SS. Co. supra.* And whether such action would operate to give undue preference to other points from which it is a party to lower through rates or to an arrangement for continuous carriage or shipment is a matter to which it would doubtless feel obliged to give due consideration.

The essential question here is one of relatively reasonable rates; not whether either rate is reasonable in itself. It is the effect of the carriers' action at one point upon the legitimate business prosperity of another point, which is the vital point in this controversy. If the present Fredericton rate does not actually result in profit, the carriers should not seek to control or stimulate traffic from that point by making the rate so low; and if they carry for unusually small compensation from that place they do so under the plain injunction of the law that

their action must not inflict undue prejudice or disadvantage upon other communities or persons. When a carrier engages in transportation for which, by reason of competitive conditions or for purposes of its own, it receives less rates from some patrons and at some localities, it accepts the legal obligation to give impartial service to other patrons and at other localities that sustain similar relations to the traffic. *Manufacturers & Jobbers Union v. Minneapolis & St. L. R. Co.* 3 Inters. Com. Rep. 115, 4 I. C. C. Rep. 79.

Applying this principle to the situation here and considering that the controlling influence upon traffic in this case is shingle manufacture at and water competition from St. John, and that the effect of such competition at Fort Fairfield is only less in degree than at Fredericton, we must hold that a rate from Fort Fairfield, on such low grade freight as shingles, which is 50 per cent higher than the rate in force on that commodity from Fredericton, is not justified by the mere fact that Fort Fairfield is located 52 miles farther than Fredericton from the market and upon a branch road unremunerative as a separate line. That road is short in length and its operation is not unprofitable to the main line; it is regarded and worked as a "feeder" to the Canadian Pacific system.

While it is evident that Fort Fairfield is entitled to some reduction from the present rate of 26½ cents, just how much the rate should be reduced is difficult to determine. It might with some reason be held that a rate per ton per mile of 8.2 mills produced by the Fredericton rate of 17½ cents, though not very profitable from that point for the distance of 426 miles to the market, is a sufficient rate per ton per mile for the distance of 478 miles from a competing locality in the same territory to the same market; the rate per ton per mile rule being that while the aggregate charge should increase with distance the rate per ton per mile should decrease; but upon all the facts we believe that the proper relation of these rates is indicated by the defendants' own action soon after this proceeding was instituted. Immediately after the complaint was filed they reduced the Fort Fairfield rate to 26½ cents and raised the Fredericton rate to 20 cents, and they alleged as a reason for subsequently lowering the latter rate to 17½ cents that the traffic from Fredericton began to go by water. While the evidence is not sufficient upon this point we do not question that under the 20 cent rate *some traffic went somewhere by sea*; but we have seen that Fort Fairfield occupies a definite relation to the Fredericton shingle industry and to St. John water competition by reason of the facility of driving shingle logs down the river to the coast, and we think an adjustment which the defendants voluntarily established and attempted to continue cannot be unfair to them

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and should be enforced by transferring the 2½ cent reduction to Fort Fairfield, unless they prefer to again put in the 20 cent rate at Fredericton; for it is the relation of rates which constitutes the question in this case, and defendants can at their option make that relation reasonable by raising the latter or lowering the former rate, provided neither rate is made unreasonable in itself. This, on the basis of 22,000 lbs. to the car-load, will amount to a difference of \$5.50 per car.

Our reason for not comparing lumber rates with shingle charges in this case will appear from the following statement of the conditions which govern lumber transportation from the points in question. Notwithstanding lumber rates are as low as 15½ cents from Fort Fairfield, and correspondingly low from other Aroostook branch points, shipments of lumber over that branch do not constitute more than 4½ per cent of its traffic, and at Fredericton, where the rate is only a cent lower, not over a dozen cars a year go by rail. The obvious conclusion is that the tendency of the timber traffic to seek the cheap means of the log drive to the coast, and thence by sea, either in the form of log or sawed into lumber, cannot be overcome by any rates the railroads can afford to make. Yet, despite this natural tendency, the evidence shows that under the relatively favorable rate from Aroostook points considerable lumber *does* go by rail, and that practically none is shipped from Fredericton, and this is a clear indication of recognition on the part of the rail carrier of the favorable situation of Aroostook branch points in respect of distance from the timber cut and cost of logs in the mills; and further, of the controlling force of the log drive upon lumber traffic and rates. The river drive operates with stronger force upon the lumber than upon the shingle trade. Why this is so the testimony does not show, though various reasons deducible from general knowledge might be stated; but it is idle to speculate as to the cause when the fact itself is sufficient for the purpose in view. The lumber rates have not been regarded as a standard by which to judge of the legality of shingle rates in this case, because it is shown that the river drive has materially different effect upon the manufacture and shipment of the two articles.

Before concluding this report we desire to say that the fact of Aroostook shingle shipments being considerable, under rates in force for the last two years, is not a sufficient answer to the charge of undue disadvantage which we find sustained; nor is such answer strengthened by the further fact that several shippers on the Aroostook have, willingly or otherwise, expressed themselves satisfied with present rates. Whether Aroostook shingle men have been prospering under adverse rates, or

whether some of them are content with present rates, does not determine the main question. The aim of this report is not to ascertain the measure of their prosperity, or how high rates their industries will stand; its purpose is to determine their rights.

There are some other facts which ought to be noticed. The timber from which shingles are made both at Fort Fairfield and Fredericton is grown in the state of Maine. No Canadian timber of any consequence is sawed at Fredericton. The shingle industry has greatly developed at this point since the year 1887, and one rate has, with little variation, been in effect from that point during all that time. It was originally 16½ cents; when this complaint was brought it was 16½ cents, and now it is 17½ cents. At Fort Fairfield the rate from 1887 to 1889 was 34 cents; from 1889 to April, 1892, it was 31½ cents; and following the institution of this proceeding it was made and now is 26½ cents. During the year ending July 31, 1891, Fredericton shipped 284 cars; and the year following its shingle shipments increased to 400 cars, a total of 684 cars for the two years. The hardship entailed upon Aroostook river points was so manifest that the defendants themselves, at the time of complaint, saw the necessity of a large reduction of the 31½ cent rate; and while that reduction was, as defendants' contend, a voluntary concession, yet, having followed shortly after the complaint, it can be regarded in no other light than as a concession which Fort Fairfield and other Aroostook points were entitled to as a matter of right. The present difference in rates of 9 cents a hundred against Fort Fairfield, amounting on, say, 250 cars a year, to nearly \$5,000, it seems to us is unduly prejudicial to

that point in favor of Fredericton, and a difference that would be nearly, if not quite, unbearable if it were not for the less cost of logs in the mills. The reduction to be ordered will reduce this amount by about \$1400. Whether this is all Fort Fairfield is entitled to we have some doubt; but considering the character of the lines, the sparsely populated country through which they pass, and the fact that neither of the present rates can be considered unreasonable in itself, that amount of reduction is as much as we feel called upon to require.

The claim for reparation in this case was for a refund of the excess over reasonable charges collected by defendants subsequent to complaint. The substantial reduction announced by the carriers soon after the proceeding was instituted was intended by them to satisfy the complaint, and we are not satisfied, because that reduction as finally fixed was accidentally insufficient, that the order for further reduction should have retroactive effect. The claim for reparation must be denied.

The substance of the order based upon the conclusions herein stated will be that defendants cease and desist from charging or receiving for the transportation of shingles in carloads from Fort Fairfield, Stevens' Siding, and Hurd's Siding in the state of Maine to Boston in the state of Massachusetts and points taking Boston rates, any greater aggregate rate per hundred pounds than is found and obtained by adding 6½ cents per hundred pounds to the rate contemporaneously in force over their roads for the transportation of shingles in carloads from Fredericton, in the province of New Brunswick and Dominion of Canada, to Boston and the Boston rate points aforesaid.

JOHN W. S. BRADY and GEORGE T. PARKHURST, Partners, Trading under the Firm Name of J. PARKHURST & Co.,

v.

THE PENNSYLVANIA RAILROAD COMPANY, THE PENNSYLVANIA CO., THE PITTSBURGH, CINCINNATI & ST. LOUIS R. Co.

and

JOHN HENRY NICOLAI, Trading as "EAGLE OIL WORKS,"

v.

THE PENNSYLVANIA RAILROAD COMPANY, THE PENNSYLVANIA CO., and THE PITTSBURGH, CINCINNATI & ST. LOUIS R. Co.

Application by defendants for rehearing.

Mr. James A. Logan, for Defendants, in support of application.

Mr. John Henry Keene, for Complainants, in opposition thereto.

MEMORANDUM.

By the Commission:

The original complaints and answers in these cases presented one and the same question substantially, and they were, by consent of parties, tried together. The complaints were filed November 28, 1887, and alleged that between April 27 and September 1, 1887, the defendants charged complainants 50 cents per barrel of 45 gallons of oil shipped from Washington, in Washington county, Pennsylvania, by way of Pittsburg, to Baltimore, Maryland, and that the said charge of 50 cents was unjust and unreasonable to the extent of 10 cents per barrel.

Complainants further alleged that at the time said alleged excessive charge of 50 cents was being made by defendants they were (and, as the proof shows, one of them, the Pennsylvania Railroad Company, was) carrying oil to Baltimore from Bradford, Clarendon, and points in the Bradford oil field, about the same distance from Baltimore as the Washington oil field, at 40 cents per barrel of 45 gallons, and that this difference of 10 cents per barrel in the transportation rates and charges from the Washington and from the Bradford oil fields "are not based upon any reasonable or just foundation whatsoever."

In their answer, the defendants averred "that said charge of 50 cents is just and reasonable considered by itself or compared with the rates from Bradford, Olean, and Clarendon" for the reason, as they further averred, that the traffic in passing through the city of Pittsburg was moved the length of two railroad yards, which movement was slow and expensive, and that "the hazard because of liability to ignition in passing through said city of Pittsburg was great to the company."

In their petition for rehearing, the respondents present several grounds for their application, but in the main their motion is based upon:

"First: That the superior quality of the oil produced in the Washington oil fields, as compared with the oils produced in the Bradford and Olean districts, justifying a larger charge for the former, although adverted to in the testimony, was not sufficiently developed in the evidence, and was not sufficiently considered by the Commission in determining the case.

"Second: The fact of adverse gradients on the line over which the Washington oil passed, and favoring gradients on the line over which the Bradford and Olean oils passed, although presented by the testimony, was not given weight by the Commission, inasmuch as the report says, 'The (defendants) did not call to their aid any alleged difference in grade, volume of business or other causes which affect the cost of transportation.'"

It is true that the superior quality of Washington oil was "adverted to in the testimony." The officers and agents of the defendant companies in their testimony went extensively into the nature of the traffic and the circumstances attending it, including the slightly greater value of Washington oil, the alleged risk of passing through the city of Pittsburg and the extensive yards of the Pennsylvania Railroad Company, the heavy grades passed over in going up the mountains, and the care necessary to be taken in going down. Except the alleged risk of passing through Pittsburg, these questions were not raised by the complaint or answer, but were taken into consideration in connection with all the facts by the Commission before the findings and order of the Commission were made.

The motion for rehearing is apparently based chiefly upon the following statement contained in the opinion, or conclusion, of the of the Commission.

"The defendants justify the fifty cent rate as reasonable on the alleged hazard and liability to accident in carrying oil through Pittsburg, and on this alone. They do not call to their aid any alleged difference in grades, volume of business, or other causes which affect the cost of transportation."

In the argument of counsel in support of the motion for rehearing the respondents insist that this statement shows that the question of gradients was not given weight by the Commission. This is an erroneous view of the matter. All that was meant or intended by this language used in the opinion was that the respondents by assigning the alleged slow movement and expense of passing through their Pittsburg yards and the hazard and risk of passing through Pittsburg city alone as reasons in justification of the 50 cent charge, relied upon these reasons alone, and did not deem any other to have any bearing on the subject. No other was set up in the answer, and no argument was made claiming any other. As shown by the opinion in facts found, the controversy and correspondence between complainants and defendants as to the oil rates from Washington had been going on for two or more years, and in that correspondence the superior quality and commercial value of the Washington oil was always assigned as the justification for the higher transportation charge on the Washington oil. In that correspondence neither the expense of passing the yards, nor the risk which was assigned in the answer as justification, nor the gradients, was mentioned or "was given weight" by the respondents themselves. It was by the testimony of the officers of the Pennsylvania Railroad Sys-

tem shown that the general cost of transportation is "getting down." The rate from Washington, Pa., to Baltimore was never higher than 50 cents, though it had been lower. The Commission was of opinion that it should be lowered to 40 cents, and so ordered, and is still of opinion that that is as high as the rate may reasonably be, and that the Commission correctly so found. The motion for a rehearing must, therefore, be denied.

CHARLES H. BROWNELL

COLUMBUS & CINCINNATI MIDLAND RAILROAD COMPANY.

W. R. SCHRIEVERS AND FIFTY-TWO OTHERS, Claiming to be Large Dealers in Eggs;
JACOB GUAGI AND TWO HUNDRED AND NINETY-FIVE OTHERS, Claiming to be Small Dealers in Eggs;

CLARK A. POST AND FOUR HUNDRED AND TWENTY-ONE OTHERS, Claiming to be Farmers, and among other things, Producers of Eggs and Selling Eggs to Local Dealers in Small Quantities, Intervenors as Complainants.

THE PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, Intervenors as Respondents.

[No. 187.]

1. Unreasonable or unjust classification of a commodity is not shown by evidence of lower classification for articles widely dissimilar in the elements of risk, weight, bulk, value, or general character. The proper method of comparison is the classification accorded by the carriers to analogous articles.
2. When an article moves in sufficient volume and the demands of commerce will be better served, it is reasonable to give a lower classification for carloads than that which is applied to less than carload quantities, but the difference in such classification should not be so wide as to be destructive to competition between large and small dealers. *Thurber v. New York Cent. & H. R. R. Co.* 2 Inters. Com. Rep. 742, 3 I. C. C. Rep. 473, cited and reaffirmed. The justice of the claim for a lower rating on carload lots can only be determined upon the facts in each case.
3. When on complaint of a carload shipper unjust discrimination is alleged to result from equal rates on carload and less than carload quantities of the same commodity, the burden of proof is upon the complainant.
4. Upon complaint alleging unjust discrimination against carload shippers of eggs in favor of shippers in less than carloads, it appeared that under the "official classification" eggs take second class rates for carload or less quantities; that the commodity is carried in refrigerator cars; that for carload shipments ice to the amount of 6,000 pounds is furnished by the carrier without extra charge; that less than carload shipments are taken from local stations in "pick-up" cars to distributing points and forwarded in carloads to New York and other large markets; that notwithstanding the special facilities afforded to small shipments by the carriers, the large dealers control 88 per cent of the traffic. Held, upon all the facts in the case, that no unjust discrimination results to the carload shipper from the equal rating of carload and less than carload lots and the special service rendered in gathering and forwarding small shipments, and the complaint should therefore be dismissed.
5. Power of concentrated business interests to force concessions in transportation rates which operate to the disadvantage of the general public discussed.

Complaint filed March 29, 1889.—Answer filed April 22, 1889.—Hearings at Toledo, Ohio, May 24, 1889.—Indianapolis, Ind., Sept. 17, 1889.—Case ordered re-opened May 24, 1890.—Additional testimony taken at Cincinnati, Ohio, May 3, 1892.—Petitions for leave to intervene filed February 6–10, 1892.—Briefs filed July 11, 1889, and May 25 to Oct. 5, 1892.—Decided April 1, 1893.

CLASSIFICATION of Eggs. See Complaint, 3 Inters. Com. Rep. 491.

Hon. J. B. Foraker, for Complainant.

Mr. H. L. Bond, for the Columbus & Cincinnati Midland R. R. Co. and The Baltimore & Ohio Railroad Company.

Mr. J. T. Brooks, for the Pittsburgh, Cincinnati & St. Louis Railway Company.

Mr. H. H. Poppleton, for the Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

REPORT AND OPINION OF THE COMMISSION.

McDill, Commissioner :

This complaint was filed March 29, 1889. The case was partially heard at Toledo, Ohio, on the 24th day of May, 1889, and for the purpose of taking more testimony on the part of both complainant and defendant, the hearing was continued at Indianapolis, Indiana, on the 17th of September, 1889. At that point the complainant appeared in person, but the defendant was not represented. Amongst other things there done the complainant filed questions in writing which he wished to be submitted to the chairman of the Central Traffic Association for answer. The case was to have been submitted upon the receipt by the Commission of answers to the questions so filed, and such answers were filed on the 30th of September, 1889.

After examination of the record at that time, the Commission found that it was claimed that it would be for the advantage of ordinary producers of and local dealers in eggs to have carload lots transported at less rates than was charged for quantities in amount less than carload lots; and that they, with the larger dealers, preferred to have such less rates for carload lots, and there having been little or no testimony introduced upon which to base this claim; it being also claimed that many railroad officials agreed that there should be a less rate on full carload lots than for less than carload lots; and the case having been tried in a somewhat irregular manner whereby the petitioner might have been misled in the manner of putting in the evidence on his part, it was ordered that the case be re-opened for the purpose of enabling both parties to present further evidence bearing upon the above claims.

As a result of this order, the intervenors mentioned as intervening complainants filed what they styled petitions; and the issues being made up, the case came on for hearing at Cincinnati, Ohio, May 3, 1892.

The complaint is that the defendant, the Columbus & Cincinnati Midland Railroad Company refuses a carload rate on eggs when a car is shipped from one consignor to one consignee, while a carload rate is granted on sugar, coffee, starch, soap, oranges, celery, pumpkins and squashes, thereby discriminating against eggs; and that the rate on eggs in

carloads of 20,000 pounds weight from Washington Court House, Ohio, to New York, is \$107.00, and is unreasonably high and excessive when compared with carload freights to New York.

The original respondent, by its General Superintendent, answered April 15, 1889, admitting that eggs were carried at one rate, regardless of quantity, and alleging that the rate is in accordance with the classification of the Trunk Lines (over some one of which eggs must go from Washington C. H. to New York); denying that thereby any discrimination is worked, but alleging that the common rate to all persons, whether shipping by the carload or in less than carload lots, is in the line of public policy, treating all shippers alike; and denying that on 20,000 pounds, that being the weight of a carload of eggs, the rate from Washington Court House to New York, being 53½ cents per 100 lbs., or \$107.00, is unreasonable.

The several intervenors described as "large dealers in eggs, small dealers in eggs, and farmers or producers of eggs," filed petitions stating that they are of the opinion that it will be for the best interests of all of the producers and local dealers, and also the railroads, to have a different and reasonably lower classification on eggs shipped in proper carload lots than is now charged for eggs in less than carload lots, over the railway lines from such points as Washington C. H., Wilmington, London, Xenia, Greenfield, and other such points in Ohio and other western states, to New York and other cities in the east.

There are some things in the appearance of these intervening petitions that might indicate that the signers did not clearly apprehend the nature of the questions involved.

One of the signers under date of January 26, 1892, addressed the Interstate Commerce Commission saying that "he was asked a few days before to sign a petition for a lower classification on eggs than is now charged by the railroad companies. That he signed the petition thinking it called for a reduction in classification of eggs in a local way as well as in carloads. That he has discovered since that the petition is misleading in this respect and that it really asked for a lower rate in carload lots than is charged in a local way. If

such is the case, he states he is bitterly opposed to any such measure, as such an act would certainly as nearly monopolize the trade as anything that could be done."

Upon the order above mentioned being made, various railroad companies engaged in the service under consideration were notified of the order and the scope of the proposed hearing, and in consequence thereof, The Pittsburgh, Cincinnati & St. Louis Railway Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company and The Baltimore & Ohio Railroad Company appeared and were made parties to the proceeding as intervenors and defendants.

The first question presented is whether the rate of 53½ cents per cwt. for eggs from Washington Court House to New York is unreasonable and excessive, as compared with other carload rates upon products mentioned in complainant's petition, so as to create an unjust discrimination against large dealers in eggs, and in favor of the small dealers. If the evidence fails to establish this proposition, the complainant, it would seem, must fail for both in the production of testimony and in his argument the complainant has sought to establish his contention by a comparison of the charge upon a car of eggs of 20,000 pounds weight with other carload rates on other articles. These rates as set forth in a table attached to Mr. Brownell's first statement are carload rates upon cranberries, peanuts, tobacco, dried corn, fish, fresh or frozen, biscuit, bread, yeast cake, ginger ale, condensed milk, cocoanuts, celery, cucumbers, coffee, starch, soap, kraut, hops, oranges, lemons, beeswax, mince-meat and dressed beef.

Complainant has also filed what is called a comparison between the Western and Official Classification, showing, as it is claimed, that almost every other farm product except eggs and dairy products has been awarded a classification by which it is granted a carload rate less than the rate charged to those who ship in less than carload quantities, and it is contended that eggs are unequally treated and improperly discriminated against by reason of not having a carload rate. With reference to the comparison sought to be made between eggs and such articles as cranberries, peanuts, tobacco, ginger ale, cocoanuts, celery, cucumbers, starch, soap, kraut, etc., it is difficult to see any particular similarity of the articles that would justify a comparison. Take, for instance, the article of cranberries. The nature of this product seems entirely different from that of eggs, the risk in shipment cannot be the same, neither can bulk or value be near the same; yet all these matters are, according to the testimony of experts, to be considered in determining upon the classification.

One of the expert witnesses, when testifying, says that weight; space occupied; value; ease

of handling; liability to accident or loss; value of the article in the event of accident or loss; frequency or infrequency of shipments; the necessity of providing cars of special construction; the necessity of special care of property such as furnishing ice, stoves, etc.; the speed with which the carriage must be made; the ability to load so that the cars may be filled to their fullest capacity; the liability of certain classes of freight to injure other freight by contact or in accidents, such as acids; the dangerous character of some freights, such as matches and powder; the character of packages such as wine in glass which is much more fragile than wine in wood; are all conditions to be considered in determining upon the proper classification of articles, yet with reference to any or all of these matters there is little if any testimony offered upon which an intelligent comparison can be based.

The evidence shows that in the western states, or upon the lines of railway which have adopted what is known as the Western Classification, eggs in carload lots are placed in a different class from eggs in less than carloads, and this fact is urged by counsel with much earnestness as indicating by the action of the railways themselves the propriety of a distinction in rates as prayed for. In connection with this it is urged, and there is some evidence to sustain the position, that many railway men are of the opinion that there should be a carload rate less than the rate charged for less than carload shipments, although the record seems to show that they contemplate a change by raising the rate on small shipments. It is also urged that most of the railroads engaged in carrying eggs would prefer a carload rate and a less than carload rate, but that the Pennsylvania road has constantly opposed such a distinction, and thus far has been successful in hindering its adoption by the carriers.

The evidence in the case shows that the cost of gathering eggs to the large dealers, who usually ship in carloads, is about 20 cents per 100 lbs.; and it is earnestly contended that if the small dealer has his goods taken up and carried to market at the same rate as the large dealer, necessarily there is a discrimination against the large dealer to the extent of his expense, 20 cents per 100 lbs., in gathering eggs.

As to all these arguments the defendants answer that for a great number of years there has been growing up a system by which the railroad carriers seek to reach the small dealers; that they have developed the present system of gathering eggs in the interest not only of the public, but in their own interests; that it is far better for them to deal with the small dealers than with a few large shippers, and that the real purpose or wish of the complain-

ant is to bring about a discrimination against shippers in small quantities; that the large shippers would, if the power was granted, concentrate the egg business in their own hands, and would then be in a situation to endeavor by throwing their business all to one road, to compel unfair concessions to them; and that it is for the interest of the railways and also for the interest of the public, so far as possible, that transportation transactions should be general, and directly with the smaller business men, rather than with a few parties who have monopolized the business, or would if further advantages were granted them, eventually succeed in doing so.

The facts found from the evidence are as follows:

(1) The original complainant, C. H. Brownell, residing and doing business at Washington C. H., Fayette county, Ohio, is a buyer of eggs and a shipper of the same in carload lots to the city of New York; and in making such shipments he incurs considerable expense in collecting from producers and small dealers such carloads, and in caring for and packing the same.

(2) While said complainant is a shipper in carloads, rated at 20,000 lbs., and upwards, each, he is allowed by defendants to ship a quantity greatly less than 20,000 lbs. as a carload,—a quantity varying from 6,000 lbs. upwards, the same being iced by defendants and sealed to its destination as a carload at the regular rate of 58½ cts. per 100 lbs., as second class freight, according to the Central or Official classification;—in other words, if complainant ships 10,000 lbs. in each of two cars, the 20,000 lbs. go through to destination, under seal and iced, in two cars for the same money as 20,000 in one car. Ice is not furnished the shipper in small lots, and the average amount necessary for this purpose is 6,000 lbs. to the car.

(3) The total cost to said complainant of collecting his shipments of eggs—including packing in cases and loading into the car, and not including cost of cases, is about 20 cts. per 100 lbs.

(4) The testimony shows that shipments of eggs in carload lots are attended with less damage by breakage and otherwise, than are shipments in less than carload lots.

(5) It appears that by prevailing custom and arrangements made, all producers of and dealers in eggs along the lines of defendants' roads are able to bring their product directly to the various depots and stations, put it into refrigerator cars and have it carried to its destination, to wit: the larger cities, generally on the seaboard,—Baltimore, Philadelphia, New York, etc.,—at a uniform rate per 100 lbs.; whether in large or small amounts, one hundred pounds being the unit as to eggs, and cer-

tain other kinds of freight, under the Central or Official Classification adopted by defendants.

(6) While this arrangement is open alike to all—producers and dealers, large and small—yet there are some producers who prefer to sell directly to the small dealers, others to the large dealers who ship in carloads; and, again, some of the small dealers prefer to sell to large dealers instead of shipping for themselves to the eastern market. Various reasons incident to locality, distance to market, motives of personal convenience, motives arising from neighborhood acquaintance and mutual confidence between the parties concerned, and the many influences governing the transactions of daily life cause this diversity of practice.

(7) The Union Line, the through freight department of the Pennsylvania Company, of which the Pittsburgh, Cincinnati & St. Louis Railway, defendant company, is a leased road, has provided such refrigerator cars for all producers, dealers and shippers (within the range of the country wherein complainants reside) who may desire to ship eggs from their several places of residence or business to eastern markets over the roads of defendants.

(8) Said Union Line has a system or method of collecting farm and dairy products, including eggs, by means of "pickup" cars running over said range of country and gathering the greater portion of such freight at Chicago where it is concentrated into carloads; and as a general rule, such freight arriving at Chicago in the morning goes out the following evening on through fast trains to its eastern destination. This system extends as far west as Dakota and Nebraska, and has various central points for collection or concentration,—Chicago being the principal point, and Columbus, O., another, at which latter point is concentrated a large portion of the egg product of the surrounding country, including Fayette county and Washington, C. H., complainant Brownell's place of business. Agents of said Union Line are assigned to such central points and they travel over the adjacent districts of country, and solicit consignments direct from shippers; and this system has been in use from ten to twenty years. The Central or Official Classification of farm and dairy products, including eggs, is in use from the Mississippi river eastward and over a territory within which the complainant in this case resides; and west of said river a different classification as to many of said products, including eggs,—known as the "Western" classification—prevails.

(9) The present cost of the refrigerator dairy product car, such as is used in carrying eggs, is about \$1000. The weight of the car is about 42,000 pounds. It is equipped with self-couplers and air brakes. The old box car in which eggs were formerly carried weighed

about 23,000 pounds and cost about \$450. The rate upon eggs Chicago to New York was as follows, at the periods named:

In 1865	\$1.55 per hundred pounds.
1866	1.25 per hundred pounds.
1874	1.10 per hundred pounds.
1876	.85 per hundred pounds.
1878	.70 per hundred pounds.

1887 and at the present time, 65 cents per hundred pounds.

Section 2 of the Act to Regulate Commerce, so far as it may be claimed to be applicable to the case under consideration, prohibits charging a greater compensation for any service rendered "than is charged any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions."

It was specifically claimed by the complainants in the case of *Thurber v. New York Cent. & H. R. R. Co.* that carload rates upon certain articles, less in amount than the rate charged for smaller quantities of the same articles, were in violation of the second section of the Act. But the Commission held that "where the article moves in sufficient volume, and the demands of commerce are thereby better served, it is reasonable to give a carload classification and rate." 2 Inters. Com. Rep. 742, 752, 8 I. C. C. Rep. 478, 501. The Commission then proceeded to discuss and decide the specific questions involved as to rates for the carload and less than carload lots upon particular articles complained of, and held that the disparity between the rates shown to exist was not justified by the circumstances; that the differences made were unreasonable, and therefore their reduction within reasonable bounds was ordered. The propositions which seem to have been established by the decision were, that carload rates, as to some articles under proper conditions and circumstances, were reasonable and not forbidden by the statute, and that the difference between carload and less than carload rates should only be in proportion to the extra cost, or in the line of equalization. In the *Thurber* case the complaint was on account of a difference in rates between carload and less than carload rates. In this case the complaint is on account of an equality of rates.

The proposition of complainant in this case is, that carload rates being permitted in some cases, it is an unjust discrimination to extend the same rate on eggs to the smaller shipper as that given to the shipper by the carload. To maintain this proposition it would be necessary for the complainant to show that the different circumstances of the two kinds of service justify a different charge, and that in consequence of giving the small shipper the same rate as the carload shipper, an unjust discrimination has been brought about against

the large shipper. The evidence shows that no carload rate has been made upon eggs, but that equal rates by the 100 pounds have been granted to large and small shippers of that article.

To give the complainant the relief he seeks, upon the theory of the complaint, it will be necessary to order a carload rate at the figure now prevailing, and to order an increase of the rate to the small shipper. This course would be necessary because the complainant does not attack the present rate of \$107.00 on eggs per carload of 20,000 lbs. from Washington Court House to New York as excessive in itself. His contention is that it is excessive as compared with carload rates given to other articles. But it does not appear from the evidence that there is such a similarity of circumstances and conditions attending the carriage of the article cited by complainant, and the article in question, as to give a basis for fair comparison, and from which it may be determined that the difference in rates operates as an unjust discrimination.

A lower carload rate could only be required upon a showing that the circumstances and conditions of service to the large shipper were so dissimilar as to require, in the line of equal treatment, a less rate than is made for the small shipper. The evidence upon this point does not satisfy us that the Commission would be justified in making such an order in this case. Only a few points of difference have been established which might be deemed material to such an inquiry. They are the greater speed and saving of time in carload shipments from a single consignor to a single consignee, and a slightly lighter expense in the way of billing to one instead of several consignees. To counterbalance this, it appears that where carloads are sent they are iced by the carrier, while this is not done at all in the less than carload shipments. Undoubtedly something is gained in carload shipments in the receipt, hauling, delivery and unloading of the car; but, as we have seen, the evidence does not show that after due consideration of the differing conditions and circumstances surrounding the two shipments any unjust discrimination results from giving a common and equal rate. While the allegation is made that the rate is unreasonable and excessive, yet it is coupled with the proposition that it is excessive as compared with other carload rates, and the examination and trial has been conducted upon the theory that the grievance complained of is an unjust discrimination against the large shipper by reason of an equal rate to the small shipper.

While the complainant cites numerous articles, heretofore mentioned, as having a carload rate, and seeks to make a comparison between eggs and the articles named, and also cites the general concession of carload rates to agricult-

ural products, there is a dearth of evidence to enlighten the Commission as to the proper method of comparison, if any can be made, between eggs and the articles named by complainant. It is apparent, even to one not an expert, that there is no general resemblance between the articles mentioned by the complainant and the article in question. ¶ We are, therefore, driven to the conclusion that the complainant has failed to show by evidence any unjust discrimination against himself and other similar dealers in eggs by reason of the present rates.

If the relief asked by the complainant cannot be granted by ordering a lower carload classification and rate, a difference in rate between carload and other smaller shipments might be brought about by increasing the rate to the small shipper in less than carload lots. But the record shows that the complainant does not seek to raise the rate to the small shipper, although witnesses, who claimed common interest with the complainant, suggested that the less than carload rate might be increased; and there is some evidence which tends to show that railway freight managers, who were inclined to concede a carload rate, expected and wished that this should be accomplished by an increased rate to the small shipper. But the evidence fails to show that the rate to the small shipper is too low. In fact, the record as made by the complainant is against any such claim.

The table hereto attached shows the classification applied upon eggs packed in barrels or boxes in each of the various classifications now and formerly in use throughout the United States.

Statements showing classifications applied upon Eggs,*packed in barrels or boxes, in each of the various classifications now and formerly in use throughout the United States.

(Rates in Cents per Hundred Pounds)

Year	Name of Classification	From	To	L. C. L.		C. L.	
				Class	Rate	Class	Rate
1886	Joint Merchandise	Philadelphia	Elmira	2	32	4	18
1893	Official No. 11	"	"	2	30	2	30
1886	Middle & Western States	Buffalo	East St. Louis	2	50	4	26
1893	Official No. 11	"	"	2	47	2	47
1886	East Bound	Chicago	New York	3	70	3	70
1888	Official No. 4*	"	"	2	65	3	50
1893	Official No. 11	"	"	2	65	2	65
1886	West Bound	New York	Chicago	1	75	1	75
1888	Official No. 4*	"	"	2	65	3	50
1893	Official No. 11	"	"	2	65	2	65
1878	Western	Chicago	Kansas City	2	70	4	30
1887	Joint Western	"	"	2	75	3	50
1893	Western	"	"	2	60	3	42
1876	So. Ry. & S. S. Ass'n	Louisville	Atlanta	2	125	2	125
1880	So. Ry. & S. S. Ass'n	"	"	3	89	3	89
1893	So. Ry. & S. S. Ass'n	"	"	2	92	2	92

*From Aug. 15, 1888 to Feb. 17, 1890, inclusive.

From this it will appear that in the year 1886 and earlier, carload and less than carload rates were given, but that they were soon abandoned, 4 INTER 8.

and since about the year 1886 with a single exception for a short period noted in the table the Trunk Lines have carried at a fixed rate per 100 lbs. The same seems to be true of the roads embraced in the Southern System, while the custom prevailing in the Western System seems always to have been to make a difference between carload and less than carload rates.

In classification, dairy products and poultry have usually been classified with eggs. If one article embraced in a class is entitled to a carload rate, shippers of analogous articles embraced in the same class might claim the same treatment. Evidence, therefore, was introduced tending to show the effect of making a carload and less than carload rate upon such articles as butter and cheese. Witnesses representing the dairy interests were heard upon this question, and they united in declaring that the establishment of a carload rate upon dairy products would result in very serious injury to the dairy business as it is now conducted in the western states. It is therefore urged with some degree of force that the interests, not alone of those who are shipping eggs, but of those who are shipping dairy products, should be considered.

The evidence tends to the conclusion that the method of conducting the butter and cheese business is of such a character that the extension of a uniform rate per 100 lbs. to the small dealers is of very great advantage to them, and that the establishment of a carload rate would work a serious injury to the small producers of butter and cheese.

The production of eggs is widely diffused among our population; indeed, it is perhaps safe to say that more persons are engaged in

there is striking similarity between eggs and the more delicate variety of small fruits, like peaches, and berries. In the nature of things, a producer of these commodities is seldom able to ship a carload at one time, though during a favorable season he will make frequent and often daily shipments to the market. So with eggs, the producer must be largely engaged indeed who can ship a carload quantity. The common custom of the railroads is the same with fruit and berries as with eggs; they are gathered in small lots at various stations and carried direct to the general market, and the value of this transportation facility to producers and small dealers can hardly be over estimated. The egg is a delicate and perishable commodity. Though methods adopted for its preservation retard the decomposition to which it is subject, they do not prevent the article from taking on that musty and strong flavor so often noticed in "stored eggs." While not as perishable as the small fruits mentioned, yet, considering the delay which is necessary in the accumulation of sufficient lots for sale or sending to market, its inherent liability to early decay, and the fact that "fresh eggs" are commonly held to be an indispensable food article in every household, it must be deemed sufficiently perishable to be classed with articles of that character. In the official classification eggs, any quantity, are classed as low as berries in carloads, fruit in carloads, not otherwise specified, and butter and cheese, in any quantity; and they are given a lower class than poultry, game, peaches, or oysters, not in the shell. These commodities, though diverse in character, are all perishable food products and particularly subject to deterioration after short lapses of time and under climatic influences. Considered as a perishable article eggs cannot be deemed to have an unfavorable classification; they are classed lower than some, and no higher than any, of the articles above mentioned. That less than carload lots of eggs can be shipped at the carload rate is, in our judgment, a concession to the less than carload shipper which, under its already low classification and the other circumstances surrounding the egg traffic, does not work unjust discrimination to the shipper of eggs in carloads.

The unit of quantity that carriers have universally employed for the purpose of rate making is the hundred pounds. The purpose of a classification is to group the various articles of commerce into general classes upon which the rate per hundred pounds shall apply. Classification of carloads in a lower class than is given to the same article in a less quantity was at first merely incidental to the business of transportation, and the practice has not yet become so general that a lower carload class must be given to every article which may

be offered in carload quantities. The justice of the demand depends upon the facts in each case; it cannot be determined by an inflexible general rule. It is a sound rule for carriers to adapt their classifications to the laws of trade, that is, as before stated, if an article moves in sufficient volume *and the demands of commerce will be better served*, it is reasonable to give it a carload classification. *Thurber's Case, supra.* The large dealers, who now control more than three fourths of the business of gathering and shipping eggs to the large cities, cannot be said to suffer material damage from the competition of small shipments under the same rate to the same market. Beyond giving a practical monopoly to the large dealers, it does not appear that any other portion of the public would be benefited by a lower class for carloads of eggs. If the railroads were not willing to gather the small lots of eggs and carry them direct to a general market, there might be some ground for holding that the volume of egg traffic, the demands of trade, and the interests of local dealers and producers, are such that a lower carload classification is desirable; but the special facilities furnished local shippers for putting their eggs in large markets in as fresh state as possible are, in our view, of greater benefit to producers, local dealers, city dealers, and consumers, than any other method of gathering and shipping which has yet been devised for this or any other perishable food product; and such advantage to the general public should not be interfered with or its continuance in any way discouraged unless a more satisfactory method of reaching the markets can be established in its stead.

In the Thurber case above cited, where the complaint was of too great difference between carload and less than carload rates, we held that "A difference in rates upon carloads and less than carloads of the same merchandise between the same points of carriage, so wide as to be destructive to competition between large and small dealers, especially upon articles of general and necessary use, is unjust and violates the provisions and principles of the Act." In this case, where a lower carload rating is sought, we think the same general rule is applicable. The business of the carload shippers is not diminishing, but it has increased, under equal rates, and in view of the fact that they now handle most of the traffic it is evident that less rates for carload quantities must result in giving them a practical monopoly, and that any difference in rates will be a difference "so wide as to destroy the competition between large and small dealers."

To avoid any misunderstanding it may be said here that the Commission is aware of and has in former utterances called attention to the manifest tendency towards the establishment of carload rates. Tariffs filed in this office

show a constant tendency to include more and more articles in a carload classification. If, at some future time, the carriers engaged in carrying butter, eggs, poultry and similar articles, should agree upon and establish carload and less than carload rates for such articles, reasonable in themselves, and maintaining a true relation between the two rates, giving no undue advantage to one kind of shippers over another, the Commission would probably decline to interfere.

The Commission believes that the law to regulate commerce was intended to secure to persons needing transportation service the nearest possible approximation to equal treatment, and that where there exists in the cost or conditions of the service sufficient reason therefor, the carriers may rightfully establish and maintain carload and less than carload rates, but where the carriers themselves make one uniform rate per hundred pounds, if such act on the part of the carrier is warranted by the conditions, a nearer approach is made to perfect equality than could be made in any other way and the Commission should interpose no objection. But when the conditions of the service are so marked and distinct as to bring about an unjust discrimination or a preference by the maintenance of such uniform rate, then there would be a departure from the equality of treatment which seems to be one of the principal results sought for by the law.

But the question here presented has necessarily been considered upon the evidence as introduced in the case, and upon the evidence before us the complainant has failed to establish his right to the relief prayed for.

The fact seems to be that so far as the gathering of eggs is concerned there is competition between the large dealers and the railways engaged in gathering. The evidence shows that the cost to the complainant of gathering eggs for shipment is about twenty cents per 100 lbs. The nature of the preparation made by the railways for the similar service on their part warrants the conclusion that the cost of gathering to them is probably not less than that amount, and it seems to be a cost or charge incident to the nature of the business, and may not be avoided by persons engaging therein, and whether incurred by railways or large dealers, can make no material difference to the producer. The gathering of eggs along the line of railways is clearly connected with and a part of the transportation service, and it does not appear that any benefit, but rather an injury would result to the small dealers and producers by the order asked for by the complainant and that it would have a tendency to concentrate the business in the hands of large operators. The evidence shows that at the present time 88 per cent of the business is controlled

by these large shippers, and it would seem that an order granted as prayed for by complainant would go far towards concentrating the whole business in their hands. The tendency of the times, deplored by all, is the concentration of the transportation business of the country in the hands of a few individuals who control large amounts of business. This interferes with competition, and works an injury to many who are almost as well equipped for the business as those who in the end succeed by a concentration of power in the hands of a few to rule out all below them. It is common testimony that large dealers have often, by throwing their business first upon one railway and then upon another, forced concessions which are secretly made; and being made to the few and not to the many, they are less easily detected, and work great injury to the general public.

It is, therefore, the order of the Commission that complainant's petition shall be dismissed.

Knapp, Commissioner:

I agree with Commissioner McDill that the complaint in this case should be dismissed, but prefer to state in my own way the general reasons which lead me to that conclusion.

The fundamental issue involved, as I view it, is independent of the question whether the particular carload rate complained of is excessive, and presents a much broader and more important inquiry. Can a violation of the Act to Regulate Commerce, under any circumstances, be predicated upon the fact that an interstate carrier maintains the same rate per hundred pounds for the transportation of a given article, whether shipments are made by the carload or in smaller quantities? This question, I am convinced, should be answered in the negative. If the carload rate is itself reasonable, by whatever standard it may be measured or tested, no legal discrimination results, or can result, from fixing the same basis of compensation for the carriage of smaller shipments. Theoretically at least, the charges for public transportation should be proportioned in each case to the weight of the commodity carried, that being at once the most convenient and most equitable method of determining the relative value of the carrier's services to different shippers of the same article. The wholesale and retail principle has no just application to the business or duty of providing the facilities of public conveyance. It is at variance with the spirit and purpose of the law which aims to secure equality of treatment to every person. That purpose is not fully accomplished when one scale of charges is adopted for shipments of large volume and a higher rate imposed for smaller quantities, even though all large shippers pay the same and all small shippers are charged

Like. The right of equal transportation is not perfectly secured unless the same rate is granted in every case whether the shipment be large or small.

It is quite true that in *Thurber v. New York Cent. & H. R. R. Co.*, 2 Inters. Com. Rep. 742, 3 I. C. C. Rep. 473, the Commission recognized the distinction somewhat commonly made by carriers between carload and less than carload rates, and, while condemning as too great the differences there complained of, virtually conceded the general right to maintain such a distinction. But the practice of granting the lower rate on carload shipments had grown up with the development of railroad commerce and antedated by many years the regulating Act of Congress. It was a common feature of tariff construction, and there are substantial reasons arising out of the ordinary methods of transportation by which the policy can be defended. Moreover, it does not appear as a rule that any serious injustice results to the smaller shippers, or that the suitable distribution of commercial products is impeded, by the maintenance of carload and less than carload rates on the same commodity. Unless the disparity between the two rates is unreasonable, which is another question, the fact that such a distinction is made will not ordinarily prove of much practical importance. In a great measure the business of the country is adjusted to this method of rate making, and its continuance is not likely to be injurious to public or private interests. In administering this remedial statute it is obviously unwise to interfere with established usages, unless they plainly offend its provisions and in a substantial degree abridge the rights which it was designed to protect. To attempt the enforcement of absolute uniformity by condemning the prevalent custom of granting lower rates on carload shipments would, under present conditions, be both injudicious in effort and impracticable in execution; nor does the chief purpose of the Act require such a general departure from existing practices.

But it does not follow that the adoption of a uniform rule, by which the same measure of compensation is applied whether the shipment be large or small, can sustain a complaint of unjust discrimination against the carrier whose charges are thus regulated. There is a wide margin between refusing to condemn an established and prevalent custom, and compelling its literal observance in a particular instance. It is one thing to concede the right to make a carload and a less than carload rate, it is quite another thing to require it. The single rate is not unlawful because differing rates would ordinarily be permitted. Even if the distinction here considered was the general practice in all parts of the country, which

is very far from being the case, I do not see how a uniform rate, though applied by but one carrier to a single commodity only, could operate as an illegal discrimination within the meaning and intent of the statute.

When it is conceded that a given carload rate can be criticised for no other reason than that the same rate is accepted for smaller shipments, that carload rate, I contend, is reasonable both in fact and in law, and the circumstance that the lesser quantity is carried at the same rate per hundred pounds affords no just ground of complaint by the carload shipper. How can the law be violated if the rate is reasonable and all shippers are treated alike? Long continued custom and the methods of transportation in actual use may justify in most cases a lower rate for carload shipments than for smaller quantities, but when a carrier sees fit to apply the same rule for fixing its compensation whether it carries a train load or a ton, what right of the larger shipper is infringed, and upon what principle can the action of the carrier be condemned?

Under ordinary conditions, of course, the larger the shipment the greater the profit per hundred pounds to the carrier. The carload undoubtedly pays better in proportion to the weight transported than the smaller quantity, when the same rate is applied to both. More than this, the work of loading and unloading is mainly done by the carrier when merchandise is shipped in small quantities, while in the case of carload shipments the loading is usually done by the consignor and the unloading by the consignee. The carrier can afford to take the greater shipment for a smaller rate of compensation. This is partly because the large shipper, for his own convenience or advantage performs part of the service which it is the carrier's duty to perform, and partly because the greater tonnage can be hauled and delivered at proportionally less expense. But the pecuniary advantage of the carrier is by no means the controlling consideration in determining the just relation of rates. The general public right to equal transportation must be recognized, and that right may be seriously invaded if charges are graduated according to the volume of business. Some of the largest shippers not only do their own loading and unloading, but also provide their own cars, side tracks, warehouses and other facilities for the easy and economical delivery to the carrier of their immense shipments, and thus make their patronage peculiarly desirable. Much the same argument which justifies a reduced rate to carload shippers would justify a still lower rate when shipments are made, as frequently happens, by the train load. But no reduction from carload rates in favor of train load shippers would be sanctioned by the Commission or permitted by the law making authority.

Such a concession would concentrate the commerce of the country in the hands of a few great capitalists, and would be an obvious and intolerable encroachment upon the rights of the vast majority of shippers. If the system of lower rates for carload quantities had not been in vogue when government regulation was first undertaken, if the general practice prior to that time had been to charge in all cases by the hundred pounds, I apprehend that permission to establish a lower carload rate, on the ground that the railroads could afford to grant it, would have been unhesitatingly denied, and that a complaint of unjust discrimination, because the same rate was given to all, would have been summarily dismissed. The equitable basis of transportation charges is the weight of the shipment; the just rate of the carrier's compensation should not be affected, as between different shippers, by the volume of their business.

I assume that the carload rate under consideration is not shown to be unreasonable for carload shipments, and that conclusion appears to be required by the investigation made. So far as the complaint is based upon the theory that smaller shipments should be subjected to higher charges, and that seems to be the main contention, no case for relief is established, and on that theory the proceeding should be dismissed. Such a decision, however, should not preclude the Commission from entertaining another complaint against the rate in question, based on other grounds and measured by other standards.

Commissioner Morrison, dissenting:

The complainant in this proceeding insists

upon the right to a lower rate on the hundred pounds of eggs shipped in full carloads than is paid on the hundred pounds carried in small quantities from Washington Court House, Ohio, to New York City. Many roads now concede this right in territory west of Chicago.

The practice of carrying the great mass of products at lower rates when shipped in carloads than in less than carloads was when the Act to Regulate Commerce was passed and still is in very general use, and the legality of this practice has been justified and upheld by this Commission under said Act. It has been so justified and upheld because, among other reasons, the shipper loads and the receiver or consignee unloads carload shipments, while the carrier loads and unloads articles shipped in small quantities. Carloads require but one billing and one delivery; less than carloads necessitate the making of many bills and as many separate deliveries. In receiving, transporting and delivering goods by the carload carriers are relieved from a considerable part of the labor and expense necessarily done and incurred by them when articles are shipped in small parcels or quantities. So long as such general practice prevails I see no good reason why eggs should be made an exception. The reasons upon which lower rates on goods in carloads are based are as applicable to eggs as they are to other articles, and the shippers of eggs in carloads should have the same equal treatment as shippers of other products who are accorded lower rates on carload shipments than are given to shippers of the same products in less than carloads.

NORTH CAROLINA SUPREME COURT.

ATLANTIC EXPRESS CO., *Appt.*,

v.

WILMINGTON & WELDON R. CO. *et al.*

(.....N. C.....)

1. Investing a railroad commission with authority to make just and reasonable rules and regulations to prevent excessive charges and unjust discriminations and preferences by carriers, the reasonableness and legality of which is reviewable by the

courts, is not unconstitutional as a delegation of legislative power.

2. Authority is given to the railroad commission to hear and determine complaints of unjust discriminations and preferences under the North

NOTE.—The conflict of decisions on the question of a railroad company's obligation to give equal facilities for transportation to express companies makes any new decision on that question important. The North Carolina court adopts the decision of the Supreme Court of the United States in

Memphis & L. R. Co. v. Southern Exp. Co. 117 U. S. 1, 29 L. ed. 791.

But the great weight of that decision is lessened by the fact that it was made against the dissent of

Carolina Railroad Commission Act which expressly provides that if a railroad company is guilty of a violation of the rules of the commission and after due notice of such violation does not make full recompense for the wrong or injury done, it shall incur a penalty, and also constitutes such commission a court of record.

3. The details of practice and pleading may be supplied by a railroad commission which is constituted a court of record under the inherent power of every court of record to make such rules not inconsistent with the law as are necessary to the exercise of the powers conferred upon it.

4. A statute making it unlawful for any common carrier to give undue or unreasonable preference to any person, company, firm, corporation or locality does not require equal facilities to be given to express companies for carrying on business over a railroad unless it holds itself out as a common carrier of such companies.

5. A railroad company is not under obligation to furnish an express company with facilities for doing an express business upon its road such as it provides for itself or some other express company, unless it holds itself out as a common carrier of express companies.

Decided December 13, 1892.

A PPEAL by complainant from a judgment of the Superior Court for Wake County dismissing the complaint in an action brought to compel defendants to afford plaintiff proper facilities for carrying on its business. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. W. Clark and O. H. Guion for appellant.

Messrs. Haywood & Haywood, for appellees:

The law applies to the persons—the public—for whom transportation services are rendered, and not to the instruments; be they persons or corporations, through or by which the services are performed.

Memphis & L. R. R. Co. v. Southern Exp. Co. 117 U. S. 1, 29 L. ed. 791.

Railroad companies are not required to furnish express facilities to all alike who demand them.

Pfister v. Central Pac. R. Co. 70 Cal. 169, 27 Am. & Eng. R. R. Cas. 346. See also *Sargent v. Boston & L. R. Co.* 115 Mass. 416; *Camblos v. Philadelphia & R. R. Co.* 4 Brewst. 563; *Jencks v. Coleman*, 2 Sumn. 224; *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 344, 12 L. ed. 465; *Barney v. Oyster Bay Co.* 67 N. Y. 801; *The D. R. Martin*, 11 Blatchf. 238.

Express companies are not subject to provisions of the Interstate Commerce Act.

United States v. Moreman, 42 Fed. Rep. 448; *Re Express Companies*, 1 Inters. Com. Rep. 677, 32 Am. & Eng. R. R. Cas. 567.

The cases relied upon to establish that the defendants can be compelled to extend equal facilities to all express companies applying for the same, viz: *New England Exp. Co. v. Maine*

Cent. R. Co. 57 Me. 188, 2 Am. Rep. 31; *Buffalo East Side R. Co. v. Buffalo Street R. Co.* 2 L. R. A. 384, 111 N. Y. 132; *People v. Hawley*, 8 Mich. 330; *Chicago, B. & Q. R. Co. v. Cutts*, 94 U. S. 155, 24 L. ed. 94,—are not applicable to this case.

The "Granger Cases" have been materially modified by subsequent decisions of the United States Supreme Court.

See *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 80 L. ed. 244; *Chicago, M. & St. P. R. Co. v. Minnesota*, 184 U. S. 418, 33 L. ed. 971; *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 868; *Bonman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 701; *Fargo v. Stevens*, 121 U. S. 230, 30 L. ed. 888; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 811; *McDuffee v. Portland & R. R. Co.* 52 N. H. 480, 18 Am. Rep. 72; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 667.

The legislature has no power to pass a law impairing the obligation of a contract made between the defendants and the Southern Express Company before the passage of the Railroad Commission Act.

Sinking Fund Cases, 90 U. S. 700, 25 L. ed. 496; *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 454, 21 L. ed. 204; *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. ed. 178; *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 852; *Hoboken Water Power Co. v. Lyman*, 83 U. S. 15 Wall. 500, 21 L. ed. 188; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Chicago, B. & Q. R. Co. v. Cutts*, 94 U. S. 155-161, 24 L. ed. 94, 95; *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed.

two justices, and was contrary not only to the decisions of lower Federal courts in *Wells, Fargo & Co. v. Oregon R. & Nav. Co. (Or.)* 16 Am. & Eng. R. R. Cas. 87, 8 Sawy. 600; *Dinsmore v. Louisville, C. & L. R. Co. (Ky.)* 2 Fed. Rep. 465; *Southern Exp. Co. v. Louisville & N. R. Co. (Tenn.)* 4 Fed. Rep. 481; *Southern Exp. Co. v. Memphis & L. R. Co. (Ark.)* 8 Fed. Rep. 799, which it reversed or overruled, but also to several carefully considered decisions of eminent state courts in *McDuffee v. Portland & R. R. Co.* 52 N. H. 480, 18 Am. Rep. 72; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 667; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31.

Since the question is not one on which the decision of the Supreme Court of the United States is binding on state courts, the question must be re-

garded as unsettled except in those few jurisdictions in which it has already been decided.

In respect to the necessity of a railroad company's holding itself out as a common carrier of expressmen in order to make it liable for discrimination between them, it is expressly held in *McDuffee v. Portland & R. R. Co.*, *supra*, that it does so hold itself out when it accepts the business of one express company.

For note on the general subject of compulsory service by party whose business it is to serve the public, see further, *Rushville v. Rushville Nat. Gas Co. (Ind.)* 15 L. R. A. 821.

For note on the right of a carrier at common law to discriminate between its patrons generally, see *Louisville, E. & St. L. Consol. R. Co. v. Wilson (Ind.)* 18 L. R. A. 105.

629; 1 Morawetz, Priv. Corp. §§ 1-8; *Siebert v. United States*, 122 U. S. 284, 30 L. ed. 1161; U. S. Const. art. 1, § 10; Ang. & A. Priv. Corp. § 787; *Edwards v. Kearney*, 96 U. S. 595, 24 L. ed. 793.

To destroy the ability of a party to perform his contract, is to impair its obligation within the meaning of the Constitution.

Pumpelly v. Green Bay & M. Canal Co. 80 U. S. 18 Wall. 166, 20 L. ed. 557; *St. Tammany W. W. Co. v. New Orleans W. W. Co.* 120 U. S. 64, 30 L. ed. 563; *Shields v. Ohio*, 95 U. S. 819, 24 L. ed. 857; *Sinking Fund Cases*, 99 U. S. 700, 721, 740, 742, 748, 749, 757, 758, 25 L. ed. 496, 502, 509, 510, 512, 515; *New Orleans Gas Light Co. v. Louisiana L. & H. P. & Mfg. Co.* 115 U. S. 650, 660, 672, 674, 29 L. ed. 516, 520, 524, 525; *Louisville Gas Co. v. Citizens Gas Light Co.* 115 U. S. 638, 29 L. ed. 510; *Morawetz, Priv. Corp.* §§ 473, 474, 478.

The reservation of legislative control over the corporate power of the defendant acts only upon the relations between the state and corporation, and not upon what is done between the corporation and those with whom it deals.

New Orleans Gas Light Co. v. Louisiana L. & H. P. & Mfg. Co. supra; *Railroad Commission Cases*, 116 U. S. 807-829, 29 L. ed. 636-643; *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 459, 21 L. ed. 204; *Sinking Fund Cases*, 99 U. S. 721, 759, 25 L. ed. 501, 515; *Miller v. State*, 82 U. S. 15 Wall. 499, 21 L. ed. 104; *Chicago v. Sheldon*, 76 U. S. 9 Wall. 50-55, 19 L. ed. 594, 597.

Mr. F. H. Busbee also for appellees.

Shepherd, Ch. J., delivered the opinion of the court:

Although we are of the opinion, for the reasons hereinafter stated, that the particular relief asked for in this proceeding is not authorized by the provisions of what is known as the "Railroad Commission Act," still we do not feel at liberty to ignore the important question of jurisdiction suggested in the answers of the defendants and the arguments of counsel. The question is a serious one, and involves in a great measure the efficiency of the legislation designed for the "supervision" of railroad companies and other common carriers in respect to the fixing of reasonable freight and passenger tariffs, the prevention of unjust discriminations and preferences, and the regulation of other matters pertaining to transportation within the state, in which the public is deeply interested. That the legislature has the authority to provide reasonable rules and regulations for the effectuating of such purposes is too well settled to admit of discussion (*Durham & N. R. Co. v. Richmond & D. R. Co.* 104 N. C. 673; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Dubuque & R. C. R. Co. v. Richmond*, 86 U. S. 19 Wall. 584, 22 L. ed. 173;) and it is equally well settled that, in delegating such authority to a commission, it does not transcend its constitutional powers. *Stone v. Farmers Loan & Trust Co.* 116 U. S. 307, 29 L. ed. 636; 19 Am. & Eng. Enc. Law, 686, and the numerous authorities cited in the notes.

"The difference between the power to pass
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a law and the power to adopt rules and regulations to carry into effect a law already passed is apparent and great; and this we understand to be the distinction recognized strikingly by all the courts as the true rule in determining whether or not, in such cases, a legislative power is granted. The former would be unconstitutional, whilst the latter would not." *Georgia R. & Bkg. Co. v. Smith*, 70 Ga. 694, 9 Am. & Eng. R. R. Cas. 385. A careful scrutiny of the act of assembly constituting a "railroad commission" (Acts 1891, chap. 320) fails to disclose a purpose to confer upon that body anything in the nature of legislative power. The act, among other things, denounces excessive charges, unjust discriminations and preferences, as unlawful, and invests the commission with authority to "make such just and reasonable rules and regulations as may be necessary for preventing" the same; the reasonableness and legality of such rules and regulations being reviewable by the courts. This power, as we have just seen, may be delegated to a commission, and any objection on that ground is therefore untenable.

It is insisted, however, that the commission has no jurisdiction to entertain and pass upon complaints made in respect to the violation of the provisions of section 4, and perhaps other sections, of the said act. That section declares that all unjust discriminations and preferences shall be unlawful, and it is urged that the only remedy provided against its infraction is by indictment, to be prosecuted in a court of competent jurisdiction. It is very plain to us that the contention is without foundation, as in section 5 the authority of the commission to make rules and regulations for the prevention of these very acts is expressly conferred. The subjects embraced in section 4 are perhaps the most important that are confided to the regulation of the commission; and, without reference to the plain language of the act, it is hardly to be supposed that the legislature intended to insert therein a merely penal provision, entirely independent of and unconnected with the duties imposed upon that body. Neither is there any force in the argument that the legislature cannot confer judicial powers upon the commission, as the constitution (art. 4, § 2) expressly authorizes the establishment of such courts inferior to the supreme court as the legislature may deem proper; and it is to be observed that the commission has been "created and constituted a court of record," with all the "powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in the act creating" the same. Acts 1891, chap. 498. Whether a court having no power to enforce its judgments fulfills the definition of a court of record and of general jurisdiction is unnecessary to be considered. It is sufficient to say that the legislature has the authority to establish courts inferior to the supreme court, and to "allot and distribute" its jurisdiction "as it may deem proper." Const. art. 4, § 12. The question, then, is simply whether the power to hear and determine complaints of this character has been conferred, and this is easily solved by a perusal

of section 10 of the said act, which is as follows: "That if any railroad company doing business in this state, by its agent or employées, shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation, given to the principal officer thereof, . . . ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than fifty dollars nor more than five thousand dollars, to be fixed by the judge of the court in which such action shall be tried. An action for the recovery of such penalties shall lie in any county of the state where such violation has occurred or wrong has been perpetrated, and shall be in the name of the state of North Carolina. The commissioners shall institute such action through the attorney-general or solicitor of the judicial district in which the violation has occurred," etc.

It must be noted that the present proceeding is not an action instituted by the commissioners for the enforcement of penalties; nor is it, as suggested, an ordinary civil action for the recovery of damages, as is provided in section 11 of the act. It is brought for the purpose of seeking "ample and full recompense" for the alleged "wrong and injury" done the complainant. The act looks beyond the mere infliction of a penalty for the violation of a rule or regulation, and evidently provides for specific redress in the premises. This redress is to be "directed by said commissioners" upon due notice to the party complained of; and it is difficult to understand how the proper measure of relief can be ascertained except by the examination of testimony. The necessary conclusion, therefore, must be that the commission has the authority to hear and determine all matters that are embraced within that part of the said section to which we have referred.

No summons was issued in the present proceeding, as in civil actions, but, upon a complaint being filed, the defendants were notified to "satisfy the complaint or answer the same" within thirty days. After hearing the testimony, the commission declared, in effect, that the rule and regulation made pursuant to the law had been violated, and that "ample and full recompense" should be made by providing the complainant with the facilities mentioned in the order. It is insisted that, as no procedure is provided, the commission has no authority to make an order of this character. It is true that no particular rules of practice are prescribed; but the power to hear and determine, upon notice, is, as we have seen, expressly given, and all necessary means are provided for the conducting of any inquiry which it is the duty of the commission to make. Provision is made for the service of notices the attendance of witnesses, and the punishment of contempts; and the rules of evidence are declared to be the same as in civil actions. It is also provided that there may be an appeal, "as in other cases of appeal," from

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"all decisions or determinations arising under the operation or enforcement" of the act. We cannot hold that, with all of these facilities provided by law, a power expressly granted to hear and determine is to be denied because the particular form of the complaint, or the manner in which the proceeding is to be entitled, or some other immaterial matter of detail, is not particularly prescribed. Besides, such details may well be supplied by the commission under the inherent power of every court of record to make such rules, not inconsistent with the law, as are necessary to the exercise of the powers conferred upon them. 4 Am. & Eng. Enc. Law, 450, and the cases cited. It must be admitted, however, that in many respects the act is singularly obscure and confused. It bears the impress of hasty legislation, and seems to be composed of parts of other acts of a similar character, united with but little regard to order or perspicuity. Its amendment, in many particulars, may well be considered by the lawmakers. Among its defects we find the strange omission of any provision in section 10 as to the effect to be given to the determination of the commissioners in an action brought in the superior court for the enforcement of the penalties prescribed. Whether, in the absence of an appeal, such a determination is conclusive, or whether it simply amounts to a prima facie case, are questions left in very great doubt. This, however, cannot affect the right to hear and determine what recompense shall be made to an injured party. The power is expressly conferred, and it is the duty of the commission, in all proper cases, to exercise it. The effect of such a determination, when brought before the courts, is quite another thing. We are therefore of the opinion that the commission has ample authority to entertain and pass upon complaints for a violation of any rule or regulation respecting the matters embraced within section 4 of the said act.

Having disposed of the question of jurisdiction, we will now inquire whether the present complainant is entitled to the particular relief which it seeks in this proceeding. It must be borne in mind, in considering this case, that there is no complaint that the demands of the public—that is, the demands of persons who desire to ship express freight—are not fully met and supplied. The controversy is solely between the respective corporations, and the real question is not whether the defendant railroad companies are authorized to do an express business for themselves, nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose, nor whether they shall carry express freight for the complainant company as they carry like freight for the general public, but whether it is their duty to furnish the complainant with facilities for doing an express business upon their roads, the same in all respects as those they provide for themselves or afford to any other express company. That this is a proper statement of the question is apparent from

the application of the complainant and the findings of the commission. It distinctly appears that the complainant made no actual tender of any article of freight to be transported by the defendants, but that it demanded "rates and facilities for conducting an express business over their roads in this state," and that each of the defendants "should furnish it with a car or carriage over its respective lines, and rates of transportation, as well within as without the limits of the state, for shipment of goods within the scope of its organization." It is not insisted that the defendants have ever held themselves out as common carriers of express companies, "that is to say, as common carriers of common carriers" (*Express Cases*, 117 U. S. 1, 29 L. ed. 791) and the chief point to be determined is whether, in the absence of such a usage, the law imposes a duty of that character upon them. It is contended that such a duty is imposed by the following provision of section 4 of the act constituting the commission: "That it shall be lawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever." We are of the opinion that the foregoing provision does not change or enlarge the common law duty which the defendants owe the complainant. That constitutional provisions in almost the same language have been construed as but declaratory of the common law is shown by various authorities. The constitution of Colorado declares "that all individuals, associations, etc., shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state." The constitution of Kansas provides "that no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, and no railroad company shall make any discrimination or preference in furnishing cars or motive power." The constitution of Arkansas provides "that all individuals and corporations shall have equal rights to have persons and property transported over railroads, . . . and no undue or unreasonable discrimination shall be made in charges or facilities in transportation." The constitution of Missouri provides "that no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad company . . . shall make any preference in furnishing cars or motive power." In speaking of these constitutional provisions, Waite, *Ch. J.*, says: "These provisions impose no greater

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obligations than the common law would have imposed without them." *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291. This high authority settles the question that our Railroad Commission Act does not extend the common-law duty; and it therefore becomes material to inquire whether, at common law, the defendants owed the complainant the duty sought to be imposed in this proceeding. The Supreme Court of the United States, in the *Express Cases*, *supra*, has answered the question. It declares that "in the absence of some special statute, there is no law which requires railroads to furnish express facilities to all express companies which may demand them." It must be noted that these cases came from the states of Colorado, Kansas, Arkansas, and Missouri; and it is in the light of the constitutional provisions above quoted that this and the following language of the chief justice is used: "The railroad company performs its whole duty to the public at large, and to each individual, when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public, as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security. . . . The constitutions and the laws of the states in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which, in positive terms, requires a railroad company to carry all the express companies in the way that, under some circumstances, they may be able, without inconvenience, to carry one company. . . . In some of the states, statutes have been passed which, either in express terms or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies (as in Maine and New Hampshire) . . . but these are of comparative recent origin, and thus far seem not to have been generally adopted."

In view of the foregoing authorities, we are of the opinion that so much of the order of the commission as determines that "the refusal of the defendants to grant to the plaintiff facilities for conducting an express business was a violation of the terms of said act" is not warranted by the statute under consideration. The judgment of the commission, however, also declares that the defendants have violated rule 8 of the "Regulations Concerning Freight Rates." The rule is as follows: "No railroad company shall, by reason of any contract with any express or other company, decline or refuse to act as a common carrier to transport any articles proper for transportation by the train for which it is offered." We are unable to see that, in view of the facts found, there has been any violation of this rule. No duty is imposed by the rule upon any railroad company, but it merely prohibits the refusal to perform a duty by reason of any contract with an express or other com-

pamy. We have seen that the defendants did not owe any duty to act as a "common carrier of express companies." Had they owed such a duty, we are very sure that they could not have avoided its performance because of their having made an exclusive contract with the Southern Express Company. We do not think, however, that the rule applies to this case. The defendants have not refused to act as a common carrier, or to transport any article tendered by the complainant. They have refused to afford it facilities for carrying on an express business upon their roads, and this we have seen they had a right to do. In this refusal, they were not guilty of making any discrimination or preference within the act of the legislature. As we have seen, the Supreme Court of the United States has said that they are under no obligation to carry another company; and the mere fact that they are carrying another company does not amount to an unjust or unreasonable preference. It is the duty of the defendants to carry express matter, but they may carry it themselves, or employ competent agencies for that purpose. *Express Cases*, 117 U. S. 3, 29 L. ed. 791, 28 Am. & Eng. R. Cas. 545, and the authorities cited in the notes. The Supreme Court of the United States, in deciding the cases just referred to, stated that "railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness, dispatch, and comfort to the passengers. The express business on passenger trains is in a degree subordinate to the passenger business; and it is consequently the duty of a railroad company, in arranging for the express, to see that there is as little interference as possible with the wants of the passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the con-

dition on which it will be occupied. The space that can be given to the express business on a passenger train is to a certain extent limited. . . . If the general public were complaining that the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented." The same remark is applicable if the agencies adopted by the railroads (in this case the Southern Express Company) are not affording the public sufficient facilities. It is further to be observed that the power to fix rates and tariffs for such agencies is conferred upon the commission by section 13 of the act. We will also observe that, if the defendants had held themselves out as common carriers of express companies, they would have been guilty in this case of discrimination or the giving of a preference, and therefore subject to the regulation of the commission, had that body declared such discrimination or preference, under the circumstances, to have been "unjust" or "unreasonable."

In view of the facts found by the commission, and of the high authority we have cited, we are of the opinion that the defendants have violated no duty imposed by the law. If other duties are to be imposed, it must be by further legislation, and not by the courts. "To what extent it must come, if it comes at all from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and, when imposed, it will, if necessary, be enforced by the courts; but unless a duty has been created, either by usage or by contract or by statute, the court cannot be called upon to give it effect." Waite, *Ch. J.*, *Express Cases*, *supra*.

The judgment below is affirmed.

KANSAS SUPREME COURT.

STATE of Kansas

v.

WILLIAM C. PHIPPS *et al.*, *Appls.*

(..... Kan.)

1. The word "trade," as defined by this court in the case of *Re Pinney*, 47 Kan. 82, does not mean interstate commerce, nor was such a meaning within the contemplation of the court at the time the decision was rendered.

2. The business of insurance, as ordinarily conducted in this state by insurance companies organized under the legislation of other states, is not interstate commerce.

3. Foreign insurance companies doing business in this state, that combine to control and increase the rates of insurance on property within a city

*Headnotes by SIMPSON, C.

NOTE.—An important case applying an "Anti Trust Law" to a combination fixing rates of insurance in which corporations of other states are involved is above reported. The claim that insur-

ance by such companies constitutes interstate commerce is, in view of prior decisions, interesting chiefly by reason of its forcible and elaborate presentation by counsel. On the general subject

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in this state, violate the provision of chapter 257 of the Laws of 1889, being "An Act to Declare Unlawful Trusts and Combinations in Restraint of Trade and Products, and to Provide Penalties therefor;" and their local agents who attempt to, and do, enforce such combined rates, are subject to prosecution under the provisions of said act.

4. The legislature of this state has the power to prescribe the conditions upon which an insurance company organized under and by virtue of the laws of another state can do business within the limits of the state of Kansas.

Decided January 7, 1898.

A PPEAL by defendants from a judgment of the District Court for Labette County convicting them for violating chapter 257 of the Laws of 1889 prohibiting unlawful trusts and combinations in restraint of trade. *Affirmed.*

The facts are stated in the commissioner's opinion.

Mr. E. F. Ware, for appellants:

The Anti Trust Law of Kansas was passed in 1889, chap. 257. Its title is: "An Act to Declare Unlawful Trusts and Combinations in Restraint of Trade and Products, and to Provide Penalties therefor."

The said law, when read parenthetically, as pertains to insurance, is as follows:

Section 1. "All arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to control the cost or rate of insurance are hereby declared to be against public policy, unlawful, and void."

Section 8. "Any person who shall attempt to carry out or act under any such arrangement, contract, agreement, trust, or combination, either on his own account or as agent of any corporation, or in any capacity whatever, shall be guilty of a misdemeanor."

The constitution of the state of Kansas provides, art. 2, § 16: "No bill shall contain more than one subject, which shall be clearly expressed in its title."

The supreme court of Kansas has decided (*Re Pinkney*, 47 Kan. 89), that the said act of 1889 was constitutional in that the subject of the act was clearly expressed in the title. Therefore insurance is trade.

That decision finally settled the status of insurance companies in Kansas.

The Federal law of July, 1890, concerning trusts, when read parenthetically as regards the case at bar, is as follows (26 U. S. Stat. at L. 209):

Section 1. "Every contract or conspiracy in restraint of trade among the several states is hereby declared to be illegal." Every person, on conviction thereof, shall be punished by a fine not exceeding \$5,000.

Section 2. "Every person who shall com-

bine to monopolize any part of the trade among the several states shall be guilty of a misdemeanor."

Section 4. "The several circuit courts of the United States are hereby vested with jurisdiction."

The Federal law is exclusive of the state law; the state law is inoperative, and the defendants must be discharged.

Walling v. Michigan, 116 U. S. 456, 29 L. ed. 694.

Commerce is intercourse, and the term "interstate commerce" means intercourse between people of different states.

If insurance is trade, then insurance policies and insurance agents are instruments of trade, and the power to regulate commerce embraces all the instruments by which trade may be carried on.

"It extends to the persons who conduct it as well as to the instruments used."

Cooley v. Philadelphia, 53 U. S. 12 How. 299, 18 L. ed. 996.

Communication by telegraph is a part of commerce.

Western U. Tele. Co. v. Atlantic & Pacific States Tele. Co. 5 Nev. 102; *Pensacola Tele. Co. v. Western U. Tele. Co.* 2 Woods, C. C. 643; *Pensacola Tele. Co. v. Western U. Tele. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Tele. Co. v. Texas*, 105 U. S. 460, 28 L. ed. 1067; *Western U. Tele. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187; *Ratterman v. Western U. Tele. Co.* 127 U. S. 411, 32 L. ed. 229.

If the recital over the wire of an unfortunate and uninteresting piece of ancient personal history is interstate commerce, then the only definition of interstate commerce is "intercourse."

Commerce among the several states means, "intercourse between the citizens of different states."

"Power to regulate commerce" including navigation and commercial intercourse was one of the primary objects for which the United States Constitution was adopted.

2 Story, Const. (3d ed.) 4.

Commerce includes the fact of intercourse,

of combinations to prevent competition and creating monopolies, see notes to *Lealie v. Lorillard* (N. Y.) 1 L. R. A. 456; *People v. North River Sugar Ref. Co.* (N. Y.) 2 L. R. A. 33; *Carroll v. Giles* (S. C.) 4 L. R. A. 154; *Richardson v. Buhl* (Mich.) 6 L. R. A. 457; *Herreshoff v. Boutineau* (R. I.) 8 L. R. A. 469; *National Ben. Co. v. Union Hospital Co.* (Minn.) 11 L. R. A. 487; *Lovejoy v. Michels* (Mich.) 13 L. R. A. 770.

See also, on the same subject, *Texas Standard Cotton Oil Co. v. Adoue*, 15 L. R. A. 568, 83 Tex. 650; *Leonard v. Poole*, 4 L. R. A. 728, 114 N. Y. 371; *People v. North River Sugar Ref. Co.* 9 L. R. A. 33, 121 N. Y. 582; *State v. Standard Oil Co.* (Ohio) 15 L. R. A. 145; *More v. Bennett*, 15 L. R. A. 361, 140 Ill. 69.

For a decision under the Act of Congress similar

to the Kansas act above involved, making combinations or conspiracies in restraint of trade criminally punishable, see *United States v. Jellico Mountain Coke & Coal Co.* 12 L. R. A. 753, 46 Fed. Rep. 432.

Another case just decided by the Circuit Court of the United States for the District of Massachusetts decides that an indictment under that Act must allege that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market, and that it is not sufficient to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation or otherwise. *United States v. Patterson* (C. C. D. Mass.) March, 1898.

and of traffic, and the subject-matter of intercourse and of traffic. The fact of intercourse and traffic again embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and further still, comprehends the act of carrying them on at these places and by and with these means.

Pom. Const. Law, § 378.

It also means intercourse and navigation.

Fuller v. Chicago & N. W. R. Co. 31 Iowa, 207; *People v. Raymond*, 34 Cal. 492.

Free intercourse and trade between the states and with foreign countries can be safely regulated only by that jurisdiction that looks to the general interests of the nation as a whole rather than the special advantages of a particular locality.

State v. Pratt, 59 Vt. 590.

Congress has power to legislate over intercourse as well as traffic.

King v. American Transp. Co. 1 Flipp. 6; *United States v. The James Morrison*, Newb. Adm. Rep. 244; *People v. Brooks*, 4 Denio, 469; *Be Wong Yung Quay*, 6 Sawy. 447; *Sweatt v. Boston, H. & E. R. Co.* 5 Cliff. 348; *United States v. Cisna*, 1 McLean, 260; *Western U. Teleg. Co. v. Atlantic & Pacific States Teleg. Co.* 5 Nev. 109; *Norfolk & W. R. Co. v. Com.* 13 L. R. A. 107, 88 Va. 95; *State v. Delaware, L. & W. R. Co.* 30 N. J. L. 478; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Moor v. Veazie*, 81 Me. 360; *Pennacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Worcester v. Georgia*, 31 U. S. 6 Pet. 561, 8 L. ed. 501; *State Tonnage Tax Cases*, 79 U. S. 12 Wall. 214, 20 L. ed. 373; *Hall v. De Cuir*, 95 U. S. 491, 24 L. ed. 549; *Trade Mark Cases*, 100 U. S. 86, 25 L. ed. 550; *Welton v. Missouri*, 91 U. S. 290, 23 L. ed. 349; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23.

There are now, as shown by the report of the commissioner of insurance, thousands of insurance agents in the state, regularly licensed to issue policies.

The business is done in the name of the foreign company, and not in the name of the agent.

When a policy is written, a report thereof is sent out of the state to the home office of the company, and the company accepts or rejects the risk.

The money that is received for the premium is promptly remitted to the foreign company, and the company pays the agent, for the agent is not doing business for himself or in his own name.

If a building is burned and the company so elect, it can build another building in place of the one burned down, thereby trading one building for another; or the company from its treasury abroad can send into the state its money to pay the loss. If articles of property are damaged, the company reserves the right to buy them. This is intercourse.

The very genius of the business makes it interstate. It is the only known business that is naturally interstate.

During all this time the foreign corporation is not a citizen, or a resident, or an inhabitant of the state of Kansas. It is at all times foreign.

Purcell v. British Land & Mortg. Co. 42 Fed. Rep. 465; *Henning v. Western U. Teleg.* 4 INTER S.

Co. 48 Fed. Rep. 97; *Myers v. Murray & Co.* 11 L. R. A. 216, 43 Fed. Rep. 695; *Conn v. Chicago, B. & Q. R. Co.* 48 Fed. Rep. 177.

And the corporation is not only not domesticated, but it cannot be held to an agreement that it is domesticated, because the law says that such agreement is invalid.

Home Ins. Co. v. Morse, 87 U. S. 20 Wall. 415, 22 L. ed. 365.

The reasoning of the United States Supreme Court in *Paul v. Virginia*, 75 U. S. 8 Wall. 183, 19 L. ed. 361, is incomprehensible so far as it relates to the insurance part of the case.

If a New York insurance company sends an agent to Virginia to make a contract of indemnity to be paid by the New York party, it makes no difference whether the contract is delivered in Virginia or Quebec, so far as its interstate feature is concerned. It is still an interstate contract.

The first mistake to be noticed is that the supreme court fails to distinguish between an executed contract and an executory contract. A policy of insurance is not an executed contract.

The second mistake to be noticed is that insurance cannot be likened to a New York man who goes into Virginia and buys something. It should be likened to a New York man who goes into Virginia and sells something (indemnity) to be delivered in the future from the home office in New York. If, instead of "indemnity," we read "stoves," we find the case already decided in *Wrought Iron Range Co. v. Johnson*, 8 L. R. A. 278, 84 Ga. 754.

See also *McCall v. California*, 136 U. S. 104, 34 L. ed. 392.

It is easily possible for the insurance companies of the United States to send a committee of experts to Kansas, who would revise and prepare fire maps for the state showing every building. Then the business could be run from the home or department office. If, after the report of the committee upon maps and rates, the companies should see proper to combine, and adopt the maps and rates, then the local agent would know nothing of it, and the companies violating the laws of Kansas would have innocent local agents in Kansas carrying out the combine.

If the local agent be not guilty, and cannot be punished, and if all the other persons connected with the violation of law live outside of the state, then what is the status of the actors?

If a person outside of the state commits, by reason of an innocent agent, a crime within the state, he is guilty of committing a crime within the state.

Bishop, Crim. Proc. § 53.

Suppose a misdemeanor is committed in Kansas by a man who was never in the state, and that the man remains outside of Kansas, can he be extradited and tried in the state?

Only "fugitives from justice" can be extradited.

The most liberal opinion on that subject is *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, and that case requires the prisoner to be in the state when the crime was committed.

Tennessee v. Jackson, 36 Fed. Rep. 258.

Courts of equity do not generally enjoin the commission of crime. But if it should, the re-

sult of such action inside the state of Kansas by the state against foreign companies would be wholly fruitless.

Kansas cannot go into the foreign Federal courts and enjoin the insurance companies at their homes from violating the laws of Kansas.

A suit brought by a state outside of its own territory, in the courts of the United States, against the citizen of another state, must be an action in which a money judgment can be rendered, and it must be a "civil suit" as to its origin.

An injunction suit by Kansas in a Federal court, as suggested, would be a suit to enforce the penal laws of Kansas. No country or state will execute the penal laws of another.

Wisconsin v. Pelican Ins. Co. of New Orleans, 127 U. S. 265, 32 L. ed. 239; *Dey v. Chicago, M. & St. P. R. Co.* 45 Fed. Rep. 82.

Outside of the commerce clause of the Constitution, it would seem that there had been given inherent power to Congress to legislate concerning the relations of states with citizens (and insurance companies) of other states.

Kan. Const. art. 3, § 2, art. 1, § 8.

There is no common law as to insurance.

When the United States Constitution was formed fire insurance was not a science; it was hardly a business.

What, then, is to be the construction of the Constitution of the United States as to matters of which the framers could not have foreseen the importance?

What is to be the construction as to matters that are both new and important and which can be included or excluded in the interpretation of the Constitution?

Ought we to say: What would the framers of the Constitution have done if the matter had been presented to them in its then condition?

Ought we to say: What do the American people want now?

Obviously the latter.

Dartmouth College Trustees v. Woodward, 17 U. S. 4 Wheat. 644, 4 L. ed. 661; *Tiedeman*, *The Unwritten Constitution*, p. 144.

When Kansas says that insurance is trade, the Federal courts are bound to accept and follow that ruling as part of the settled policy of the state.

McKeen v. DeLancy, 9 U. S. 5 Cranch, 22, 3 L. ed. 26; *Green v. Neal*, 81 U. S. 6 Pet. 291, 8 L. ed. 402.

The United States Supreme Court is therefore at liberty to overrule *Paul v. Virginia*, 75 U. S. 8 Wall. 183, 19 L. ed. 361, and follow *Re Pinkney*, 47 Kan. 89.

The Supreme Court of the United States will follow and carry to their ultimate logical conclusions the decisions that the state courts give to state statutes, if valid.

Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244.

If trusts are an evil, if the combinations of citizens of various states to violate the laws of other states are contrary to public policy and deserve restraint, has not Congress an implied power to recognize and control such a condition of things?

See *Council Bluffs v. Kansas City, St. J. & 4 INTER 8*.

C. B. R. Co. 45 Iowa, 351, 24 Am. Rep. 773; *Crandall v. Nevada*, 78 U. S. 6 Wall. 85, 18 L. ed. 745.

Whenever those subjects are of a national character over which the power of Congress to regulate commerce is asserted, or of a national concern, or whenever such subjects admit of a uniform interstate system of regulation, then their nature is such that Congress may by appropriate legislation regulate them exclusively.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700; *Hall v. DeCuir*, 95 U. S. 495, 24 L. ed. 550; *Crandall v. Nevada*, 78 U. S. 6 Wall. 42, 18 L. ed. 746; *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996; *Pensacola Tele. Co. v. Western U. Tele. Co.* 96 U. S. 1, 24 L. ed. 708; *Munn v. Illinois*, 94 U. S. 113, 84 L. ed. 77.

Messrs. J. N. Ives, Atty. Gen., and J. R. Hill, with *Mr. F. H. Atchinson, Co. Atty.*, for the state.

Simpson, C., filed the following opinion: W. C. Phipps and Theo. Gardner, with four others, were complained against, by information, in the district court of Labette county, upon a charge of having violated chapter 257, Laws 1889, being "An Act to Declare Unlawful Trusts and Combinations in Restraint of Trade and Products, and to Provide Penalties therefor." It seems from the record that only Phipps, Gardner, Neely, and McClure were arrested. The other two defendants were not served with process. At the trial the defendants Phipps and Gardner were found guilty, while the defendants James L. McClure and George A. Neely were found not guilty. Each of the appellants was fined \$100 and costs. The specific charge was that the accused were agents of various insurance companies organized under the laws of the states of New York, Colorado, Minnesota, and Connecticut; that they were doing business in this state, and that said insurance companies had combined to control the price and rate of insurance in the city of Oswego, Labette county, Kan.; that by agreement they had established certain rates, larger than those existing before said combination; and that the accused, as agents and adjusters of said companies, were engaged in compelling local agents to observe such combination rates, so established by said companies. The defendants Phipps and Gardner appeal to this court.

The counsel for the appellants contends, to state his proposition in general terms, that chapter 257, Sess. Laws 1889, so far as it affects foreign insurance companies or their agents, is in conflict with the power of Congress to regulate commerce among the several states, and for that reason void; or, that the federal Anti Trust Law of July 2, 1890 (26 U. S. Stat. at L. p. 209) is exclusive of the state law, and that all prosecutions for such offenses as are charged in this information must be commenced in the Federal courts, and hence these appellants must be discharged. The counsel has filed an elaborate brief, and made a long oral argument, discussing the Anti Trust Law of this state and of the United States; the commerce clause of the Federal Constitution and the power of

Congress to legislate on that subject; as well as other branches of inquiry that may be involved in the proper discussion of this appeal.

The major premise of the argument in favor of the discharge of the appellants is that this court has decided in a recent case that insurance is "trade," within the meaning of the provisions of the Anti Trust Law of this state, under which these appellants were prosecuted and convicted. The exact question in the case of *Re Pinkney*, 47 Kan. 89, was whether the word "trade," in the title to the Anti Trust Law (being chapter 257, Laws 1890) so far as it relates to the business of insurance contained in the first section of the act, was broad enough to fairly indicate that such a provision with respect to insurance was a part of the act; and the court held the act valid so far as it related to the business of insurance, that being covered by the title of the act. This is what the court did say: "The question presented is, Does the word 'trade,' used in the title, fairly indicate and include the provisions of the act with reference to insurance? It is argued that the usual meaning of the word should govern, and in that sense it has reference to the business of selling or exchanging some tangible substance or commodity for money, or the business of dealing by way of sale or exchange in commodities; and it is said that the use of the word in connection with that of 'products,' in the title, qualifies the meaning of 'trade,' and makes it all the more apparent that the construction contended for is the correct one. This is the commercial sense of the word, and possibly may be the most common signification which is given to it, but it is not the only one, nor the most comprehensive meaning in which the word is properly used. In the broader sense, it is any occupation or business carried on for subsistence or profit. . . . The broader signification given to the word by most of the lexicographers would fairly embrace and cover the provision of the act with reference to the business of insurance. The title prefixed to an act may be broad and general, or it may be narrow and restricted, but in either event it must be a fair index of the provisions of the act. . . . That the broader meaning of the word 'trade' was the one intended by the legislature is manifest from the incorporation of the insurance provision in the body of the act. . . . How can it be said that the business of insurance is foreign to the title of the act, when the subject expressed in the title, taken in its broadest sense, and the one intended by the legislature, would embrace such business?" So it may be fairly said, as it is in the printed brief of counsel for appellants, that a legislative and a judicial definition of insurance is that it is "trade," within the meaning of the Anti Trust Law of this state.

The minor premise of counsel is that "trade," as defined by this court in the case of *Re Pinkney*, *supra*, means interstate commerce. This is an assumption, rather than a fair and logical deduction from the language used in the opinion. Trade between citizens of this state is not interstate com-

merce. Trade between a citizen of this state and a citizen of another state temporarily in this state is not interstate commerce. In fact, at the time the opinion in the case of *Re Pinkney* was written, there were no facts in the case that would suggest to the mind of the writer any question as to interstate commerce, because nowhere in the complaint, proceedings, or record of that case is it hinted that the unlawful combination intended and designed to control the cost of insurance was made or attempted by other persons than residents of the state of Kansas. So that it can be positively asserted that the word "trade," as used in that decision, meant then, and means now, trade between citizens of this state,—domestic trade, if you please,—and not trade or commerce between citizens of different states, or interstate commerce. It is a conclusive presumption of the law that this court knew that the legislature of this state had no power to regulate interstate commerce, and the presumption is equally strong and conclusive that by the use of the word "trade" the intercourse between citizens of different states that constitutes interstate commerce was not in contemplation. It has been judicially determined, time and time again, by the highest judicial authority in the land, that issuing a policy of insurance is not a transaction of commerce. The Supreme Court of the United States, in the case of *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357, in an elaborate opinion by Mr. Justice Field, says: "The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce. In *Nathan v. Louisiana*, 49 U. S. 8 How. 73, 12 L. ed. 993, this court held that a law of that state imposing a tax on money and exchange brokers who dealt entirely in the purchase and sale of foreign bills of exchange was not in conflict with the constitutional power of Congress to regulate commerce. The individual thus using his money and credit, said the court, 'is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not

be carried on.' And the opinion shows that, although instruments of commerce, they are the subjects of state regulation and, inferentially, that they may be subjects of direct state taxation. 'In determining,' said the court, 'on the nature and effect of a contract, we look to the *lex loci* where it was made or where it was to be performed. And bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the states have adopted the law-merchant, others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different states. These laws, in various forms and in numerous cases, have been sanctioned by this court.' And again: 'For the purposes of revenue the Federal government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now, the Federal government can no more regulate the commerce of a state than a state can regulate the commerce of the Federal government, and domestic bills or promissory notes are as necessary to the commerce of a state as foreign bills to the commerce of the Union. And if a tax on an exchange broker who deals in foreign bills be a regulation of foreign commerce, or commerce among the states, much more would a tax upon state paper, by Congress, be a tax on the commerce of a state.' If foreign bills of exchange may thus be the subject of state regulation, much more so may contracts of insurance against loss by fire." The doctrine of this case was distinctly affirmed by the supreme court in the case of *Liverpool & L. L. & F. Ins. Co. v. Massachusetts*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029, in which *Mr. Justice Miller* says: "The case of *Paul v. Virginia* decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation having an agency by which it conducted business in another state was not engaged in commerce between the states." The case of *Paul v. Virginia*, *supra*, was distinctly affirmed in the cases of *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148, and *Philadelphia Fire Asso. v. New York*, 119 U. S. 110, 30 L. ed. 342, and has been cited approvingly in many other Federal and numerous state decisions. It must now be regarded as the law of the land, in spite of the facetious criticisms of counsel for appellants. In *Paul v. Virginia*, *supra*, a statute of that state required that every insurance company not incorporated by Virginia should, as a condition of carrying on business in Virginia, deposit securities with the state treasurer, and obtain a license; and another statute made it a penal offense for a person to act in Virginia as agent for an insurance company not incorporated by Virginia without such license. *Paul*, having acted as such agent without a license, was convicted and fined under the statute. So that case arose out of an attempt on the part of the state of Virginia to enforce its penal laws for the regulation of the business of insurance within its bor-

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ders; and in this respect it is very similar to the case we are now discussing.

In the case of *Leavenworth v. Booth*, 15 Kan. 628, which was the prosecution of a local agent of a foreign insurance company for a violation of a city ordinance that required foreign insurance companies to pay certain license taxes for the privilege of doing business in said city, this court, by *Mr. Justice Valentine*, said: "It must be remembered that the insurance company involved in this controversy is a foreign insurance company, having no rights in this state except such as the state may see fit to confer upon it. It has no power to do business in Kansas by virtue of its organization in Wisconsin. It has no power to do business in Kansas by virtue of the laws of Wisconsin, or by virtue of the Constitution or laws of the United States, or by virtue of all combined. *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972; *Liverpool & L. L. & F. Ins. Co. v. Massachusetts*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029. It can do business in Kansas only under the laws of Kansas, and by permission from the state of Kansas. This state might absolutely exclude it, or might require that it do business only under a license, and might require that it not only get a license from the state, but also that it get a license from every city, county, or village in which it should attempt to do business. The state may permit such insurance company to come into the state under such just restraints and regulations as the state may choose. Hence the state is not bound to permit said insurance company to come to this state, as individual citizens of other states have a right to do, and then, for the purpose of raising revenue, resort only to the ordinary modes of taxation. On the contrary, the state, without resorting to taxation at all, may require that such insurance company shall pay for the privilege of coming into the state, and of doing business therein, and may require that it shall not only pay a sum to the state for the privilege of doing business therein, but that it shall also pay a sum to every municipal corporation in the state in which it shall attempt to do business. And all this the state may do without violating any provision of its own Constitution." This case asserts in the strongest possible language the right of this state to regulate the business of insurance within its borders, not only with reference to those insurance companies that may be organized under our laws, but especially with regard to insurance companies organized under the laws of sister states, doing or desiring to do business in this state.

At this writing it is probable that every state in the Union has passed laws upon this subject, until it may be said that the right of state regulation of the business of insurance is universally recognized and upheld. So it can be confidently said that this court, when it held in *Re Pinkney* that insurance was "trade," did not contemplate that the term used could be tortured into interstate commerce; and it can be said with equal

confidence that the settled law of this country is that the issuing of a policy of insurance is not a transaction of commerce. As we have seen, neither the major nor minor premise of the argument of counsel for the appellants is sound, and that the inevitable conclusion—that Congress alone has power to regulate interstate commerce, and to provide penalties against insurance trusts and combinations—does not follow. The court did not mean "trade," as synonymous with interstate commerce. The business of insurance is not interstate commerce. The state has power to regulate and control—and to provide penalties for the transgression of its regulating and controlling statutes—the business of a foreign insurance company within its boundaries. If the theory of the counsel for the appellants ever ripens into authoritative judicial decision, the power of the state to regulate and control the business of insurance within its limits is gone. The insurance department, and every act upon the statute books for the protection of the policy holders, and every line looking to the punishment of the violators of its public policy in this respect, goes with it, except, possibly, as to such companies as may be organized and operated under the laws of this state.

We recommend that the judgment of conviction be affirmed.

Per Curiam:

It is so ordered.

Johnston, J., concurs.

Horton, Ch. J.:

I dissent from the judgment ordered, not, however, upon the ground of the interstate character of insurance, as urged by the attorney for the appellants, but because of my reasons for my dissent in the case of *Re Pinkney*, 47 Kan. 89. The subject of an act must be clearly expressed in its title. Chapter 257 is penal in its nature. The title thereof should not be extended by construction. Common or popular words are to be understood in a popular sense. In the construction of statutes, a word which has two significations should ordinarily receive that meaning which is generally given to it.

Considering the provisions of the constitution concerning titles to bills or acts, and the foregoing cardinal rules of construction, I do not think the word "trade," used in the title of said chapter 257, Sess. Laws 1889, indicates or includes, in any public sense, or as generally understood, lawyers, doctors, insurance agents, or insurance companies. When I speak of the profession or business of a lawyer, a doctor, or an insurance agent, I do not say he is a trader or tradesman, or is in trade, nor that he is carrying on a trade, or doing well in his trade. I have never heard any person, in referring to the success of a lawyer, a doctor, or an insurance agent, say of either that he is prosperous in his trade, or that he is doing well in carrying on his trade, or that he is an energetic trader. Indeed, I never have heard insurance agents spoken of as "in trade." I think the decisions referred to in the foregoing opinion except the one of this court 47 Kan. 89, all tend to show that insurance is not "trade." The Supreme Court of the United States, in the case *Paul v. Virginia*, cited, say insurance policies "are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale." 75 U. S. 8 Wall. 168, 19 L. ed. 357.

Valentine, J.:

I concur in the decision of this case, and in affirming the judgment of the court below. It is evident from the body of the act (chapter 257, Laws 1889) that the legislature, in using the word "trade" in the title to the act intended to include insurance, but did not intend to include interstate commerce; and it is the duty of the courts to carry out the will and intention of the legislature, when enacted into law, and when the same can be fairly ascertained, and not to defeat the same, although the legislature may not have used the most appropriate language in expressing its will and intention. There is nothing in this case with reference to lawyers or doctors, or their business or profession. Hence it is wholly unnecessary to say anything with reference thereto.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF NORTH CAROLINA.

Re SIMON W. SANDERS.

(See 18 L. R. A. 549.)

A state statute prohibiting the sale of seed unless the year in which it is grown is plainly marked on each package except on a sale of seed in open

bulk by farmers to other farmers or gardeners is void as to seed brought from another state and sold in original packages.

Decided November 14, 1892.

NOTE.—The law of interstate commerce as applied to sales by drummers or peddlers is shown by a note to *Re Spain* (N. C.) 14 L. R. A. 97, and by the later cases of *Titosville v. Brennan*, 14 L. R. A. 100; 123 Pa. 642, 24 Am. St. Rep. 590; *Gunn v. White Sewing Mach. Co.* (Ark.) 18 L. R. A. 306.

For the law of interstate commerce as affecting sales of intoxicating liquors, see *State v. Winters*, 10 L. R. A. 616, and note, 44 Kan. 723; *Com. v. Zeit*, 11 L. R. A. 602, 128 Pa. 615.

For the effect of such law upon the similar subject of sales of oleomargarine, see *Re Gooch*, 10 L.

PETITION of Simon W. Sanders for a writ of habeas corpus to obtain his discharge from the custody of the sheriff of New Hanover county. *Discharge granted.*

The facts are stated in the opinion.

Messrs. Alfred Russell and D. L. Russell for petitioner.

Mr. John D. Bellamy, Jr., for the state: The act is an exercise by the state of the police power to protect its citizens from fraud.

That the power to establish police regulations, in the American constitutional system, has been left with the individual states cannot be disputed.

Cooley, Const. Lim. p. 706; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 28; *Licence Cases*, 46 U. S. 5 How. 504, 12 L. ed. 256; *United States v. Dewitt*, 76 U. S. 9 Wall. 41, 19 L. ed. 598; *Henderson v. New York*, 98 U. S. 259, 28 L. ed. 548.

What is this power? It is the power vested in the legislature, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same.

Cooley, Const. Lim. p. 705.

The power is located in the states and all that the Federal authority can do is to see that the states do not, under cover of this power, obstruct the exercise of the power confided to the nation.

Cooley, Const. Lim. p. 706.

If the act complained of affects commerce, but does not regulate it, it is valid.

Licence Cases, 46 U. S. 5 How. 615, 12 L. ed. 306; *Hannibal & St. J. R. Co. v. Huen*, 95 U. S. 465, 24 L. ed. 527; Cooley, Const. Lim. p. 707; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115.

It is a reasonable exercise of the police power of the state for a legislative act of Kentucky to require all illuminating oils to be inspected and to have branded on the casks "Standard Oil" or "unsafe for illuminating purposes."

Patterson v. Kentucky, *supra*.

The court held in *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370, that a statute of Maryland forbidding the exportation of tobacco except in hogshead inspected and passed as required by the act, is valid.

The state has power to pass laws making it penal to introduce paupers and criminals within its borders.

Moore v. Illinois, 55 U. S. 14 How. 18, 14 L. ed. 306. See also *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *State v. Newton*, 50 N. J. L. 584; *Stole v. Thompson*, 44 Minn. 271; *Steiner v. Ray*, 84 Ala. 93, 5 Am. St. Rep. 382; *State v. Marshall*, 1 L. R. A. 51, 64 N. H. 549.

R. A. 880, 3 Inters. Com. Rep. 530, 44 Fed. Rep. 276; Com. v. Huntley (Mass.) 15 L. R. A. 839.

For other sales within the scope of interstate commerce as affected by state legislation, see *American Fertilizing Co. v. North Carolina Board of Agri.* 11 L. R. A. 179, 3 Inters. Com. Rep. 532.

On the question whether shipments between
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Every possible presumption is in favor of the validity of a statute, and this continues beyond a rational doubt.

Sinking Fund Cases, 99 U. S. 718, 25 L. ed. 501. See also *Fletcher v. Peck*, 10 U. S. 6 Cranch, 128, 3 L. ed. 175; *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015; *Powell v. Pennsylvania*, *supra*.

Goff, Circuit Judge, delivered the following opinion:

Simon W. Sanders presents his application for the writ of habeas corpus. In substance, it alleges that petitioner is restrained of his liberty by the sheriff of New Hanover county, North Carolina, who detains petitioner by reason of a certain *mittimus* or warrant issued by a justice of the peace in and for said county and state, founded upon a judgment of conviction rendered by the justice for the violation of a certain statute of the state of North Carolina, passed by the General Assembly of that state on the 5th day of March, 1891, entitled "An Act to Protect Seed Buyers in North Carolina," being chapter 381 of the Acts of the General Assembly of North Carolina for the year 1891, in this: that petitioner, as the agent of D. M. Ferry & Co., a firm composed of citizens of the state of Michigan, and doing business in that state, exposed to sale and sold at Wilmington, in North Carolina, certain seeds, which were shipped to petitioner from the state of Michigan by said firm of D. M. Ferry & Co., to be sold by him as their agent. It also alleges that the seeds so sold by petitioner were in the original packages as received from the state of Michigan, and it admits that the packages were not marked as required by the statute alluded to. Petitioner claims that the act of the general assembly of North Carolina, by virtue of which he was convicted, in so far as it applies to the act done by him, is in violation of the Constitution of the United States, and that, therefore, no lawful conviction is possible under it, and that consequently he is restrained of his liberty wrongfully. The writ, as prayed for, was issued on the 8th day of March, 1892. The sheriff made return to the writ on the 24th day of March, 1892, admitting that he had petitioner in his custody, and that he held him in accordance with the terms of a warrant of commitment from a justice of the peace for the state and county mentioned. With his return the sheriff files a certified transcript of the record of the court of the justice, showing the trial, conviction, and commitment of the petitioner, from which it appears that the facts relative to the sale of the seed are correctly set forth in the petition filed in this manner. The sheriff, at the time he filed his return to the writ, produced before the court the petitioner, who was represented by counsel, and, there being

points in the same state lose their character of domestic commerce by passing out of the state during transportation, see note to *Campbell v. Chicago, M. & St. P. R. Co.* (Iowa) 17 L. R. A. 448.

As to shipments within a state as part of interstate or foreign transportation, see note to *Missouri Pac. R. Co. v. Sherwood* (Tex.) 17 L. R. A. 642.

no appearance for the sheriff nor for the state of North Carolina by counsel, the court ordered that the hearing of the matter involved in this proceeding be postponed until the next term of the circuit court of the United States at Wilmington, N. C., and committed the petitioner to the custody of the marshal of that district. At the spring term, 1892, of the circuit court at Wilmington the matters arising on the writ and return were argued by counsel for petitioner, for the sheriff, and the state of North Carolina, and submitted to the court.

The petitioner, as a member of the firm of S. W. Sanders & Co., of Wilmington, N. C., contracted with D. M. Ferry & Co., of Detroit, Mich., to sell for them garden, flower, and field seeds on certain terms and conditions set forth in a contract dated October 30, 1891. The seeds ordered were duly shipped by D. M. Ferry & Co., from Detroit, received by S. W. Sanders & Co., at Wilmington, and portions of them sold by petitioner. On the 5th day of March, 1891, the general assembly of North Carolina passed an act of which the following is a copy:

"An Act to Protect Seed Buyers in North Carolina. The General Assembly of North Carolina do enact: Section 1. That any person or persons doing business in the state, who shall sell seed, or offer for sale any vegetable or garden seed, that are not plainly marked upon each package or bag containing such seed the year in which said seed were grown, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten dollars or more than fifty dollars, or imprisoned not more than thirty days, for each and every offense; provided, that the provisions of the act shall not apply to farmers selling seed in open bulk to other farmers or gardeners. Sec. 2. That any person or persons who shall, with intention to deceive, wrongfully mark or label, as to date, any package or bag containing garden or vegetable seed, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten or more than fifty dollars, or imprisoned not less than ten or more than thirty days. Sec. 3. That this act shall be in force from and after the 1st day of September, 1891. Ratified this, the 5th day of March, 1891."

The seeds so sent by D. M. Ferry & Co., were in packages which were not marked with the year when the seeds were grown, as was required by this statute, and the sales made by the petitioner were in the original packages received from Michigan. Petitioner claims that this statute is a regulation of commerce among the states, the power to make which is not possessed by the legislature of a state, but is, by article 1, § 8, cl. 3, of the Constitution of the United States, vested exclusively in the Congress provided for by that instrument. Counsel for the state of North Carolina contends that the act mentioned, while it may affect commerce, is not a regulation thereof, but is simply the exercise by the state of its police power to protect its citizens from fraud. The clause of the Constitution above cited reads as follows: "The Congress shall have power to regulate

commerce with foreign nations and among the several states and with the Indian tribes." The need of a national regulation of commerce among the states was one of the most influential causes leading to the formation of the Constitution of the United States, the desire being to secure uniformity of the commercial regulations against discriminating or burdensome state legislation. It is now well established that Congress has the exclusive right to regulate commerce, and that the grant to Congress in the Constitution relating to that subject carried with it the whole matter, leaving nothing for the state to act upon in cases where the subject is national in character. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710; *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Leisy v. Hardin*, 135 U. S. 106, 34 L. ed. 132.

Is this act of the general assembly of North Carolina, as applied to the sale in question, a regulation of interstate commerce? If so, it is void. The fact that Congress has not legislated on this particular subject—has not especially regulated this character of commerce—does not authorize the state legislature to regulate it, but shows that Congress intends such sales to be free in all the states, and not to be restricted or burdened by any state statute. *Philadelphia & S. M. S. S. Co. v. Pennsylvania*, 123 U. S. 336, 30 L. ed. 120; *Bourman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700.

In *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694, the court says: "The power granted to Congress to regulate commerce among the states being exclusive when the subjects are national in their character, or admit only of one uniform system of regulation, the failure of Congress to exercise that power in any case is an expression of its will that the subject shall be left free from restrictions or impositions upon it by the several states."

The meaning of the decisions of the Supreme Court on this question is expressed by William Draper Lewis in his recent instructive work entitled "The Federal Power over Commerce, and Its Effect on State Action," (page 123):

"Whenever the subject effected by state laws is in its nature national, or requires one uniform rule or plan of regulation, then the inaction of Congress is evidence to the court of its intention that the commerce in this respect shall be free and untrammelled; but when the subject, from its local nature, does not seem to require a uniform rule of regulation, the inaction of Congress is evidence to the court that that body is willing that the states can effect such subjects in the legitimate exercise of their reserved powers."

In one of the early cases in which this clause of the Constitution received careful consideration (*Brown v. Maryland*, 25 U. S. 19 Wheat. 447, 6 L. ed. 688) Chief Justice Marshall, in delivering the opinion of the court, used this language: "What, then, is the just extent of a power to regulate com-

merce with foreign nations and among the several states? This question was considered in the case of *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior.

... If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

If Congress should pass an Act requiring all seed sold in packages to be marked with the year in which the same were grown, and prohibiting the sale unless so marked, regardless of the country where grown, including imported and domestic seeds, as this act does, it would be the exercise by Congress of the power granted by the Constitution, and a regulation of commerce among the states. The difficulty of honestly complying with such legislation would be presented to the consideration of that body as a reason why the statute should be amended or repealed. If this be true (and can it be doubted that Congress has the constitutional right to legislate on this subject?) and if the conclusion I reach is correct, that Congress has exclusive jurisdiction of such regulation, does it not follow that this legislation by the general assembly of North Carolina is unconstitutional and void? If the states can legislate, as to the matter of the North Carolina statute, because of the absence of legislation by Congress on the subject, as was claimed by counsel in the argument, would not the provisions of that Act be held to be so unreasonable, such a burden on the business of the country, and so interfere with the rights and privileges of the citizens thereof, as to render it void? It virtually prohibits the sale in North Carolina of seed imported from foreign countries, for the packages would not be marked, and our dealers could not truthfully mark them as required by that statute. It prevents the sale in North Carolina of seed lawfully carried into that state in the mails of the United States, sent by dealers residing and doing business in other states, who pay to the gov-

ernment of the United States, the postage or freight for the transportation of the same, under laws passed by Congress. It favors the grower and dealer in seeds doing business in North Carolina to the detriment of the growers and dealers of all the other states, for the farmers of North Carolina are, in effect, regarded as growers and dealers in seeds, and exempted from the requirements of the law, and it would follow that all persons desiring to purchase from them would be "farmers or gardeners." It would thereby permit a certain portion of the citizens of that state to engage in that business, and prohibit all the rest from so doing. Why should the farmers of North Carolina be permitted to sell seed in open bulk to other farmers or gardeners, and the petitioner, or D. M. Ferry & Co., or any citizen who desires to engage in that traffic, be prohibited from so doing? How does this protect seed buyers? What is meant by "open bulk?" The natural meaning of the words is, "in the mass; exposed to view; not tied or sealed up." Used in the connection they are in this act, they do not relate to the quantity that may be sold, nor does the statute restrict it to an ounce or less, or require a bushel or more to be sold. Any quantity of any garden or vegetable seed, not in a package or bag, but in open bulk, may be sold by a farmer to other farmers or gardeners, without the mark relating to the year when grown. The effect of this is that all dealers must sell their seeds through farmers, or be excluded from the market. The farmer may sell seeds, free from any restrictions or marks, but any one else selling the same kind of seeds, even if from the same original mass or bulk, if the same be in packages or bags, must have plainly marked upon them the year when grown,—the words that give purity to the contents, and eliminate all fraud from the sale. This statute virtually prevents the importation into the state of North Carolina of all garden and vegetable seeds in paper packages or bags, for sale in the packages in which imported, and destroys that extensive and useful trade, so far as that state is concerned. If one state can do this, all can. If North Carolina can impose this burden, other states can and will impose similar or heavier ones, to the great damage of a commerce in which not only this petitioner and D. M. Ferry & Co. are interested, but in which many citizens of many of the states have invested their means, and to which they have devoted their time and energies. In *Ex parte Kieffer*, 40 Fed. Rep. 399, Mr. Justice Brewer says: "The moment you find any act of the legislature or any ordinance of a city which prevents the free exchange of lawful articles of commerce between the states, you find an act or ordinance which contravenes the commercial clause of the United States Constitution."

It was argued that the statute in question is but the legitimate exercise of the police power of the state. What is the "police power," conceded to and proper to be exercised by the state? About this eminent jurists have differed, and have found it difficult to draw the line between it and the

powers granted to the general government. *Mr. Justice Strong*, in delivering the opinion of the court in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, said on this subject: "It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. As was said in *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149: 'It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state, according to *sic utere tuo ut alienum non laedas* which being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.' It was further said that by the general police power of a state persons and property are subjected to all kinds of restraint and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right of the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be, made so far as national persons are concerned."

It may also be admitted that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted with contagious or infectious diseases; a right founded, as intimated in the *Passenger Cases*, 48 U. S. 7 How. 283, 12 L. ed. 702, by *Mr. Justice Grier*, in the sacred law of self-defense. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious and infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are

self-defensive. I do not deem it necessary to review the cases on this subject. It was really disposed of in *Gibbons v. Ogden*, the reasoning of *Chief Justice Marshall* being, to my mind, conclusive, and, as expressed in said case, never having been departed from in matters where exclusive jurisdiction is given to Congress. As he well says: "The nullity of an Act inconsistent with the Constitution is produced by the declaration that the Constitution is supreme."

Mr. Justice Miller, in *Henderson v. Wickham*, 92 U. S. 529, 23 L. ed. 543, on this question says: "It is clear, from the nature of our complex form of government, that whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states."

I conclude that the police power of a state cannot be held to embrace a subject confided exclusively to Congress by the Constitution of the United States. If the subject-matter of state legislation is included in the exclusive grant of commercial power to Congress, then the state enactment is void, even if it passed in the exercise of the police power of the state. The authorities in support of this are numerous, and from them I cite *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649; *Leisy v. Hardin*, 135 U. S. 108, 34 L. ed. 182.

Other questions are submitted by counsel for petitioner, but holding as I do on the matters I have mentioned, I do not find it necessary to pass upon them.

For the reasons that I have given I conclude that the act of the general assembly of the state of North Carolina entitled "An Act to Protect Seed Buyers in North Carolina," being chapter 381 of the acts for the year 1891, is inoperative and void, and that the petitioner is in custody in violation of the Constitution of the United States.

I therefore order that he be discharged from custody.

ARKANSAS SUPREME COURT.

N. H. GUNN, *Appt.*,

v.

WHITE SEWING MACHINE CO.

(See 18 L. R. A. 208.)

A contract by which a resident of a state agrees with a foreign corporation to canvass certain territory for the sale of its sewing machines, which the corporation thereby agrees to sell to him on credit and a bond given to secure payment to the corporation of any sum that may become due under such contract, constitutes a part of the interstate commerce carried on by the sale of such

sewing machines in accordance with said contract, and therefore cannot be affected by a state statute prohibiting business within the state by a foreign corporation which has not complied with certain requirements, such as filing a certificate to designate an agent on whom process may be served.

(*Cochran*, Ch. J., and *Manaford*, J., dissent.)

Decided December 3, 1892.

NOTE.—For note on peddlers and drummers as related to interstate commerce, see *Re Spain* (N. C.) 14 L. R. A. 97.

4 INTER S.

A PPEAL by defendant from a judgment of the Circuit Court for Faulkner County in favor of plaintiff in an action brought to enforce the liability of defendant as surety upon a bond which had been given to plaintiff by one, Julian, in connection with a contract for the sale of plaintiff's machines. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. H. Harrod and E. A. Bolton, for appellant.

The legislation of a state will only be restrained when the exercise of the right conflicts with the perfect execution of a sovereign power delegated to the United States.

Dobbins v. Eris County, 41 U. S. 16 Pet. 485, 10 L. ed. 1023.

Even if a state were bound to accord to a company the right of acting in a corporate capacity within its limits, the state would undoubtedly retain the power of making reasonable regulations for the government of the company, and prescribing conditions to be complied with before the right may be claimed.

2 Morawetz, Priv. Corp. § 974.

Messrs. Sanders & Watkins for appellee.

Battle, J., delivered the opinion of the court:

The White Sewing Machine Company was a corporation organized and doing business under the laws of the state of Ohio, and was engaged in the selling of sewing machines and other goods at Cleveland, in that state. A. I. Julian and N. H. Gunn were citizens of Faulkner county, in this state. On or about the 6th day of August, 1888, the sewing machine company entered into a contract with Julian, by which the company undertook and bound itself to sell sewing machines, and the component parts thereof, to Julian, at stipulated prices, on a credit, and Julian agreed to canvass Faulkner county, or cause it to be canvassed, "with horse and wagon, exclusively for the sale of the White sewing machines." Julian was to order the machines, or the component parts of the same, when he desired them to be sent to him. At the same time Julian, as principal, and Gunn, as surety, executed a bond to the sewing machine company, conditioned, among other things, that Julian would pay all sums of money that he would be owing to the company for sewing machines or otherwise. After this the company, pursuant to the terms of its contract, and on the faith of the bond executed to it, sold and shipped to Julian a large number of sewing machines and other property, and Julian became indebted to it on account thereof in a large sum of money. Julian failing to pay, the company brought this action on the bond against Gunn to recover the same, or a part thereof.

The only defense made by Gunn was the company had not, at the time the bond was executed, filed any certificate in the office of the secretary of the state of Arkansas, designating an agent upon whom process could be served, and its principal place of business in this state.

Evidence was, however, adduced at the trial tending to prove, among other things,

the facts before stated, and that the machines and other property were sold by the company in Ohio, and shipped to Julian in this state. The court below held that these transactions were a part of the interstate commerce of the United States, and were not affected by the laws of this state, and rendered judgment in favor of plaintiff against the defendant, and he appealed.

Appellant contends that the bond sued on is void under the Act of the General Assembly of April 4, 1887. That Act declares that before any foreign corporation shall begin to carry on business in this state it shall, by a certificate under the hand of the president and seal of such company, filed in the office of the secretary of state, designate an agent, who shall be a citizen of the state, upon whom process may be served, and also state therein its principal place of business in this state; and provided that, if any such corporation shall fail to file such certificate, all its contracts with citizens of this state shall be void as to the corporation, and shall not be enforced in any of the courts of this state in favor of the corporation.

It is conceded that the certificate required by that Act was not filed by the appellee until after the debt sued on matured. Was the bond void?

In *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357, the court, speaking of a foreign corporation, said: "The recognition of its existence, even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests, or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion."

But this right of the state cannot be so exercised as to interfere with the power of Congress to regulate interstate commerce. In *Paul v. Virginia* the corporation involved in litigation was an insurance company, and was not engaged in interstate commerce. In speaking of the power to regulate commerce, in that case, the court further said: "It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals."

This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be car-

ried on. It is general, and includes a like commerce by individuals, partnerships, associations, and corporations."

In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, the court, speaking of interstate commerce, said: "The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed; that is, the conditions upon which it shall be conducted, to determine when it shall be free, and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While, with reference to some of them, which are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them, yet, when they are national in their character, and require uniformity of regulation, affecting alike all the states, the power of Congress is exclusive. . . . Nor does it make any difference whether such commerce is carried on by individuals or by corporations."

In *Pembina Consol. S. Min. & M. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, the court, after discussing this power at length, said: "The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal government, is not to be restricted by state authority." *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1187.

In *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694, the court said: "Certain principles have been already established by the decisions of this court which will conduct us to a satisfactory decision. Among those principles are the following: (1) The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation. . . . (2) Another established doctrine of this court is that, where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereinafter mentioned, is repugnant to such freedom."

"Of the former class may be mentioned all

that portion of commerce with foreign countries or between the states which consist in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe." *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Escañaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442.

"Of the class of subjects local in their nature or intended as mere aids to commerce," on which it has been held that the authority of the states may be exerted for their regulation and management until Congress interferes and supercedes it, "may be mentioned harbor pilotage, buoys, beacons to guide mariners to the proper channels in which to direct their vessels," bridges over navigable streams, wharves, wharfage and quarantine. "State action upon such subjects," said the court in *Mobile County v. Kimball*, *supra*, "can constitute no interference with the commercial power of Congress, for, when that acts, the state authority is superseded. Inaction of Congress upon these subjects of local nature or operation, unlike its inaction upon matters affecting all the states, and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority."

A few cases will serve to show the character of some of the statutes which have been held by the court to be unconstitutional because they interfere with the exclusive power of Congress to regulate interstate commerce, and thereby what constitutes, in part, the commerce over which such power extends. In *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547, a statute of the state of Louisiana which attempted to regulate the carriage of passengers upon railroads, steamboats, and other public conveyances, and which provided that no regulation of any companies engaged in that business should make any discrimination on account of race or color, was considered. "The case presented under the statute was that of a person of color, who took passage from New Orleans for Hermitage, both places being within the limits of the state of Louisiana, and was refused accommodations in the general cabin on account of color. In regard to this the court declared that, for the purposes of this case, we must treat the Act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons traveling in that state, upon public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color."

We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the states." And, speaking in reference to the right of the states, in certain classes of interstate commerce, to pass laws regulating them, the court said: "The line which separates the powers of the states from this exclusive power of Congress is not al-

ways distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. . . . But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without, or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage."

In *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 80 L. ed. 604, the taxing district of Shelby county, Tenn., which includes the city of Memphis, acting under the authority of a statute of that state attempted to impose a license tax upon a drummer for soliciting, within that district, the sale of goods for a firm in Cincinnati, which he represented; but the court decided that such a soliciting of business constituted a part of interstate commerce, and that the statute of Tennessee imposing a tax upon such business was in conflict with the commerce clause of the Constitution of the United States, and was therefore void.

In *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, the plaintiff in error was convicted of violating an order of the city and county of San Francisco, in the state of California, which made it a misdemeanor for any one to act as an agent of a railroad company without having first paid the sum of \$35 as a license fee. He was an agent in said city and county for the New York, Lake Erie & Western Railroad Company, a corporation having its principal place of business in the city of Chicago, and which operated a continuous line of road between Chicago and New York. As such agent his duties consisted in soliciting passenger traffic in that city and county over the road he represented. He did not sell tickets for his company; neither did he receive nor pay out money on account of it. His sole offense consisted in soliciting passengers to go over his company's road, without having paid the license tax imposed upon him by said order as a condition precedent to his right to act as such agent in said county. The court held that the license fee as to such agency was a tax upon interstate commerce, and in that respect was unconstitutional. The court, speaking of the agency and tax, said: "The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the means by which the company sought to increase, and doubtless did increase, its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a

means or an occupation of carrying on interstate commerce, pure and simple."

In this case the contract between the corporation and Julian, and the bond sued on, were executed in this state, and were business transacted in Arkansas. But no sales or indebtedness were created by them. The contract was only an agreement to sell, and the bond was a condition upon which the corporation agreed to sell and a means adopted to secure the indebtedness to be contracted by sales, and both constituted a contract. They were made a foundation of a future trade between a corporation of one state and a citizen of another, and were a direct method devised to increase the business of the former, and, as to them, served as a basis of interstate commerce. Relying on them, the corporation sold the machines and other property, and shipped them from the state of Ohio, its place of manufacture and business, to Julian, in Arkansas; the place of sales being in Ohio. Until they ceased, according to their terms or by agreement of the parties to be of any force, they were an inducement to, and entered into, every sale, and formed a part of it. According to the principles firmly established by numerous decisions of the Supreme Court of the United States, they (the bond and contract) and the sales and shipment of the machinery and other property, were a part of the interstate commerce of the United States, which Congress has the exclusive right to regulate, and were and could not be affected by the Act of April 4, 1887.

Judgment affirmed.

Cockrill, Ch. J., dissenting:

A corporation created under the laws of one state has no right to recognition in another state. It is a privilege to be enjoyed only through comity. Having the absolute power of excluding it from its jurisdiction, the state may, of course, impose such conditions upon the privilege of doing business in its limits as it may think expedient. This doctrine went without qualification for more than three fourths of a century after the adoption of the Constitution of the United States, when the Supreme Court of the United States ingrafted upon it an exception in favor of foreign corporations which were agencies of commerce. The exception was first adverted to in *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357. But that was confessedly *obiter*, and established nothing. It has been said by judges delivering the opinions of the court that the exception was first established in *Pennacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708, in 1877. See *Horn Silver Min. Co. v. New York*, 143 U. S. 805, 314, 86 L. ed. 164, 167; *Pembina Consol. S. Min. & M. Co. v. Pennsylvania*, 125 U. S. 181, 185, 31 L. ed. 650, 652. But Chief Justice Waite, who delivered the opinion in that case, seems not to have been aware that he was deciding the question, for, after quoting the *obiter* in *Paul v. Virginia* above mentioned, he says, "the questions thus suggested need not be considered now," and gives as a reason for it the fact that the court had

placed the invalidity of the state statute under consideration upon the ground that it conflicted with the legislation of Congress. The question has since been adjudicated in several cases. I am aware of no case in which it has been ruled that the exception applies to a foreign corporation which is not itself an agency of commerce. There are *dicta* which may go further, but there are also expressions of the courts so pointed as to indicate that the exception is limited to such corporations as are agencies of commerce,—as carriers of freight, passengers, or communications. Thus, in *Pembina Consol. S. Min. & M. Co. v. Pennsylvania*, *supra*, Judge Field, who first gave expression to the exception, in speaking of the case of *Pensacola Teleg. Co. v. Western U. Teleg. Co.* *supra*, said it was there held that the telegraph, as an agency of commerce and intercommunication, came under the controlling power of Congress and could not be excluded by a state from transacting its business within its limits. And again, in the same case, he says the exception extends only to a foreign corporation in the employ of the Federal government, "or where its business is strictly commerce." The same language is quoted with approval through Judge Lamar in *McCall v. California*, 136 U. S. 112, 34 L. ed. 398. In *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, Judge Bradley, after saying that a state could not restrict the right of a foreign corporation where "the principal object of its organization" was "the business of carrying on interstate commerce," said: "The case is entirely different from that of . . . manufacturing corporations, and all other corporations whose business is of a local and domestic nature."

Conceding that the extreme doctrine of *Robbins v. Shelby County Tax Dist.* 120 U. S. 489, 30 L. ed. 694, must be extended to foreign corporations, the conclusion does not follow that such a corporation, engaged in interstate trade,—as selling merchandise,—can gain a domicile in a state in violation of its statutes, merely to gain a vantage ground for the sale of its goods. A manufacturing corporation is connected with commerce, for if it cannot sell, its output is worthless. Many manufacturing corporations would suspend operations if their sales were limited to the state creating them. They are, then, in a measure connected with interstate commerce. But the business connection with commerce must be direct in order to work an inhibition of state action. It is not sufficient that the business is remotely or incidentally connected with interstate or foreign commerce. State legislation which operates upon natural persons and corporate agencies of commerce is not invalidated by the commerce clause of the Constitution, unless it directly affects commerce. *Sherlock v. Alling*, 98 U. S. 99, 102, 23 L. ed. 819, 820; *Smith v. Alabama*, 124 U. S. 474, 31 L. ed. 511. The rule as to corporate business cannot be more rigid against the state's right of regulation or prohibition. In *Pembina Consol. S. Min. & M. Co. v. Pennsylvania*, *supra*, state legislation was upheld restricting the privilege of a foreign mining company from maintain-

ing an office in Pennsylvania notwithstanding the maintenance of the office in that state afforded the corporation the opportunity for the sale of its foreign products. So in *Horn Silver Min. Co. v. New York*, 143 U. S. 905, 36 L. ed. 164.

Following the decisions of the Supreme Court of the United States, the only question in this case open to serious consideration, in my judgment, is, Did the White Sewing Machine Company do business in this state? Or, to put the question as Judge Field does in the case of *Horn Silver Min. Co. v. New York*, *supra*, Did the company do business as a corporation in this state? If so, it must submit to any condition the state sees fit to impose upon it. Any other rule would bind the hands of the state authorities, only to subject the public to all the corporate abuses now known or hereafter to be devised. The statement of such a doctrine is startling. This case does not stand upon a single casual transaction in Arkansas followed by contracts for sales of merchandise which were consummated in Ohio. Nor was the contract which the corporation entered into with Julian, for whom the appellant was surety, simply an agreement to sell merchandise. If those were the only facts in the case, it might be gravely doubted whether the corporation had done business in Arkansas, within the meaning of our Constitution and statute. It has been ruled by the Supreme Court of the United States that a foreign corporation does not, by doing a single act of business in one state, with no purpose of doing other acts there, come within the prohibition of a constitution and statute which are substantially like our own. *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1187. See *Scruggs v. Scottish-American Mortg. Co.* 54 Ark. 566. And a merchant in Ohio who fills orders for merchandise received from a customer in Arkansas, cannot be said to be doing business in the latter state. If neither one nor the other constitutes carrying on business in Arkansas, it is difficult to see how the two together could make out the case. If they do not no question under the commerce clause of the Constitution is presented, and the discussion of it by the court is *obiter*. But the record shows the following state of facts in this case: The White Sewing Machine Company, an Ohio corporation, maintained a resident agent at Little Rock, in this state. The proof does not show that the agent held or sold any machines or other merchandise for the company. He traveled over the state, and in the name of the company sold to individuals the exclusive right to vend its merchandise in a limited territory. The consideration for this exclusive privilege was a contract on the part of the vendee, binding himself to sell no other sewing machine, and to canvass the territory assigned to him in the interest of the White machine. The company also bound itself to sell the vendee White sewing machines upon terms fixed by the contract. As a part of this contract, the vendee was also required to enter into bond to the company, with a surety, for the faithful payment of whatever indebtedness might be incurred by them to the corporation under

the contract named, or by any other means, whether the same should arise out of the purchase and sale or lease of sewing machines, or the consignment of property or merchandise, or the failure to redeliver or account for the same to the corporation, or for indebtedness arising in any manner whatever. A great number of such contracts were entered into before the corporation complied with the statute. After the one in suit was executed, the corporation complied with the law by filing a certificate designating the agent before mentioned as the person upon whom service might be had, and Little Rock as its principal place of business in Arkansas. The business continued as before. Julian signed one of these contracts and bond, with the appellant as surety, and purchased machines, as set out in my brother Battle's opinion. The suit is to recover upon the bond thus executed. I understand that it is upon the uncontroverted facts above stated that the court concludes that the corporation carried on business in Arkansas. The ruling that it carried on business, within the meaning of the statute, is expressly announced. The evidence does not show simply the case of a drummer soliciting contracts for purchase of merchandise, to be consummated in Ohio, as was the case of *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694. It shows that the intention of the foreign corporation to gain a domicile in Arkansas, and to carry on its business of selling, leasing, and consigning machines there through local agents, as it was authorized to do in the state of Ohio. To ascertain whether the corporation did business in Arkansas, we are not required to limit our inquiry to the transaction with which the defendant alone is concerned. If it was carrying on a business in Arkansas before and after the transaction with the defendant, it was competent for him to show that his transaction was of the general class; and when it is proved that the corporation has done acts here manifesting the intent to gain a domicile for the purpose of transacting its business, that is the beginning of its business here, and the contracts which manifest that intention are avoided by the statute. The instant the business is entered upon, the prohibition of the statute attaches, without waiting to see what the corporation will do next. Suppose the corporation had entered into a contract to hire an office in Arkansas, with the avowed purpose of establishing a domicile here. That would be sufficient proof of the beginning of business here, and, as the statute prohibits it from beginning business here until it complies with the law, it could not enforce the contract. The fact that the transaction in suit, if isolated from the others, would show one connected transaction of interstate commerce, and nothing more, will not take the case out of the statute, for when it is once established that the corporation is exercising its functions in a foreign state, as distinguished from the performance of mere commercial acts to be consummated in another state, it becomes subject to state regulation. *Horn Silver Min. Co. v. New York, supra*; *Baker v. State*, 44 Ark. 134. That the acts of the corporation in this case

are not mere commercial transactions of the character indicated, seems apparent. The sales by the corporation of exclusive territory within which the vendees might sell White sewing machines, and the covenant on their part that they would sell none other, are contracts executed and to be performed in Arkansas, and, if connected with interstate commerce, it is remotely. The terms of the contracts show that they relate not only to domestic commerce, but to transactions having no connection with commerce at all; and the contract of suretyship, like the contract of insurance and indemnity, is not the subject of commerce. These matters were not transactions of interstate commerce, but were business transacted in the state independently of commerce. According to the decisions above cited, they rendered the corporation amenable to state regulation.

The defendant's cause might be rested here, but I think it may be fortified still further. If the foreign corporation were strictly an agency of commerce, entering the state for the purpose of carrying on the business of interstate commerce, I think it should be held that the regulation is not a restriction upon commerce. What is the regulation? It is that the foreign corporation doing business in this state shall make known its place of business here, and designate the agent upon whom service shall be had. No license fee or tax is demanded of the corporation. Not even a fee for defraying the expenses of the regulation is required. The regulation, then, is nothing more than that the corporation doing business here shall consent to be found here, and shall designate the officer upon whom service shall be had, and where he may be found. In theory the domicile of a corporation is only in the state where it is created, and the general rule, in the absence of legislation, is that it can be found nowhere else. But when it sends its agents into a foreign state to transact its business it is really as much represented by them there as in the state of its creation. It is competent for the legislature of the foreign state to enact that personal service may be had on the corporation by service on agents in its borders who transact the company's business there. The corporation doing business thereafter in the foreign state is presumed to assent to that rule. *American Casualty Ins. Co. v. Lea*, 56 Ark. 539. But it was found often inconvenient for the creditor of the corporation to prove the agency, and so, to make the matter simpler, some of the states enacted that some particular state official should be authorized to receive service for the corporation. That is the law in this state as to insurance companies. As to others, it requires the corporation to designate a person who shall be its agent to receive service. That is fairer to the corporation than to compel it to run the risk of having judgment rendered against it by service on some one of a number of persons transacting business for it, who may not have the interest of the corporation at heart enough to notify it of the pendency of the suit. It is better for the creditor, because he is relieved of doubt as to the proper person upon whom to get serv-

ice. To enforce the regulation, the penalty of avoiding the contract for its violation is imposed. That the regulation is reasonable, and within the power of the state, has never been doubted. *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222; *Cooper Mfg. Co. v. Ferguson*, *supra*. "Legislation in a great variety of ways may affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution; and it may be said generally that the legislation of a state, not directly against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operation of commerce, is of obligatory force upon citizens within its territorial jurisdiction whether on land or water, or engaged in commerce, foreign or interstate." *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 30 L. ed. 852; *Little Rock & Ft. S. R. Co. v. Hanniford*, 49 Ark. 291. This legislation is not directed against commerce or any of its regulations, but re-

lates only to the right of the citizen to sue in the jurisdiction where the cause of action arises, and imposes upon the corporation only the duty of submitting to that jurisdiction. The domestic corporation is required to show by record where its principal place of business is, and the law specifies that service may be had on its officers. "It does not lie in any foreign corporation to complain that it is subjected to the same law as the domestic corporation." *Horn Silver Min. Co. v. New York*, *supra*. When a state no longer possesses the power to compel every corporation doing business within its jurisdiction, whether exclusively engaged in interstate or foreign commerce or not, to give publicity to its affairs in so simple a matter as making known its officers and place of business there will remain but little of value in its reserved rights. I think the judgment should be reversed, and the complaint dismissed.

Mansfield, J.:

I concur with the chief justice in dissenting to the grounds stated in his opinion.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

Re Application of the INTERSTATE COMMERCE COMMISSION for an Order upon
W. G. BRIMSON *et al.* to Answer Questions.

The process of a Federal court cannot be exercised in aid of an investigation before the Interstate Commerce Commission as that is an administrative and not a judicial body as a proceeding be-

fore an administrative body is not a "case" or "controversy" within the constitutional powers of the Federal courts.

(December 7, 1892.)

APPPLICATION by the Interstate Commerce Commission to the United States Circuit Court for the Northern District of Illinois for an order to compel the alleged agents of certain railroad companies to produce certain books and papers before the Commission, and answer questions which had been propounded to them. *Application dismissed.*

The facts are stated in the opinion.

Mr. Walter D. Dabney, with *Messrs. Thomas E. Milchrist*, U. S. Dist. Atty., and *John P. Hand*, Asst. Dist. Atty., for the Commission.

Messrs. Lyman Trumbull, *John P. Wilson*, and *James C. Hutchins*, with *Messrs. Williams, Holt & Wheeler*, for the railroad companies, and incidentally for the witnesses:

This investigation is in its nature judicial, and authority to make it could not lawfully be conferred by Congress upon the Interstate Commerce Commission, which is, in its nature, a legislative or administrative, and not a judicial body.

The Federal government is one of delegated and divided powers.

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When we find in the Federal Constitution the provision "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as Congress may, from time to time, ordain and establish," we have the most express limitation upon the right of Congress to place any judicial power in any other body whatsoever.

1 Kent, Com. 804; *United States v. Ferreira*, 54 U. S. 18 How. 52, 14 L. ed. 47, note.

These alleged violations of law are, if anything, crimes, punishable by heavy penalties of fine and imprisonment, and the investigation of the question whether crime has been committed is not a "legitimate governmental (i. e., administrative) purpose."

Cooley, Const. Lim. (5th ed.) 109, 110; *Com. v. Jones*, 10 Bush, 725; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 87 Fed. Rep. 618; *United States v. Ferreira*, 54 U. S. 18 How. 45, 14 L. ed. 44, and note.

The so-called "visitorial power" of the government can have no application to railroad companies at all.

2 Kent, Com. (18th ed.) 800; *Waterman*,

Corp. 668; *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 871; *Re Pacific Railway Commission*, 32 Fed. Rep. 251; *Kilbourn v. Thompson*, 108 U. S. 168, 26 L. ed. 877.

Even if Congress could empower the Commission to make this investigation, still it could not empower this court to grant the order applied for; because whether the character of the inquiry is judicial or nonjudicial, the question does not here arise in a case or controversy as required by the Constitution.

Re Pacific Railway Commission, 32 Fed. Rep. 251; citing *Chisholm v. Georgia*, 2 U. S. 2 Dall. 432, 1 L. ed. 445; *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 745, 6 L. ed. 205; *Smith v. Adams*, 180 U. S. 173, 32 L. ed. 397; *Hayburn's Case*, 2 U. S. 2 Dall. 409, 1 L. ed. 486; *United States v. Todd*, 54 U. S. 13 How. 52, 14 L. ed. 47, note; *United States v. Ferreira*, 54 U. S. 13 How. 45, 14 L. ed. 44; *Re McLean*, 37 Fed. Rep. 648; *Story*, Const. § 1646.

The court will look at the nature of the right, and not merely at the form in which it is asserted, to determine whether there is or is not a "case" for judicial consideration.

Murray v. Hoboken Land & Imp. Co. 59 U. S. 18 How. 282, 15 L. ed. 876; *United States v. Ferreira*, 54 U. S. 13 How. 45, 14 L. ed. 44.

The courts have uniformly and repeatedly refused to recognize as "cases or controversies" questions arising at a preliminary stage before the judicial power is called into exercise, or subject to revision by another department after the courts have done with them.

United States v. Ritchie, 53 U. S. 17 How. 525, 15 L. ed. 236; *Hayburn's Case*, and *United States v. Ferreira*, *supra*; *Re Election Suprs.* 114 Mass. 247.

Gresham, Circuit Judge, delivered the opinion of the court:

June 18, 1892, the Interstate Commerce Commission made an order at Washington, requiring the Calumet & Blue Island Railway Company, the Joliet & Blue Island Railway Company, the Chicago & Southeastern Railway Company, the Chicago & Kenosha Railway Company, and the Milwaukee, Bay View & Chicago Railway Company, and certain other railway companies, to appear at Chicago on July 18th, to answer an informal complaint, made by unknown persons, charging that the Illinois Steel Company had caused the four first named companies to be organized for the purpose of operating their switches and side tracks at or near Chicago, and engaging in traffic by continuous shipment from places without the state of Illinois to places within that state, in connection with other named carriers, and had caused the last named company to be organized for the like purpose in Wisconsin; that the steel company owned the five companies, and for six months had operated them, in connection with other named railroad companies, as a convenient device for evading the provisions of the Interstate Commerce Act, and obtaining unjust preferences and illegal rates on interstate business. The five companies were particularly required to answer the following questions under oath:

"(1) Does any traffic contract, agreement or arrangement, in writing or otherwise, exist be-

tween the companies above alleged to be under the control and operated by said Illinois Steel Company and any of the other companies with reference to interstate traffic? If so, state contract, agreement or arrangement.

"(2) Are any tariffs of rates and charges for the transportation of interstate property in effect between said companies above alleged to be under the control of and operated by said Illinois Steel Company and said other railroad companies? If so, what are they, and what are the divisions thereof between the several carriers?

"(3) Have the companies alleged to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned during the six months last past, or have they delivered any of said traffic to such other carriers during that time for any person, firm or company other than the Illinois Steel Company? and, if so, to what extent?"

The commission met at the time and place appointed, and the companies alleged to be owned and controlled by the steel company, except the Calumet & Blue Island, appeared, and in writing, under oath, answered the three questions in the negative, and denied that during the six months previous to the entry of the order for the investigation they had engaged in interstate commerce. The other company, the Calumet & Blue Island, filed a verified answer, averring that it had not engaged in interstate traffic for six months before the filing of the alleged complaint; that no traffic agreement or arrangement existed between it and any of the alleged connecting companies; that no schedule of charges for the transportation of property from one state to another state was in effect between it and other connecting roads other than this; that on June 13, 1892, it united with the Pennsylvania Railroad Company in a tariff of \$2.75 per net ton on car lots of coal from points on the Southwestern Pennsylvania Railroad and the Youghiogheny Northern Railroad to Joliet, by way of Chicago, of which it received 40 cents per net ton, that amount having long been the proportion of the through rate allowed to other carriers for the same haul between Chicago and Joliet; that on July 6, 1892, it entered into a similar contract with the Lake Shore & Michigan Southern Railway Company and the Pittsburgh & Lake Erie Railway Company. The answer denied that the company's road was operated as a device to evade the provisions of the Act; denied that its operation resulted in giving the steel company illegal rates, or in affording it any kind of advantage or preference; and denied that it had neglected to file with the commission copies of any agreements or tariffs as required by the Act.

Certain officers of the five railroad companies and an officer of the steel company appeared before the commission as witnesses in obedience to its subpoena, and, having failed to elicit any facts from them which materially tended to support the charge of unlawful discrimination in favor of the latter company, the commission demanded the stock books of the steel company and the stock books of the five railroad companies for inspection, and in that connection inquired of the witnesses whether

they knew who owned the five companies, and especially whether the steel company owned them, or a majority of their stock. On the advice of counsel, the witnesses refused to produce the books or answer the questions, and the commission applied to this court for an order to compel them to do both.

The application is based upon the 12th section of the Act, which declares that the commission shall have authority to inquire into the management and business of all carriers engaged in commerce between the states; that it shall keep itself informed as to the manner and method in which such business is conducted, and have the right to obtain from such carriers full and complete information necessary to enable it to perform its duties and accomplish the objects for which it was created; that it shall execute and enforce the provisions of the Act; that upon its request it shall be the duty of any district attorney of the United States to institute in the proper court, and prosecute under the direction of the attorney general, all necessary proceedings for the enforcement of the Act and for the punishment of all violations thereof; that it shall have power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation from any place in the United States at any designated place of hearing. The section further declares that, "in case of disobedience to a subpoena, the commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents, under the provisions of this section. And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such carrier or other person to appear before said commission (and produce books and papers, if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

The Interstate Commerce Commission is an administrative, and not a judicial, body (*Kentucky Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 299, 87 Fed. Rep. 612) and the important question for decision is, can the process of this court be exercised in aid of an investigation before such a tribunal? The jurisdiction of the courts of the United States is limited, and it is not competent for Congress to confer upon them authority which is not strictly judicial, and clearly within the grant found in the 3d article of the Constitution. The first section of that article declares that the judicial power of the United States shall be vested in one supreme court and such inferior courts as Congress may from time to time establish; and the second section declares that the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, to all cases affect-

ing ambassadors, other public ministers and consuls, to all cases of admiralty and maritime jurisdiction, to controversies to which the United States shall be a party, etc. This grant of power was discussed in *Osborne v. Bank of United States*, 22 U. S. 9 Wheat. 788, 6 L. ed. 204, and in delivering the opinion of the court Chief Justice Marshall said:

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting upon it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case."

In *Smith v. Adams*, 130 U. S. 167, 32 L. ed. 895, this section was again considered, and in interpreting it the court said:

"By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy."

"The functions of the judges of the courts of the United States," said Judge Story, "are strictly and exclusively judicial. They cannot, therefore, be called upon to advise the president in any interpretation of law, or act as commissioners in case of pensions or other like proceedings." 2 Story, Const. § 1777.

The application of an administrative body (and we are now considering such an application) to a judicial tribunal for the exercise of its functions in aid of the execution of non-judicial duties does not make a "case" or "controversy" upon which the judicial power can be brought to bear. It is not a contention between litigants, "brought before a court by regular proceedings for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." The commission was engaged in investigating charges of unlawful discrimination against certain railroad companies, and this court is simply asked to aid that body in obtaining evidence which, it is claimed, will tend to support the charges. The subject of the inquiry is not brought here for adjudication, and this court can exercise no discretion beyond deciding whether the evidence demanded is pertinent to the charges, and within the general scope of the 12th section. Congress cannot make the judicial department the mere adjunct or instrument of either of the other departments of government. *Hayburn's Case*, 2 U. S. 2 Dall. 409, 1 L. ed. 436; *United States v. Ferreira*, 54 U. S. 18 How. 45, 14 L. ed. 44; *Re McLean*, 37 Fed. Rep. 648.

By an Act of Congress passed in 1887 the president was authorized to appoint three commissioners to examine the books, papers, and method of business of all railroad companies which had received aid from the United States, for the purpose of ascertaining whether they had observed the obligations imposed upon them by law. The Act gave the commissioners power to require the attendance and testimony

of witnesses and the production of books, papers, and documents relating to any matter under investigation. It also provided "that any of the circuit or district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring any such person to appear before said commissioners, or either of them, as the case may be, and to produce books and papers, if so ordered, and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." Three commissioners were accordingly appointed, and they cited before them Leland Stanford, president of the Central Pacific Railroad Company, one of the corporations which had received government aid, and propounded questions to him touching the administration of the affairs of his company, and the alleged dishonest disbursement of some of its moneys, which he refused to answer. He was also required to produce the books of his company, which he declined to do. The Circuit Court for the Northern District of California was thereupon applied to for an order upon Stanford, to show cause why he should not be required to comply with the demands of the commissioners. *Mr. Justice Field, Judge Sawyer, and Judge Sabin* constituted the court which heard the motion, and they concurred in holding that it was not a case or controversy within the meaning of the Constitution, and that the Act under which the commissioners were appointed was unauthorized and void. In a carefully prepared opinion on the motion, *Mr. Justice Field* said:

"The court is made the ministerial agent of the commission to perform its behests whenever a witness refuses to respond to a question or produce papers within the range of the authority attempted to be given by the statute. The judicial department of government is simply made, by this Act, an adjunct to the legislative department in the exercise of its political and legislative functions and powers, to execute its demands, and that, too, in a matter into which Congress, under the decision cited, has no jurisdiction whatever to inquire. I know of no power in Congress to thus render the judicial department subordinate or auxiliary to the legislative and executive departments of the government, or to either of them. If there is any one proposition immutably established I had supposed it to be that the judiciary de-

partment is absolutely independent of the other departments of the government, and that it cannot be called upon to act a part subordinate to any other department of the government." *Re Pacific Railway Comrs.* 82 Fed. Rep. 351.

Undoubtedly Congress may confer upon a nonjudicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry an offense punishable by the courts, subject, however, to the privilege of witness to refuse to make disclosure which might tend to criminate them, or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties within the meaning of the Constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a nonjudicial body. So much of section 12 as authorizes or requires the courts to use their process in aid of inquiries before the Interstate Commerce Commission is unconstitutional and void, and the application is dismissed.

In *Re* INTERSTATE COMMERCE COMMISSION.

Similar application to that made in the foregoing case for an order to compel Summer Hopkins and Henry Walker to answer certain questions. *Dismissed.*

The same counsel appeared for the commission as in the preceding case.

Messrs. Rogers, Locke & Milburn for Hopkins and Walker.

Gresham, Circuit Judge:

The commission of its own motion, instituted an inquiry to ascertain whether certain railroad companies engaged in the transportation of passengers and property from Chicago to eastern seaboard points had violated the provisions of the Commerce Act. The inquiry seems to have been chiefly directed against the Wabash Company, and the questions which Summer Hopkins and Henry Walker refused to answer relate to the business and management of that company. The application for an order to compel those witnesses to testify before the commission as demanded is dismissed for the reasons given in disposing of the application for a similar order against W. G. Brimson and others. 58 Fed. Rep. 476.

INTERSTATE COMMERCE COMMISSION.

THE TECUMSEH CELERY COMPANY

v.

THE CINCINNATI, JACKSON & MACKINAW RAILWAY COMPANY and The WABASH RAILROAD COMPANY.

1. When a carrier fails to answer a complaint filed under section 18 of the Act to Regulate Commerce, the Commission will take such proof of the facts as may be deemed proper
2. For that portion of its line over which the

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Western Classification is in force the Wash road should class celery with cauliflower, asparagus, lettuce, green peas, string beans, oyster plant, egg plant, and other vegetables enumerated in Class C of that Classification, rather than with berries, peaches, grapes, and other fruits specified in Class III. thereof, and the defendants should transport celery from Tecumseh to Kansas City at no higher rate per carload than they charge for carrying a carload quantity

of any of said other vegetables named in Class C aforesaid; and mixed carloads of celery and cauliflower or other vegetables specified in said Class C of the Western Classification should be transported by defendants from Tecumseh to Kansas City at no higher rate per carload than they charge for carrying a carload quantity of either of said vegetable articles embraced in that class.

Complaint filed February 1, 1892.—Answer of Cincinnati, Jackson & Mackinaw Railway Company filed February 23, 1892.—Depositions in behalf of complainant filed May 6, 1892.—Statement of facts filed by complainant May 16, 1892.—Hearing at Detroit, Michigan, May 2, 1893.—Decided June 15, 1893.

CLASSIFICATION of Celery.

Mr. W. C. Burridge for complainant.

Messrs. Swayne, Swayne & Hayes for Cincinnati, Jackson & Mackinaw Railway Company.

REPORT AND OPINION OF THE COMMISSION.

Veasey, Commissioner:

The petition in this case is as follows:

"I. That the complainant is a company incorporated under the laws of the state of Michigan, and has, since about the month of August, 1887, been engaged in growing vegetables near the town of Tecumseh in said state, and shipping the same over the railroads of the defendants and other carriers for sale in various markets.

"II. That the defendants above-named are common carriers and under a common control, management, or arrangement for continuous carriage or shipment, are engaged in the transportation of property wholly by railroad between Tecumseh, in the state of Michigan, and Kansas City, in the state of Missouri, and as such common carriers are subject to the Act to Regulate Commerce.

"III. That the rate of fifty-one cents per hundred pounds now charged by defendants to the complainant for the transportation of celery in carload lots of not less than twenty thousand pounds, released, from Tecumseh, Michigan, to Kansas City, Missouri, is unjust and unreasonable, in violation of the Act to Regulate Commerce.

"IV. That defendants by charging more for the transportation of celery in carloads from Tecumseh, aforesaid, to Kansas City, aforesaid, than they charge for the transportation in carloads of cauliflower and other vegetables, similar to celery in bulk, weight, and value, unjustly discriminate against complainant and subject it to undue and unreason-

able prejudice and disadvantage in violation of the Act to Regulate Commerce.

"V. That defendants by refusing to transport celery and other vegetables, of similar bulk and value, together in what is known as mixed carload lots from Tecumseh aforesaid to Kansas City aforesaid, at the higher carload rate and minimum carload weight specified for celery, and by insisting upon charging the carload rate on minimum carload weight of twenty thousand pounds of celery when only, for example, seventeen thousand pounds thereof is loaded in a car, and also insisting upon charging the less than carload rates upon, for example, three thousand pounds of cauliflower loaded in the same car, exact an unlawful and unjust charge for such mixed carloads, unjustly discriminate against complainant and subject it to undue and unreasonable prejudice and disadvantage, in violation of the Act to Regulate Commerce.

"By way of specification under the foregoing allegations the complainant avers and sets forth that the transportation of celery in carloads over defendants' lines from Tecumseh, aforesaid, to Kansas City, aforesaid, is conducted under two classifications and a combination rate, namely, Official Classification, Class IV., nineteen cents per hundred pounds, Tecumseh to St. Louis or Hannibal, distance about four hundred and forty miles; and Western Classification, Class III., thirty-two cents per hundred pounds, St. Louis or Hannibal to Kansas City. That shipments are made released; and the form of release in use is as per

copy thereof attached hereto, and marked Exhibit A. That the commodity is loaded in refrigerator cars employed by defendant in the transportation of dressed beef and similar traffic from Kansas City to eastern points, and complainant's celery furnishes return loads for these cars, which they would not have if the traffic were carried in other cars or shipped to points in other directions. That the cost of refrigeration is not included in the rate charged, but on the contrary, the ice used for refrigerating purposes, when complainant's celery is transported in such cars, is furnished by complainant, and the cost thereof is a charge upon the transportation in addition to the rate which is complained of as unlawful. That the rate on celery between the points mentioned was twenty-five cents per hundred pounds in 1887, and complainant's business was established and built up during the time it continued in force. That in or about the month of September, 1889, the rate on celery from Mississippi river points to Kansas City, was raised by a change in the Western Classification, and that commodity was taken out of Class C, which embraces cauliflower and many other vegetables, and placed in Class III. of said Western Classification. That the market price of celery had declined before the increase in rate and has since that time further declined. That celery comes in competition in the Kansas City market with celery shipped by various methods from several localities, and it also competes for sale in that and other markets of the World with other vegetables, such as cauliflower, asparagus, lettuce, green peas, string beans, oyster plant, egg plant, and the finer kinds of vegetables generally, which in value equal or exceed the value of celery. That Class III. of said Western Classification, in which celery is now placed, also includes berries, peaches, grapes, and green fruits, with which celery cannot successfully compete for sale to the average consumer. That the sale of the complainant's celery is injuriously affected by the defendants' excessive rate to Kansas City as compared with their lower charges on such competitive vegetable articles. That to be reasonable the rate on celery in carloads should not exceed the rate charged on other vegetables with which it competes for sale and which are embraced in Class C of said Western Classification. That complainant while complaining of the whole rate of fifty-one cents per hundred pounds as unreasonable, desires to call particular attention to the fact that it is so mainly because of the greatly disproportionate charge for the haul to Kansas City from points on the Mississippi river. That under the Official Classification mixed carloads of commodities differently classed may be shipped at the carload rate and minimum weight per carload specified for the article belonging to the highest class,

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but this is not allowed by the Western Classification. Complainant makes no claim for any reparation to which it may be entitled by reason of injuries sustained under the unlawful rate aforesaid.

"The complainant prays that the defendants may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendants to cease and desist from said violations of the Act to Regulate Commerce, and for such other and further order as the Commission may deem necessary in the premises."

The defendant, the Cincinnati, Jackson & Mackinaw Railway admits that its road and that of its co-defendant, the Wabash Railroad Company, forms a line of railroad from Tecumseh, Michigan, *via* Britton, Michigan, to Kansas City, Missouri, for the transportation of freight, and also admits that the rates are as set out in the complaint. The answer of this defendant also avers that the rates from Tecumseh to East St. Louis, of which no complaint is made, and which alone are pro-ratable, are uniform, reasonable and just; that the rates charged from East St. Louis to Kansas City, which form the basis for the complaint are promulgated and exacted by the different railroads comprising the Western Freight Association, over which the Cincinnati, Jackson & Mackinaw Railway has no control, and for which it should not be held responsible; that the claim of petitioner, that the celery is loaded in refrigerator cars employed by the defendants in the transportation of dressed beef and similar traffic from Kansas city to eastern points, and that complainant's celery furnishes return loads for these cars is not applicable, so far as this defendant is interested, as this defendant has been compelled to haul the empty cars to Tecumseh for loading, from its junction with the Wabash Railroad.

Practically no defense has been made to the complaint in this case. The complaint expressly disclaims any attack upon the rates charged to the Mississippi river, and the Cincinnati, Jackson & Mackinaw Railway Company, which delivers the traffic to the Wabash at Britton, only six miles from Tecumseh, is a necessary party merely on account of being one of the connecting carriers in the through line over which the traffic must pass. The burden of defending the rates complained of was therefore upon the Wabash Railroad Company, which has failed to answer or take any part in the proceeding.

Rule XI. of the Rules of Practice before the Commission, provides in the second paragraph that "in case of failure to answer, the Commission will take such proof of the facts as may be deemed proper and reasonable, and make such order thereon as the circumstances of the case appear to require." On

April 19, 1892, complainant took the testimony of P. W. A. Fitzsimmons, C. M. Woodward, and E. J. Hollister by deposition, having theretofore duly mailed reasonable notice thereof to each of the defendant corporations. Neither of the defendants participated in the taking of such depositions, nor was either of them represented at the hearing before the Commission in Detroit on May 2d, 1898, although due and timely notice of such hearing was given. At the hearing in Detroit, the complainant was represented by counsel and its manager, Mr. E. J. Hollister, the depositions above referred to were read and put in evidence, and Mr. Hollister was also sworn and examined.

This traffic from Tecumseh for Kansas City, Missouri, is taken in Wabash cars to East St. Louis, Illinois, under the Official Classification and joint through rate of the defendant carriers, and from East St. Louis the carriage is continued in the same cars to Kansas City under the Western Classification and the tariff rate of the Wabash road, but the carriage is continuous and there is but one through shipment and one through charge from Tecumseh to the point of destination. The carload rate from Tecumseh, Mich., to East St. Louis, Ill., on Celery, Cauliflower, Asparagus, String Beans, Green Peas, Lettuce, Oyster Plant, Egg Plant, etc., in either straight or mixed carloads is the same, 19 cents per 100 lbs. From East St. Louis to Kansas City, the above articles, *except celery*, take the Class C rate of 15 cents per 100 lbs. in either straight or mixed carloads, while celery, in straight carloads only, is charged the Class 8 rate of 32 cents per 100 lbs. The through rate from Tecumseh to Kansas City on celery in carloads is 51 cents per 100 lbs.; and that on the other articles mentioned, in either straight or

mixed carloads, is 84 cents per 100 lbs.; and the difference is wholly caused by the higher classification of celery in the Western Classification, which is applied by the Wabash to that portion of its line extending from East St. Louis to Kansas City. It is matter of general knowledge that during recent years, and especially since the change in classification mentioned in the complaint, celery has come into much more common use. Its production has greatly increased and its market value has declined. It certainly is no more a table luxury than some of the vegetables which have a lower class in the Western Classification. As varied or qualified by the foregoing, the facts stated in the petition are found to be true, and we hold that the complainant is entitled to the relief claimed.

For that portion of its line over which the Western Classification is in force the Wabash road should class celery with cauliflower, asparagus, lettuce, green peas, string beans, oyster plant, egg plant, and other vegetables enumerated in Class C of that Classification, rather than with berries, peaches, grapes, and other fruits specified in Class III. thereof, and the defendants should transport celery from Tecumseh to Kansas City at no higher rate per carload than they charge for carrying a carload quantity of any of said other vegetables named in Class C aforesaid; and mixed carloads of celery and cauliflower or other vegetables specified in said Class C of the Western Classification should be transported by defendants from Tecumseh to Kansas City at no higher rate per carload than they charge for carrying a carload quantity of either of said vegetable articles embraced in that class. Order will be entered accordingly.

GEORGE RICE

v.

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY and THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS.

GEORGE RICE

v.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY and THE COLUMBUS, HOCKING VALLEY & TOLEDO RAILWAY COMPANY.

Some of the grievances alleged in the complaint were subsequently removed by defendants as a result of the Commission's order in other cases. The other charges were denied by the defendants in their verified answers, and that denial was fortified by the positive testimony of witnesses. The

petitioner did not appear at the hearing, though duly notified thereof, and offered no proof in support of the information and belief upon which his allegations were made. Held, that as to these charges the complaint must be dismissed.

Complaints filed November 5, 1891.—Answers filed November 23, 1891, to January 2, 1892.—Heard and Submitted at Washington, D. C., March 28, 1893.—Decided May 18, 1893.

CLASSIFICATION of Eggs. See complaint 3 Inters. Com. Rep. 724.

Mr. Roger W. Cull, for St. Louis Southwestern R. Co. and St. Louis Southwestern R. Co. of Texas.

Mr. E. W. Strong, for Baltimore & Ohio S. W. R. Co. and Columbus, Hocking Valley & Toledo R. Co.

REPORT AND OPINION OF THE COMMISSION.

Knapp, Commissioner:

The complaints in these cases are directed against different lines of railway carriers, but are otherwise substantially alike. They were investigated together and may be properly disposed of in one report.

The rates and practices alleged by the petitioner to be unlawful relate to the transportation of refined oil and other products of petroleum from Marietta, Ohio, to various points in other states reached by the defendant lines. He asserts that these rates and practices discriminate against him, as a shipper of these commodities in barrels, in favor of certain tank shippers which belong to or are affiliated with what is called "The Standard Oil Trust." Three grounds of complaint are stated.

1. That in fixing the basis of transportation charges on petroleum products, the defendants allow an arbitrary deduction of 43 gallons from the shell capacity of a tank, while no corresponding allowance is made when these articles are shipped in barrels.

2. That such charges are based on an assumed weight of 6.8 pounds per gallon when shipments are made in tanks, while barrel shipments are carried on an estimated weight of 400 pounds per barrel, which is relatively unjust to the barrel shipper.

3. That certain favored shippers are permitted to stop their cars at stations between the points of shipment and destination and remove a portion of the contents therefrom, thereby in effect securing the lower carload rates on less than carload shipments; that such favored shippers are also permitted to ship their products at through rates, which are proportionately less than local rates, and then stop their cars at intermediate stations and remove a portion of the contents therefrom, thereby in effect securing through rates on shipments essentially local; and that these privileges are denied to the complainant.

The first two of these grievances undoubtedly existed at the time these complaints were filed, for the methods then used by the defendants and other carriers in estimating the weights of petroleum shipments were relatively unjust to barrel shippers. This subject was quite fully considered in a series of proceedings instituted by this complainant, which were decided by the Commission in April, 1892.

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Rice v. Cincinnati, Washington & Baltimore Railroad Co. 3 Inters. Com. Rep. 841, 5 I. C. C. Rep. 193.

After that decision was rendered, the rail carriers generally which engage in the transportation of petroleum products, including these defendants, fixed the minimum tank carload at the shell capacity of the tank in each case, and abandoned the practice of making any deduction therefrom. They also raised the estimated weight of these commodities, when carried in tanks, to 6.4 pounds per gallon, and are now regulating their charges according to that basis. We do not find that the application of this rule for ascertaining the weight of oil shipments in tanks, compared with the estimated weight of 400 pounds per barrel, when the same article is shipped in that form, operates to the prejudice of the barrel shipper. The rates per hundred pounds are the same whether carried in tanks or barrels; no charge is made for tanks but barrels pay the same as their contents. In view of the facts found and conclusions reached in the cases above mentioned, we must regard the subsequent action of the carriers as a substantial compliance with the requirements then made by the Commission in the respects here referred to, and therefore find no occasion for further directions in these proceedings. The question of the free carriage of barrels is not presented by the complaints now under consideration, and is designedly left open for such determination as the facts and circumstances of particular cases may hereafter seem to require.

The third ground of complaint appears to be wholly unfounded. There is no evidence that "favored" shippers have secured carload rates on less than carload shipments, or through rates on local shipments, by being permitted to remove portions of the contents of cars at intermediate stations between the points of shipment and of destination. The verified answers of the defendants explicitly deny that any such discriminations have occurred, and that denial is fortified by the positive testimony of their witnesses. The petitioner did not appear at the hearing, though duly notified thereof, and has offered no proof in support of the information and belief upon which his allegations were made. As to these charges the complaint must be dismissed.

U. S. CIRCUIT COURT SOUTHERN DISTRICT OF CALIFORNIA.

INTERSTATE COMMERCE COMMISSION.

v.
ATCHISON, TOPEKA & SANTA FÉ R. Co. *et al.*

1. Authority from the Interstate Commerce Commission is not necessary, where the circumstances and conditions are substantially different, to enable a carrier lawfully to charge more for a shorter than for a longer distance over the same line, under the Interstate Commerce Act, § 4 (24 Stat. at L. 379) providing that, it shall be unlawful to make such charge for transportation of passengers or like kind of property under substantially similar circumstances and conditions, but that the Commission may, after investigation, authorize a less charge for longer than shorter distances.

2. The provision of the Interstate Commerce Act, that the findings of fact of the Commission shall

be prima facie evidence of the matters therein stated, does not make them conclusive in proceedings before the court to enforce the order of the Commission; but the court must consider all evidence submitted, and base its judgment thereon.

3. Active competition by water and other railroads at a terminal point, for the transportation of certain goods, renders the circumstances and conditions substantially dissimilar, and justifies a railroad company in charging a less rate to former than to the latter point from those affecting an intermediate noncompeting point, when necessary to meet such competition.

April 25, 1892.

PETITION to enforce an order requiring defendants to desist from charging greater rates for a longer than for a shorter haul of freight under substantially similar circumstances. *Dismissed.* See 8 Inters. Com. Rep. 188, 571.

The facts are fully stated in the opinion.

Messrs. M. T. Allen, U. S. Atty., and Harris & Gregg for petitioner.

Messrs. A. Brunson and C. N. Sterry for defendants.

Ross, District Judge, delivered the opinion of the court:

This proceeding was instituted by virtue of the sixteenth section of the Act of Congress entitled "An Act to Regulate Commerce," as amended March 2, 1889 (25 Stat. at L. 855) to enforce an order made by the Interstate Commerce Commission on the 19th day of July, 1890, directing that, from and after September 1, 1890, the defendants, the Atchison, Topeka & Santa Fé Railroad Company, the Atlantic & Pacific Railroad Company, the Burlington & Missouri River Railroad Company, the California Central Railway Company, the California Southern Railroad Company, the Chicago, Kansas & Nebraska Railway Company, the Missouri Pacific Railway Company, and the St. Louis & San Francisco Railway Company, cease and desist from charging or receiving any greater compensation, in the aggregate, for the transportation in carload lots of certain enumerated commodities over their several lines or the routes formed by them, from Kansas City, St. Louis, Detroit, Cincinnati, or New York, or from corresponding points, for the shorter distance to San Bernardino, in the state of California, than for the longer distance over the same line, in the same direction, to Los Angeles, in the state of California. The order of the commission here sought to be enforced was made in a proceeding instituted before that body by a complaint on the part of the San Bernardino

Board of Trade, setting forth that the railroad companies above mentioned were charging and receiving higher rates for each carload of reapers, mowers, harvesters, hay presses, plows, horse rakes, seed drills, corn planters, forks, (hay or manure) hoes, hand rakes, shovels, spades, bags, burlap and gunny, compressed in bales, beer in glasses or stone, packed bottles, wine or beer in bulk, coffee in sacks, crockery, common china and white ware, packed, chairs, common wooden seated, cane seated, perforated, worth not more than nine dollars a dozen, school furniture, iron, bar or rod, fruit and jelly glasses, pumps, steam or hydraulic, sewing machines, soap, Castile, imitation Castile, common balls, and laundry, stoves, ranges, registers, radiators, black iron stove furniture and hollow ware, sugar, buggies and carriages, and farm wagons without springs, from the Missouri river, St. Louis, Chicago, Cincinnati, Detroit, and New York, over the same line, in the same direction, to San Bernardino, than to Los Angeles, San Bernardino being the shorter and Los Angeles the longer distance; thereby giving Los Angeles an unlawful preference over San Bernardino. To this complaint a demurrer was interposed by the Burlington & Missouri River Railroad Company, and answers were filed by the other defendant companies. The Commission held that the complaint was sufficient to put the carriers to proof that the services were rendered under such dissimilar

circumstances as to justify the greater charge for the shorter haul; and, after hearing evidence, found certain facts, which are set out in its report and opinion. Holding that the greater charge for the shorter haul was not justified by the facts found, the order was entered which this court is now asked to enforce.

The petition of the Commission for such enforcement sets forth, among other things, that, subsequent to the filing of the complaint of the San Bernardino Board of Trade before the Commission, the California Central Railway Company and the California Southern Railroad Company were consolidated, and constituted into a new corporation, under and by virtue of the laws of California, called the "Southern California Railway Company," which last mentioned corporation claims to have some interest in the subject-matter of this suit, and accordingly it is also made a defendant herein.

To the petition all of the defendant companies, except the Chicago, Kansas & Nebraska Railway Company, filed an answer, admitting the allegations of the petition respecting the corporate existence of the defendant companies, and the location of their principal places of business; also the consolidation of the California Central Railway Company and the California Southern Railroad Company, forming the Southern California Railway Company; but alleging that, in addition to the California Central Railway Company and the California Southern Railroad Company, the Redondo Beach Railway Company, at the time being a corporation duly incorporated under the laws of California, having its principal place of business in the city of Los Angeles, was duly consolidated with the aforesaid two companies, under the name of Southern California Railway Company; that the Redondo Beach Railway Company, at the time of such consolidation, owned and operated a line of road running from Los Angeles city, and there connecting with the California Central Railway Company, westerly to Redondo Beach, a point immediately upon the shore of the Pacific ocean, which road is now a part of the line owned and operated by the Southern California Railway Company. The defendants, answering, also admit that all of the aforesaid corporations, except the Southern California Railway Company, and its component corporations, were at the times mentioned in the petition, and still are, common carriers, engaged in the transportation of persons and property by their railroads extending through several of the United States, under a common control, management, or arrangement for a continuous carriage, and were then engaged in such business from the Missouri river, St. Louis, Chicago, Cincinnati, Detroit and New York to Barstow, in the county of San Bernardino, state of California. But the defendants, answering, deny that they are interstate common carriers between Barstow and Los Angeles or San Bernardino, and allege that the defendant companies, other than the Southern California Railway Company, carry only from the eastern points named to Barstow, where all goods

and merchandise shipped and hauled by them as common carriers are turned over and delivered to the Southern California Railway Company; that said Southern California Railway Company is a corporation organized and existing under the laws of California, having its principal place of business in the city of Los Angeles, and neither owns nor operates any line of railroad outside of the state of California, and is not subject to the provisions of the Interstate Commerce Act. The answer admits the proceedings before the Interstate Commerce Commission as stated in the petition, but alleges that neither the Redondo Beach Railway Company nor the Southern California Railway Company was a party thereto, and that neither of them had a hearing before the Commission upon any of the matters in question. The defendants, answering further, allege, among other things, as reasons why the order of the Commission should not be enforced, that the true and existing state of facts as to ocean competition existing at the time of the filing of the petition by the San Bernardino Board of Trade, and of the answers of the respective defendants therein, were not fully proven and established before the Commission; but that when the petition was filed, and when those answers were made, and when the hearing thereon was had, there did actually exist such water competition as to take the rates upon freight to Los Angeles out of the operation of the Interstate Commerce Act, and that the carrying and transportation of the freight in question to Los Angeles and San Bernardino was not under substantially similar circumstances and conditions, but was made wholly dissimilar by reason of water competition actually existing; and, further, that, since the making of the order here sought to be enforced, there has grown up and now exists a new, substantial, and continuous competition, by ocean carriers, between all of the points east of the Missouri river named in the pleadings herein and the Pacific ports, including the ports of San Francisco, Redondo Beach, and San Pedro, and that there is now being carried by such ocean transportation large quantities of merchandise and general freight, including the commodities mentioned in the petition filed by the San Bernardino Board of Trade before the Interstate Commerce Commission, to the ports aforesaid, in rivalry with and in competition to the overland carrying by the defendant companies, and that such competition is actual and present and is increasing; and that the defendant companies, by reason of such competition, have been compelled to make special rates to terminal points upon the Pacific coast, including among the number the city of Los Angeles; that the Redondo Beach Railway Company, now forming part of the Southern California Railway Company, by reason of its aforesaid consolidation, creates a continuous line through to the ocean at Redondo Beach, through which point, directly from the east and from the shipping points named in the petition of the San Bernardino Board of Trade, large quantities of freight are now being consigned and shipped directly to Los Angeles, and to the port of San Fran-

cisco, by steam and sailing vessels, and from Redondo Beach and San Pedro for Los Angeles. The defendants, answering further, allege that there are now four transcontinental lines of railroad from the east to the Pacific ocean, other than that formed by the defendant companies, namely: The Southern Pacific Railroad Company, operating its line of road from the city of San Francisco to Galveston, Tex., and other points east, running through the city of Los Angeles, and passing (three miles) south of San Bernardino; the transcontinental line composed of the Central Pacific and Union Pacific Railroad Companies, operating a line from San Francisco to Omaha, and there connecting with other roads to the eastern markets; the Northern Pacific Railroad Company, operating a line of road between Portland, Or., and Duluth, Minn., and other eastern points; the Canadian Pacific Railroad Company, operating a line of road through the British possessions from ocean to ocean. That all of these roads, other than that of the defendant companies, are engaged as common carriers in the transportation of freight from all of the eastern points named in the petition herein to the Pacific ocean, and thence down the Pacific coast, both by water and rail, to Los Angeles, from which point distribution is made to other points inland; that over all of said lines, other than that of the defendant companies, Los Angeles, though an intermediate, is recognized as a terminal, point; that neither of said companies, other than the defendants, was mentioned in the complaint filed by the San Bernardino Board of Trade before the Interstate Commerce Commission, and that neither of them is bound by its order, the enforcement of which against the defendant companies would be to subject them to an undue and unreasonable disadvantage in the carrying of freight, by reason of the other transcontinental lines not being subject to the same order, and the same charges for transportation to like common points.

Much time was consumed in the taking of testimony on behalf of the respective parties and the case has been but recently submitted. For the commission, it is contended, in the first place, that under no circumstances can any carrier, subject to the provisions of the Interstate Commerce Act, charge or receive for transportation of freight a greater compensation for a shorter than for a longer haul over the same line, in the same direction, unless upon application to the Commission such carrier be, in the particular case, authorized to charge less for the longer than for the shorter distance. If this be the true construction of the Act in question, the case is, of course, ended here; for not only was no such authority given in this case, but the order which it is sought to enforce expressly directed that the defendant companies should not charge or receive any greater compensation for the shorter haul to San Bernardino than for the longer haul to Los Angeles. In support of the construction thus contended for, it is said that "the law points out but one method of escape from the universal application of the prohibitory features of the 4 INTER S.

fourth section of the Act, and that is through an application to the commissioners, who alone are given in the exercise of a sound discretion, the right to suspend the provision in particular cases, and their findings are not reviewable by any other tribunal, because the law has confided to the commissioners, as a special tribunal, the authority to hear and determine the question." But the fundamental difficulty in the way of adopting the construction now and thus contended for by the commission is that the Act in question does not make it unlawful to charge or receive more for the shorter than the longer haul, under all circumstances, but only where the circumstances and conditions are substantially similar. By the first section of the Act (24 Stat. at L. 879) it is declared that all charges made for any service rendered or to be rendered, in the transportation of passengers or property by any carrier subject to its provisions, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. By the second section, every unjust discrimination, as between persons for doing a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, is prohibited and declared unlawful. By the third section it is declared to be unlawful "for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever;" and then follows section 4,—the sections particularly applicable to the present question,—which reads:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance: provided, however, that, upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act."

It is obvious that the authority and power conferred upon the Commission by the proviso contained in section 4 is limited to cases that fall within the enacting clause of that

section, for its purpose manifestly is to enable the Commission to relieve carriers from its operation in cases where it deems such action proper. Such purpose is also expressly declared in the concluding clause of the proviso. And the power thus conferred is exclusive, and its exercise conclusive, in all cases that fall within the prohibition of the enacting clause of the section to which the proviso is appended; that is to say, to every case where the carrier charges or receives greater compensation in the aggregate for the transportation of passengers, or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance. In all such cases, a greater charge for the shorter than for the longer haul is absolutely prohibited, unless the Commission, for good cause, sees proper to relieve a particular carrier from its operation. But, if the circumstances and conditions are not substantially similar, the prohibition imposed by the statute does not apply at all. This question the court must determine. If it finds that the circumstances and conditions under which the greater charge was made for the shorter than for the longer haul in question were substantially similar, the inquiry ends, and the order of the Commission must be enforced; for in such case it was the exclusive province of the Commission to determine whether or not there existed such other circumstances as would make it proper to authorize the defendant companies to charge and receive greater compensation for the shorter than for the longer haul. But, if the case shows that the greater charge for the shorter than for the longer haul was made under substantially dissimilar circumstances and conditions (there being no claim that the compensation charged and received for the shorter haul was otherwise unjust or unreasonable) then, and in that event, it is manifest that the case does not fall within the prohibition of the Interstate Commerce Act at all. This construction of the statute is in accord with that adopted by the Interstate Commerce Commission itself in *Re Southern R. & SS. Assn.* 1 Inters. Com. Rep. 280, where the Commission, speaking through Judge Cooley, after quoting the prohibitory clause of section 4, said:

"Here we have clearly stated what is unlawful and forbidden, and for doing the unlawful and forbidden act penalties are then provided. But that which the Act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid the carrier is left at liberty to do without permission of any one. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions and therefore if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. Should an interested party dispute

that the action of the carrier was warranted, an issue would be presented for adjudication, and the risks of that adjudication the carrier would necessarily assume. The later clause in this same section, which empowers the Commission to make orders for relief in its discretion, does not in doing so restrict it to a finding of circumstances and conditions strictly dissimilar, but seems intended to give a discretionary authority for cases that could not well be indicated in advance by general designation, while the cases which upon their facts should be acted upon as clearly exceptional would be left for adjudication when the action of the carrier was challenged. The statute becomes, on this construction, practical, and this section may be enforced without serious embarrassment. From the recital of the history of the framing of this section (which is given further on) it appears, among other things, that the proviso respecting orders for relief was devised by the senate committee which originally drafted the section, and that it was an essential part of it as first proposed; the prohibitory part of the section being then quite stringent, but a discretion being conferred upon the Commission to relieve against its operation. Afterwards the words, 'under substantially similar circumstances and conditions,' were inserted in the first sentence of the section. The proviso was perfectly intelligible, so long as the leading clause contained a hard and fast rule against charging more for the shorter than for the longer haul. It was then obvious that a discretion was left to the Commission in the matter of relaxing the rule when different circumstances and conditions rendered such relaxation, in its judgment, proper. Had the section passed as it then stood, the exercise of such a discretion might have been entered upon by the Commission with a distinct understanding of the task imposed, even though its adequate performance might have been out of the question; but, modified as it now stands, the necessity for a relieving order is greatly narrowed, it being obvious that no order is needed to relieve against the operation of the statute, when nothing is done or proposed which it makes unlawful.

"If any serious doubt of the proper construction of the clause of the statute now under review should, after careful consideration of its terms, still remain, it would seem that it must be removed when section 2, in which the same controlling word is made use of, is examined in connection. That section provides 'that if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive, from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall

be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.' Here it will be observed that the phrase is precisely the same, and there can be no doubt that the words were carefully chosen, probably because they were believed to express more accurately and precisely than would any others the exact thought which was in the legislative mind; and in this section, as well as in section 4, the phrase is employed to mark the limit of the carrier's privilege,—its privilege, too, in respect to the very subject-matter with which section 4, where it is employed, has to do,—namely, the charges for transportation service. It is not at all likely that Congress would deliberately, in the same Act and when dealing with the same general subject, make use of a phrase which was not only carefully chosen and peculiar, but also controlling, in such different senses that its effect, as used in one place, upon the conduct of the parties who were to be regulated and controlled by it would be essentially different from what it was as used in another. But, beyond question, the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate, or drawback, which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate, or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and, as Congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier whose privilege was in the same way limited by them, should in the same way act upon its judgment of the limiting circumstances and conditions."

For the reasons above assigned, it seems to me to be clear that the court must determine the question whether or not the greater compensation charged and received by the defendant companies for the transportation of the commodities in question, for the shorter haul to San Bernardino than for the longer haul to Los Angeles, was under substantially similar circumstances and conditions; and in doing so it must be guided by the powers conferred and the duties imposed upon it by the 16th section of the Act, as amended March 2, 1889, which reads as follows:

"Sec. 16. That whenever any common carrier, as defined in and subject to the provisions of this Act, shall violate, or refuse or neglect to obey or perform, any lawful order or requirement of the Commission created by this Act, not founded upon a controversy requiring a trial by jury, as provided by the 7th Amendment to the Constitution of the United States, it shall be lawful for the Commission, or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States, sitting in equity, in the judicial district in which the common

carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily, as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode, and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and, if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person, so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other persons shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment, or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding

before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission, it shall be the duty of the district attorney, under the direction of the Attorney General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the 7th Amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the 15th section of this Act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way, by petition, to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made; and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants; and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial of the findings of fact of said Commission, as set forth in its report, shall be prima facie evidence of the matters therein stated; and if either party shall demand a jury, or shall omit to waive a jury, the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but, if all the parties shall waive a jury in writing then the court shall try the issue in said cause, and render its judgment thereon. If the subject in dispute shall be of the value of two thousand dollars or more, either party may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this Act, excepting its penal provisions, the circuit courts

of the United States shall be deemed to be always in session."

On the part of the Commission it is contended that the facts found by it and set out in its report are conclusive upon the court. It is impossible so to construe the language of the statute conferring jurisdiction upon the court to enforce the lawful orders and requirements of the Commission. Not only does the provision of the statute that the findings of fact contained in the report of the Commission shall be taken as prima facie evidence of the matters therein stated preclude the idea that such finding shall be deemed conclusive evidence thereof, but such a construction would, in effect, be to convert the court from a judicial tribunal into an executive organ to carry out the orders of the Commission. Courts are instituted to hear and determine causes; and to hear is to hear not one only, but both, sides to the controversy. And so Congress, in the Act under consideration, in conferring upon the circuit courts, sitting in equity, jurisdiction to hear petitions for the enforcement of the orders and requirements of the Commission, has provided that such courts shall proceed to hear and determine such matters speedily, as a court of equity, without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end "such court shall have power, if it think fit, to direct and prescribe, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated." It is, I think, very clear from this language that while Congress, prescribing, as it lawfully might, a rule of evidence, made the findings of fact of the Commission, as set forth in its report, prima facie evidence of the matters therein stated, they are not conclusive evidence of such matters; and that it is the duty of the court to examine the entire evidence submitted, and base its judgment upon the case as here established. This conclusion is in harmony with that of the court in *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 87 Fed. Rep. 567, and *Interstate Commerce Com. v. Lehigh Valley R. Co.* 3 Inters. Com. Rep. 796, 49 Fed. Rep. 177.

The real question, therefore, for the decision of the court, is whether or not the case shows that the circumstances and conditions existing at Los Angeles and San Bernardino, respecting the transportation of the commodities in question, are substantially dissimilar; and this is a mixed question law and fact. It is said for the defendant companies that the facts in regard to that question were not fully presented to the Interstate Commerce Commission when the matter was there considered; and attention is called to the fact that the Commission itself has since held, in the case of *Rice v. Atchison, T. & S. F. R. Co.*, 3 Inters. Com. Rep. 263, that Los Angeles is a terminal and competitive point in

respect to petroleum and its products,—the traffic there involved,—and that the Atchison, Topeka & Santa Fé Railroad Company was justified, by the existence of substantially dissimilar circumstances and conditions, in making lower rates on that traffic to Los Angeles than to intermediate points. Referring to the difference in situation between Los Angeles and San Francisco, Sacramento, Stockton, Marysville, Oakland, and San Diego, the Commission there say:

“With reference to this traffic, the city of Los Angeles occupies a different position to that of the water terminals named. It appears that this city receives petroleum and its products, important in amount, by the water lines to San Francisco or San Diego, as the case may be, and which is afterwards brought down the coast by the rail lines of the Southern Pacific Company or the Atchison, Topeka & Santa Fé Railroad Company, as the case may be, to Los Angeles. It does not appear whether it is brought to Los Angeles on through bills of lading, or only on bills of lading from San Francisco or San Diego, as the case may be, and afterwards, on a separate bill, to Los Angeles; but this is not important, as, in either event, the practical result would be the same. It may be brought to Los Angeles each way. If it is a separate carriage by a water line to San Francisco or San Diego, and no further, then the rate that is thus made for its carriage is one that is not subject to the regulation provided by the Act to Regulate Commerce, and if from San Francisco or San Diego, as the case may be, it is a separate carriage by a rail carrier to Los Angeles, then it is a service beginning and ending in the state of California, and, as such, not subject to the regulation provided by the Act to Regulate Commerce. The dealer in these products at Los Angeles has a right to demand that the rail carrier shall take these articles brought by the water lines to San Francisco or San Diego, as the case may be, and bring them to him at Los Angeles at reasonable rates; and these rates might be reasonable and be less in amount than the difference, for example, between the amount of the water rate to San Francisco or San Diego and the amount of the all-rail rates to these points. Such a state of facts creates a substantial dissimilarity of circumstances and conditions in reference to the transportation of this traffic to Los Angeles that prevents the lower all-rail rate to that city upon these products from being a violation of section 4 of the Act to Regulate Commerce. These circumstances and conditions are strongly competitive, and on one side they are subject to the regulation provided by the Act to Regulate Commerce, while on the other they are not. They fairly warrant the all-rail carriers, who are subject to the Act to Regulate Commerce, in making such just and reasonable rates on this traffic as well enable them to meet at Los Angeles the rates of carriers not subject to the Act to Regulate Commerce, even though in doing so they charge lower rates than at intermediate stations, where no such circumstances and conditions exist. On the other hand, if this traffic is brought from New York, for example, by water lines to

San Francisco or San Diego, and from the one or the other of these two last named sea ports, as the case may be, to Los Angeles, under a through bill of lading, then it is manifest, up on the evidence in this proceeding, that it would be so brought from New York to Los Angeles at as low, if not a lower, rate than the all-rail rate from points east of the ninety-seventh meridian of longitude to Los Angeles; and being, as we have already seen, important in amount, would also be in actual competition with the all-rail rate, so that the rail carriers would be justified in meeting it by the all-rail rate.”

Freight carried to or from a competitive point, said *Judge Deady* in *Ex parte Koehler*, 1 Inters. Com. Rep. 819—

“Is always carried under ‘substantially dissimilar circumstances and conditions’ from that carried to or from noncompetitive points. In the latter case the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than a short one. When each haul is made from or to a noncompetitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is willfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case the circumstances are altogether different. The power of the corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or, as was said in *Ex parte Koehler*, 28 Fed. Rep. 538, ‘abandon the field, and let its road go to rust.’ Competition may not be the only circumstance that makes the condition under which a long and a short haul are performed substantially dissimilar. But certainly it is the most obvious and effective one, and must have been in the contemplation of Congress in the passage of the Act.”

The common carrier cannot be required to ignore or overcome existing differences in the transportation facilities of different localities, created, not by its own arbitrary action, but by nature or by enterprises beyond its control. San Bernardino is situated in one of the most fertile and productive valleys in the world, and is a thriving and prosperous city, but it has not the transportation facilities that Los Angeles has. It is about 60 miles distant, and further inland. By reason of its nearness to Los Angeles, it receives the benefit of the competitive rates to that terminal in proportion to its proximity thereto. But, not being a competitive point, it does not get terminal rates. The proof shows, what is also a matter of common knowledge, that railroad companies do not make terminal rates, unless compelled to do so by competition. Wherever and whenever actual competition exists, the question the carrier has to deal with is not so much what is fair rate for the service, or what the traffic will bear, but what rate can be got for the service as against the rate offered by the competitor. Especially is this true when the competitor is a carrier by water, because that is the cheapest known kind of transporta-

tion, and is unrestricted by law. If, therefore, Los Angeles can be justly regarded as a competitive point in respect to the transportation of the commodities here in question, there is such dissimilarity of circumstances and conditions between it and the intermediate point of San Bernardino as to make the long and short haul clause of the Interstate Commerce Act inapplicable.

The facts in respect to this question, as shown by the evidence submitted to the court, are widely different from those set out in the report of the Commission, and upon which its order here sought to be enforced was based. In its report and opinion the commission say:

"Between San Francisco and the southern border of California, a distance of six hundred miles, San Jose, Los Angeles, and San Diego are the only points designated Pacific coast terminals by said transcontinental association, and to which rates from the Missouri river and more eastern points are the same as to San Francisco. San Jose is an interior city, within 50 miles of San Francisco. Los Angeles is also an interior city, 25 miles from San Pedro, its nearest harbor. The rates between Los Angeles and San Pedro are from 9 to 12½ cents per 100 pounds on goods similar to those named in the complaint. Los Angeles and San Diego are the principal commercial centers of southern California. San Pedro is a seaport through which importations of coal, lumber, and other commodities from the neighboring islands and British America are brought in, and vessels come in ballast from San Francisco to San Pedro, to be loaded with grain, but its commerce is very small. None of the articles named in the complaint shipped from the Missouri river, or places further east, have reached Los Angeles through San Pedro for many years. Seven or eight years ago some agricultural implements were shipped around Cape Horn to San Francisco. The time when shipment of any of the articles named in the complaint was made from the east directly through San Pedro or other Pacific coast port to Los Angeles was not within the recollection of any witness testifying. Some goods are shipped from New York by water to New Orleans; thence by rail to California and intermediate places. Practically, there is no such thing as water competition or a water route from the Missouri and Mississippi rivers and interior cities to the Pacific coast in the carriage of the articles named. Many of them, such as stoves, ranges, black hollow ware, when carried over a water route, are liable to injury from rust. It is possible to ship most of the articles named in the complaint from Atlantic ports and cities around Cape Horn to ports and cities on the Pacific coast. None are so shipped to or through San Diego or San Pedro, Cal. To what extent they are so shipped to San Francisco, or through it to Los Angeles, if at all, has not been disclosed by the testimony or otherwise ascertained in this investigation."

And again:

"The agent of one of the defendant roads testified that seven or eight years ago some

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agricultural machinery was carried around Cape Horn to San Francisco, and on this testimony alone rests the claim of water competition to Los Angeles, nearly five hundred miles from San Francisco. That the merchandise named in the complaint is not carried by sea from New York, or by sea and rail from Cincinnati and interior points, to Los Angeles, through San Pedro, appears from the evidence, and is confirmed by the fact that the rail rates are higher to San Pedro than to Los Angeles. If they were so carried through San Diego they would necessarily go at the same rate to San Bernardino, which is a trifle nearer than Los Angeles by rail to San Diego. Possible competition by water is not sufficient to justify a greater charge for the shorter distance. Upon the provision of the 4th section of the Act to Regulate Commerce, the competition must be actual and so counteracting as to take the freight if the lower charge for the longer distance was not maintained. Such competition to Los Angeles is not established by the fact that some of the articles named in the complaint were carried by sea to San Francisco seven or eight years ago."

Reference has already been made to the subsequent case of *Rice v. Atchison, T. & S. F. R. Co.*, 8 Inters. Com. Rep. 268, where the facts were by the Commission held to be such as to establish the claim of the defendant that Los Angeles is such competitive point in respect to the transportation of petroleum and its products as to justify a less charge for the longer haul to that city than for a shorter haul to intermediate points. When the present case was before the commission, one port (Redondo) through which the evidence shows large quantities of freight of various kinds are almost daily received at Los Angeles, was not shown to have existed at all. This port is distant about 18 miles from Los Angeles, and is connected therewith by two railroads,—one formerly known as the "Redondo Beach Railway Company" and the other as the "California Southern Railroad Company." Through the port of San Pedro, also, which is distant from Los Angeles about 22 miles, and connected therewith by rail, large quantities of freight, of almost all kinds and classes, are almost constantly received. All of the freight thus brought to Redondo and San Pedro for Los Angeles is brought by steamer or sailing vessel, much of it in original packages, from New York to San Francisco, and from there transhipped to Los Angeles by way of Redondo or San Pedro; some of it by the Canadian Pacific Railroad to Vancouver, and thence by the Pacific Coast Steamship Company's ships to Redondo or San Pedro. Some freight is also brought by water to San Francisco and San Diego, and thence down or up the coast, as the case may be, by rail to Los Angeles. The evidence shows that in addition to the five overland railroads, to wit, the Canadian Pacific, the Northern Pacific, the Central Pacific, the Atchison, Topeka & Santa Fé, and the Southern Pacific, with their various connections, by which freight is transported from the eastern and middle

states to California, there is what is called the Dearborn line of sailing vessels between New York and San Francisco, the Sutton line of sailing vessels between New York and San Francisco and Portland, the Pacific Mail Steamship Company's line of vessels from New York to Aspinwall, connecting there with the Panama Railroad running to Panama, and at that place with the company's line of steamers to San Francisco, and that recently there has been established a line of steamships between New York and San Francisco by way of the straits of Magellan, on some of which, at the time of the taking of the testimony herein, there was afloat a large amount of freight of various kinds and classes for some of the Los Angeles merchants. Los Angeles is a city of about 60,000 people, and because of its location in respect to transportation facilities, and because it is the most important point in southern California, it was made one of the terminal points of the Pacific coast by the transportation companies. The evidence shows that a number of the large mercantile firms of San Francisco, dealing in some or all of the commodities mentioned in the petition, have branch houses there, some have agents, and that some of the local firms do business to the amount of \$3,000,000 per annum. It is not strange, therefore, that there should be active competition between the carriers for the transportation of its freight. The witness A. M. Sutton testified, among other things, that he represents in San Francisco the line of clipper ships which are and have been for years running from New York and Philadelphia around Cape Horn to San Francisco; that they carry almost every kind and class of freight, including the commodities mentioned in the petition; that they charter and load from 80 to 85 ships a year, have no fixed rates, but make rates so as to compete with the other water carriers, and with the overland railroads, and so as to get the business; that they solicit business as far west as Kansas City, St. Paul, Milwaukee, Pittsburgh, and Chicago; that they solicit freight for all parts of California, Oregon, and Washington; that they carry freight constantly to Southern California, chiefly to Los Angeles; that their ships take all California freight to San Francisco, and, if billed to Los Angeles, it is reshipped to San Pedro or Redondo in original packages, and then by rail to Los Angeles. The witness Edwin Goodall testified, among other things, that he represents in San Francisco the Pacific Coast Steamship Company; that their ships go to San Pedro and Redondo, to which ports within the last two years freights from San Francisco have been as low as one dollar a ton by reason of competition with other water carriers and the railroads; that they are engaged in the transportation of all kinds and character of merchandise; that goods shipped in New York by steamers or clippers for Los Angeles and San Bernardino are constantly reshipped at San Francisco in original packages to San Pedro and Redondo, from which they are taken by rail; that they sometimes run two or three freight steamers a week to those ports, and including their passenger

steamers, which also carry freight, they would probably average one every other day; that they endeavor to fix their rate also as to successfully compete with whatever opposition they may have, whether from carriers by water or rail.

In the report and opinion of the Commission, in finding, as it did, from the evidence before it, that practically there was no such thing as water competition or a water route from the Missouri and Mississippi rivers and interior cities to the Pacific coast in the carriage of the articles named, it is said: "Many of them, such as stoves, ranges, black hollow ware, when carried over a water route, are liable to injury from rust." In the case here, A. A. Watkins, a member of the firm of W. W. Montague & Co., whose principal place of business is in the city of San Francisco, with a branch house in Los Angeles, testified that his firm deals largely in stoves, ranges, registers, radiators, black iron stove furniture, and hollow ware, and that of those commodities they ship what would probably amount to about 75 carloads a year, and that about 75 per cent of them they ship by water to San Francisco, and from there reship by steamer to Redondo or San Pedro what is intended for Los Angeles and vicinity; that they ship by water because it is cheaper to do so than by rail, after deducting their estimate of 8 per cent for loss by rust; and that any increase in the rail tariff would result in their shipping still more largely by water. The testimony in the case is altogether too voluminous to refer to in detail, but I think it is safe to say, generally, that it shows that the water carriers mentioned are now, and that some of them for years past have been, competing with the overland railroads for the carriage of general freight, including the commodities mentioned in the petition, from the cities and country east of the Missouri river to the Pacific coast, including the city of Los Angeles; that they are and have been actively engaged in such transportation, soliciting the freight, and carrying what they can get; and that they actually do carry an important part of many of the commodities mentioned in the petition. The fact that such means of transportation actually exists, and is actually and actively seeking the traffic, constitutes competition, and was doubtless one of the most important factors in making Los Angeles a terminal point. Not only does the evidence show that such water competition exists, but it shows that the shipments by water are increasing; and a number of the witnesses testify that, in the event the all-rail rates should be increased from what they are now, it would result in much larger shipments by water, both in quantity and kind. For the reasons stated I am of the opinion that the circumstances and conditions attending the transportation of the commodities in question to Los Angeles and San Bernardino are essentially dissimilar, and therefore that the long and short haul clause of the Interstate Commerce Act does not apply to the case. As has been said, it is not claimed that the rates to San Bernardino are otherwise unjust or unreasonable. If they are, other provisions

of the Act will afford relief. It results from these views that petitioner is not entitled to the relief it seeks in this court. It is accordingly ordered that the petition be dismissed, at its cost.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

THE INTERSTATE COMMERCE COMMISSION

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. Co., The Western & Atlantic R. Co., The Georgia R. Co.

*1. A suit brought by the Interstate Commerce Commission in the United States circuit court to enforce an order of the Commission, is an original and independent proceeding. The court is not confined to a mere re-examination of the case as heard and reported by the Commission; but the court hears and determines the cause *de novo* upon proper pleadings and proof.

The Commission's report is *prima facie* evidence of the matters of fact therein reported; but the court will hear all such other, and further testimony as either party may introduce, bearing upon the matters in controversy; and will permit such pleadings as will bring before the court clearly, and in legal form, such matters as may be pertinent and proper in view of the issues raised.

CASES CITED: 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 87 Fed. Rep. 567, *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*; 3 Inters. Com. Rep. 796, 49 Fed. Rep. 177, *Interstate Commerce Com. v. Lehigh Valley R. Co.*; 50 Fed. Rep. 206, *Interstate Commerce Com. v. Atchison, T. & S. F. R. Co.*

2. The 1st section of the Act to Regulate Commerce provides that it "shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water where both are used under a common control, management, or arrangement, for a continuous carriage or shipment, etc."

The Georgia Railroad extends from Atlanta to Augusta. The Georgia Railroad Co. requested its connections, that in issuing bills of lading to its local stations, no rates be inserted east of Atlanta. There is no agreement on the part of said Company for any such joint tariff, as implies a reduced rate from Cincinnati, Ohio, to its local stations. On the contrary, that company collects and retains its entire local rates on all freight shipped from Cincinnati to its local stations. *Held*: That there is no such "arrangement for a continuous carriage or shipment" existing between said company and its connections, as to bring the rates which are charged to said local stations, within the first section of the Act to Regulate Commerce.

CASE CITED: 4 Inters. Com. Rep. 257, 52 Fed. Rep. 912, *Chicago & N. W. R. Co. v. Osborne*.

3. When goods are shipped through from Cincinnati, Ohio, to local stations on the Georgia Railroad, the initial carrier at Cincinnati issues through bills of lading, and quotes through rates. Said rates, however, are arrived at by adding to the rates from Cincinnati to Atlanta, the full local rates of the Georgia Railroad from Atlanta to said local stations. The Georgia R. Co. receives

the goods at Atlanta, and transports them continuously to its local stations; but it demands and collects its full local rates from Atlanta to said local stations. *Held*: That the mere reception, and continuous transportation, by the Georgia R. Co., of freight which comes to it over other lines of railroads, destined to its local stations, for which the initial carrier has issued through bills of lading, and quoted through rates, does not constitute such an "arrangement" as is contemplated by the first section of the Act to Regulate Commerce, where the through rates, so quoted, allow to that company its full local rates.

4. The 4th section of the Act to Regulate Commerce provides, that it "shall be unlawful for any common carrier, subject to the provisions of this Act, to charge or receive any greater compensation, in the aggregate, for the transportation of passengers, or of like kind of property under substantially similar circumstances and conditions, for a shorter, than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance."

There is a clear distinction between the term "railroad" as used in the other parts of the Act, and the term "line" as used in the 4th section.

The use of the word "line" is significant. Two carriers may use the same "road," but each has its separate "line."

One railroad company may lease trackage rights to another; but the joint use of the same track does not create the same "line," so as to compel either company to graduate its tariff by that of the other.

CASE CITED: 4 Inters. Com. Rep. 257, 52 Fed. Rep. 912, *Chicago & N. W. R. Co. v. Osborne*.

5. There must be a "common arrangement" between connecting companies, such as the making of a joint tariff, before a "new line" can be formed; and the "line" so formed under the joint tariff of connecting companies is one which is separate and independent from that of either of the connecting companies.

CASE CITED: 4 Inters. Com. Rep. 257, 52 Fed. Rep. 912, *Chicago & N. W. R. Co. v. Osborne*.

6. "No power exists at common law, and none is given by the Act to Regulate Commerce, to compel connecting railroad companies to unite in a joint tariff, or to enter into a through rate arrangement for transportation, unless they desire to do so. They cannot be compelled to abandon the full control of their separate roads; and neither of them is bound to adjust its own local tariff to suit the other."

CASE QUOTED: 4 Inters. Com. Rep. 257, 52 Fed. Rep. 912, *Chicago & N. W. R. Co. v. Osborne*.

See also 2 Inters. Com. Rep. 386, 2 L. R. A. 325, 37 Fed. Rep. 680, *Kentucky & I. Bridge Co. v. Louis-*

*Headnotes prepared under direction of the court.

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v. N. R. Co.; 2 Inters. Com. Rep. 765, 41 Fed. Rep. 583, *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.*

7. There is no "common arrangement," or "joint tariff," between the Georgia Railroad Company and its connections, as to traffic to its local stations. On the contrary, there is an express refusal by that company to make any "common arrangement" whatever, in regard to that traffic.

The Georgia Railroad Company demands and collects its full local rates on all shipments to its local stations. Whether shipments come from points west of Atlanta, or originate at Atlanta, the rate is precisely the same; and, as to the Georgia Railroad, the carriage is the same.

8. The Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company have formed "a new and independent line," by the adoption of a joint through tariff from Cincinnati to Augusta; but such "new line" is distinct and separate from that of either of the railroads named.

CASE CITED: 4 Inters. Com. Rep. 257, 53 Fed. Rep. 912, *Chicago & N. W. R. Co. v. Osborne*.

9. Social Circle is a local station on the Georgia Railroad, 53 miles east of Atlanta, and 119 miles west of Augusta.

The Georgia Railroad Company refuses to adopt a joint through tariff from Cincinnati to Social Circle; and charges its full local rate from Atlanta to Social Circle.

The rate from Cincinnati to Social Circle is a combination rate; and it is arrived at by adding to the rate from Cincinnati to Atlanta, the full local rate of the Georgia Railroad from Atlanta to Social Circle. The rate thus made from Cincinnati to Social Circle is greater than the joint through tariff rate from Cincinnati to Augusta; but that fact constitutes no violation of the "long and short haul" clause of the Act to Regulate Commerce; because the two rates are not made "over the same line."

The rate to Augusta is made by the "line" formed by a "common arrangement" between said three companies for a joint tariff between those points.

The rate to Social Circle is made greater than the rate to Augusta, by the Georgia Railroad Company demanding its full local rate on its own road; which road is separate and independent from the "line" made by said three companies.

CASES CITED: 4 Inters. Com. Rep. 257, 53 Fed. Rep. 912, *Chicago & N. W. R. Co. v. Osborne*; 4 Inters. Com. Rep. 247, 53 Fed. Rep. 229, *United States v. Mellen*.

10. "Freight carried to, or from, a competitive point, is always carried under substantially dissimilar circumstances, and conditions, from that carried to, or from, non-competitive points. In the latter case, the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than a short one. When each haul is made to, or from, a non-competitive point, the effect of such discrimination is to build up one place, at the expense of the other. Such action is willfully unjust, and has no justification, or excuse, in the exigencies, or conditions of the business of the corporation. In the former case, the circumstances are altogether different. The power of a corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or abandon the field, and let its road go to rust."

"Competition may not be the only circumstance that makes the condition under which a long and short haul are performed substantially dissimilar,

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but certainly it is the most obvious and effective one, and must have been in contemplation of Congress in the passage of the Act to Regulate Commerce."

CASE QUOTED: 1 Inters. Com. Rep. 517, 31 Fed. Rep. 315, 319, *Ex parte Koehler*.

11. "That competition, the life of trade, cuts an important figure in the condition and circumstances attendant upon transportation of passengers and property, cannot be well overlooked nor denied. Nor can it be well denied that, as between the short and long haul, competition may exist to that extent, that what would otherwise be similar circumstances, and conditions, will be dissimilar circumstances, and conditions."

CASE QUOTED: 31 Fed. Rep. 862, *Missouri Pac. R. Co. v. Texas & P. R. Co.*

12. "A common carrier cannot be required to ignore or overcome existing differences in the transportation facilities of different localities created not by its own arbitrary action, but by nature, or by enterprise beyond its control. . . . Wherever, and whenever, actual competition exists, the question the carrier has to deal with is, not so much what is a fair rate for the service, or what the traffic will bear, but what rate can be got for the service, as against the rate offered by the competitor."

CASE QUOTED: ante, p. 323, *Interstate Commerce Com. v. Atchison, T. & S. F. R. Co.*

13. "It is not necessary for a carrier to apply to the Interstate Commerce Commission for relief from "the long and short haul" clause of the Act to Regulate Commerce, when the circumstances and conditions are substantially dissimilar, since the carrier, in acting upon them, would commit no breach of the law, though it would be responsible in case it were found that the circumstances and conditions were misconceived, or misjudged."

CASE QUOTED: 1 Inters. Com. Rep. 278, *Re Louisville & N. R. Co.*

14. The Interstate Commerce Commission holds that where railroads, which are subject to the Act to Regulate Commerce, compete with Canadian, or other railroads, which are not subject to the Act, such competition constitutes dissimilar circumstances and conditions; but that competition between two railroads, both of which are subject to the Act, does not constitute dissimilar circumstances and conditions.

The Commission, however, also holds that it has no authority to raise railroad rates. If a railroad, which is subject to the Act, is met with competition from other railroads, which are also subject to the Act, and the commission has no authority to require such other railroads to increase their rates, even when the competition is ruinous, there is no practical difference between such a case, and the case of competition with railroads, not subject to the Act. If the general conclusion is correct, that competition will constitute dissimilar circumstances, and conditions, in the sense in which that term is used in the Act, there is no good reason for drawing the line where it has been drawn by the Commission; on the contrary, competition of carrier with carrier both subject to the Act, is as such within the terms of section 4, as competition with a carrier not subject to the Act.

15. Competition of market with market may not be so direct in its effect, as competition of carrier with carrier; but when it does exist, it is influential, and perhaps as effective and controlling, with carriers, as to their rates, as other competition. It may, therefore, constitute a part of the circumstances and conditions which a carrier can

consider in fixing rates for the transportation of goods.

16. The fact that the rate from Cincinnati to Social Circle is greater than the joint tariff rate from Cincinnati to Augusta, constitutes no "undue or unreasonable prejudice or disadvantage" against Social Circle, and no "undue or unreasonable preference or advantage" in favor of Augusta. Railway companies are only bound to give the same terms, to all persons alike, under the same conditions and circumstances; and any fact which produces an inequality of condition, and a change of circumstances, justifies an inequality of charge. Augusta and Social Circle are not "under the same conditions and circumstances."

CASE CITED: 4 Inters. Com. Rep. 92, 145 U. S. 263, 26 L. ed. 669, *Interstate Commerce Com. v. Baltimore & O. R. Co.*

17. Several lines of railway compete for the business between Cincinnati and Augusta; and there is active and influential competition by Baltimore, and other eastern cities, against Cincinnati, for the trade of Augusta.
18. Nearly all of the railroads south of the Ohio river, and east of the Mississippi, including the three railroad defendants in this case, are members of an association known as the Southern Railway & Steamship Association. Said association, in making rates, is governed by competition. The same influences control in the association, in making rates, as would control without it; and while the influences may not go to the same extent, and there may be produced by the association more harmonious relations between its members, competition influences, and, to a large extent, controls, the rates agreed upon by the association.

19. It appears that the rate charged on first class goods, in less than carload lots, from Cincinnati to Atlanta, in 1879, was \$1.39 per 100 lbs; that afterwards it was \$1.10; and subsequently \$1.07; except for a short time, when it was \$1.01. The only testimony offered to, or heard by the Commission, as to the reasonableness of the rate, was that of the Vice President of the C. N. O. & T. P. R. Co., that he considered a rate of \$1.01 reasonable. Upon that testimony, and upon the fact that the rate from Cincinnati to Birmingham is 89 cents, as compared with \$1.07 to Atlanta, the distances being substantially the same, the Commission ordered that the defendants should not charge more than \$1.00 from Cincinnati to Atlanta.

In this court, a number of railroad experts testified that the present rate of \$1.07 is reasonable.

As to the rate to Birmingham, there was evidence before this court, which was not before the Commission; viz: That the rate from Cincinnati to Birmingham, which was previously \$1.08, was forced down to 89 cents, by the building of a new road, known as the K. C. M. & B. R. R.

Held: That the existence of a lower rate from Cincinnati to Birmingham furnished no sufficient reason to determine that the rate from Cincinnati to Atlanta is unreasonable, when such lower rate is caused by conditions at Birmingham which do not exist at Atlanta.

Held, further: That the evidence offered in this court is sufficient to overcome the prima facie case made by the findings of the Commission. On the whole testimony, as now before this court, it is not believed that the Commission would have found the rate in question to be unreasonable. Certainly this court cannot so determine.

UPON petition by the Interstate Commerce Commission to enforce an order made by the plaintiff in a case brought before it by The James & Mayer Buggy Company against the above defendants for alleged violations of the Act to Regulate Commerce.

Facts are stated in opinion. See Inters. Com. Rep. 682.

Messrs. S. A. Darnell, A. G. Safford, R. L. Bernard solicitors for the Interstate Commerce Commission.

Mr. Edward Colston for the Cincinnati, N. O. & T. P. R. Co.

Messrs. Payne & Tye solicitors for the Western & Atlantic R. Co.

Messrs. J. B. Cumming and Ed. Baxter, solicitors for the Georgia R. Co.

Mr. Justice Newman delivered the opinion of the court:

This is an application by the Interstate Commerce Commission to this court, to enforce an order passed by the Commission, in the case of the James & Mayer Buggy Company v. The Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company.

The petition of the James & Mayer Buggy Company to the Interstate Commerce Commission was as follows:

"The petition of the above named complainant respectfully shows:

1st. "That the James & Mayer Buggy Company manufacture buggies, carriages, etc., in the city of Cincinnati, state of Ohio.

"2d. That the defendants above named are common carriers, and, under a common control, management, or arrangement, for continuous carriage or shipment, are engaged in the transportation of passengers and property, wholly by railroad, between Cincinnati, in

the state of Ohio, and Chattanooga, in the state of Tennessee; and between Chattanooga, in the state of Tennessee, and Atlanta, in the state of Georgia; and between Atlanta, in the state of Georgia, and Augusta, in the state of Georgia; and, as such common carriers, are subject to the Act to Regulate Commerce.

"3d. That the first class rate of freight, as published in the tariff of the C. N. O. & T. P. R. R. Co., from Cincinnati, Ohio, to Atlanta, Georgia, the distance being about 477 miles (more or less) is \$1.01 per hundred lbs.

"4th. That the first-class rate of freight from Cincinnati, Ohio, to Augusta, Georgia, over the same lines of railroad, the distance being about 648 miles (more or less) is also \$1.01 per hundred lbs.

"5th. That the first class rate of freight from Cincinnati, Ohio, to Social Circle, Georgia, over the same lines, the distance being about 525 miles (more or less) is \$1.31 per hundred lbs.

"6th. That the complainant above named, shipping vehicles to Atlanta, Georgia, ought not to be compelled to pay the same rate of freight as when shipping to Augusta, Georgia, a point 171 miles further distant on the same lines.

"7th. That the complainant above named, in shipping vehicles to Social Circle, Georgia, ought not to be compelled to pay a rate of freight which is 80 cents per hundred lbs. higher than when shipping to Augusta, Georgia, a point 120 miles (more or less) further distant along the same lines.

"8th. That the above named defendants are violating section 4 of the Act to Regulate Commerce, in charging a greater sum for a shorter distance, than for a longer distance, in the same direction, over the same lines."

The above petition prayed that an order be made commanding the defendant to cease and desist from the violation complained of, and was signed and sworn to be a representative of the James & Mayer Buggy Company.

The answer of the Western & Atlantic Railroad Company was as follows:

"The Interstate Commerce Commission, Washington, D. C.—Gentlemen: I have before me your favor of October 22d, enclosing a copy of petition filed against our company, embracing a statement of charges made by the James & Mayer Buggy Company.

"In reply, I will state that there is nothing in the interstate commerce law, so far as we read it, which requires that we should make from Cincinnati to Atlanta, a less rate than from Cincinnati to Augusta. Therefore, we do not consider that that portion of the complaint filed by the petitioners has any force."

"Regarding the rate of freight from Cincinnati to Social Circle, Georgia, I will state that Social Circle is a local point on the Georgia Railroad, and that company has not furnished us with any basis for working business to its local points, other than taking the rate, as in this instance, from Cincinnati to Atlanta, and adding their local. This company, on this business, has charged no more than if the freight had stopped at Atlanta, or than it would receive going to any point within the same radius from Atlanta as that in which Social Circle is located.

"Further, as the rates to Augusta are brought down by water competition, we do not consider that we have violated the Interstate Commerce law. The rate within itself is not unreasonable; and we cannot see that there is any discrimination against the parties at Social Circle; and this company, furthermore, is unable to control the local rates of any of its connections."

The answer of the Georgia Railroad Company was as follows:

"This respondent answering says:

1. "It is informed, and believes that the James & Mayer Buggy Company manufacture buggies, carriages, etc., in the city of Cincinnati, state of Ohio.

2. "This defendant, and the defendants above named are common carriers, and, under a common arrangement for continuous carriage or shipment, are engaged in the transportation of passengers and property, wholly

by rail, between Cincinnati, in the state of Ohio, and Chattanooga, in the state of Tennessee; and between Chattanooga, in the state of Tennessee, and Atlanta, in the state of Georgia, and Augusta, in the state of Georgia.

3. "The rate of freight on buggies, carriages, etc., from Cincinnati, Ohio, to Atlanta, Georgia, the distance being about 478 miles, was, at the date named, one dollar and one cent, per hundred pounds, in less than carload lots, knocked down, boxed or crated, and released. This was an unauthorized rate. The proper rate Cincinnati to Atlanta should have been one dollar and seven cents, per hundred pounds."

4. "The rate of freight on buggies, carriages, etc., from Cincinnati, Ohio, to Augusta, Georgia, over the same lines of railroad, and the railroad of this respondent, the distance being about 645 miles, is also one dollar and seven cents, per hundred pounds."

5. "This respondent says that it has no arrangement with the roads between Atlanta, the western terminus of respondent's railroad, and Cincinnati, for through rates from Cincinnati to any station on the Georgia Railroad, other than Milledgeville—where respondent competes with the Central Railroad of Georgia—and the terminal stations of Augusta, Athens, and Washington; that if a through bill of lading is issued at Cincinnati, for freight from that point to Social Circle, a station on respondent's railroad, the rate is made as follows, to wit, by adding to the rate from Cincinnati to Atlanta, respondent's local rate from Atlanta to Social Circle. Thus, the rate from Cincinnati to Atlanta, as given above, is \$1.07 per hundred pounds, to which is added respondent's local rate from Atlanta to Social Circle, to wit, 80 cents per hundred pounds, making a through rate from Cincinnati to Social Circle of \$1.87 per hundred pounds. Respondent does not quote any through rate from Cincinnati to any stations on its railroad, except Milledgeville, and the terminal stations above named; but of course its local tariff, as fixed by the Georgia Railroad Commission, is known to the initial road at Cincinnati."

6. "Respondent says that the rate from Atlanta to Social Circle is just and reasonable; also that the rate from Cincinnati to Social Circle is just and reasonable, and not obnoxious to any provision of the Interstate Commerce Act, by reason of not being just and reasonable.

7. "Respondent further says that the through rate from Cincinnati to Augusta, though the same as from Cincinnati to Atlanta, is not unlawful under section 4 of the Interstate Commerce Act, because said rates are charged not under substantially similar circumstances and conditions."

"In explanation of this statement, respondent says that at Baltimore, Maryland, and other eastern cities, large manufactories of buggies, carriages, etc., exist, and that the product of these factories is transported from said places to Augusta at such rates, that if this respondent and its connections between Atlanta and Cincinnati charge a higher rate than one dollar and seven cents,

per hundred pounds, from Cincinnati to Augusta, no freight of this character would come over the Georgia Railroad; for the product of the Eastern factories would be delivered in Augusta, at a rate which would exclude the Cincinnati product from the Augusta market."

8. "This respondent says, that while no arrangement exists, as above stated, for a through bill of lading from Cincinnati to Social Circle, as a matter of fact the shipment from Cincinnati to Social Circle by the petitioner was made on a through bill of lading, the rate of which was fixed, as heretofore stated, by adding this respondent's local rate from Atlanta to Social Circle, to the through rate from Cincinnati to Atlanta."

The answer of the Cincinnati, New Orleans & Texas Pacific Railway Company, in the case before the Commission, was as follows:

"The Cincinnati, New Orleans & Texas Pacific Railway Company for answer to the petition of complainant herein, says:

1. "It admits that the James & Mayer Buggy Company manufactures buggies, carriages, etc., in the city of Cincinnati, state of Ohio."

2. "That the above named defendants are common carriers, engaged in the transportation of passengers and property, wholly by railroad between Cincinnati, Ohio, and Atlanta, Georgia; and between Cincinnati, Ohio, and Augusta, Georgia; but it says that said defendants are not under a common control, management, or arrangement, for continuous carriage or shipment; but, that on the contrary, the connection of this defendant with such carriage or shipment begins at Cincinnati, Ohio, and ends at Chattanooga, Tennessee; that of the Western & Atlantic Railroad Company begins at Chattanooga, Tennessee, and ends at Atlanta, Georgia; and that of the Georgia Railroad begins at Atlanta, and ends at Augusta, in the state of Georgia."

3. "It admits that the first class rate of freight published in the tariff of this defendant, from Cincinnati, Ohio, to Atlanta, Georgia, a distance of about 477 miles, is \$1.01 per 100 pounds."

4. "It admits that the first class rate of freight from Cincinnati, Ohio, to Augusta, Georgia, a distance of about 648 miles, is also \$1.01 per 100 pounds."

5. "It admits that the first class rate of freight from Cincinnati, Ohio, to Social Circle, Georgia, over the same line, the distance being about 525 miles (more or less) is \$1.81 per 100 pounds."

"It says that the power of this defendant over said rates of freight, and the division thereof, only extends to securing a reasonable compensation for the services performed in transporting merchandise from Cincinnati, Ohio, the northern, to Chattanooga, Tennessee, the southern terminus of its line; that its proportion of the rate of \$1.01 to Atlanta, Georgia, is 71 $\frac{1}{2}$ cents, and that of the Western & Atlantic Railroad Company is 29 $\frac{1}{2}$ cents per 100 pounds; that its proportion of the rate to Augusta, Georgia, from Cincinnati, Ohio, is 52 $\frac{1}{2}$ cents; that of

the Western & Atlantic 21 $\frac{1}{2}$ cents, and that of the Georgia Railroad is 26 $\frac{1}{2}$ cents; that said rate to Atlanta is reasonable and just, and a reasonable compensation for the services performed; that the rate to Augusta is the same as to Atlanta, for the reason that such rate is governed by the rate from Baltimore and New York to Augusta, and made on a lower basis than the rate to Atlanta, on account of water competition *via* Charleston, S. C., and Savannah, Ga., which operates to lower such rate to Augusta. The relative distance hauled, and the proportionate amount of services performed by this defendant, in carrying said goods to Augusta, being less than the distance and service to Atlanta, the compensation of this defendant is relatively less."

"As to the rate to Social Circle, Georgia, defendant says that such rate can only be made by this defendant, by consent and permission of the Georgia Railroad Company, co-defendant herein; that the transportation to said Social Circle can only be effected by the co-operation of the said Georgia Railroad, said Social Circle being a station on its line, and the said Georgia Railroad stipulating, and insisting that the said rate shall be 80 cents greater than the rate to Augusta and Atlanta. This defendant receives no part of, or allowance on account of, the 80 cents additional charged to Social Circle; the same being purely a local rate charged by the Georgia Railroad, for transportation over its line from Atlanta to Social Circle."

There seems to have been very little evidence in the case before the Commission; as it appears from the report of the case, only one witness was introduced, who was an officer of one of defendant companies. The facts were principally ascertained by the admission of the parties, and from the records, and, presumably, from the tariffs of rates, etc., filed with, and in the possession of the Commission.

The serious question presented to the Commission in this case was the right of the defendant railroad companies to charge more for shipments of first class freight from Cincinnati to Social Circle, than from Cincinnati to Augusta.

The Cincinnati, New Orleans & Texas Pacific Railway runs from Cincinnati, in the state of Ohio, to Chattanooga, in the state of Tennessee, a distance of 886 miles; the Western & Atlantic Railroad runs from Chattanooga, in the state of Tennessee, to Atlanta, in the state of Georgia, a distance of 188 miles; the Georgia Railroad runs from Atlanta to Augusta, Georgia, a distance of 171 miles. Social Circle is a town on the line of the Georgia Railroad, 52 miles east of Atlanta, and 119 miles west of Augusta, Georgia; and consequently a shorter distance by the last named number of miles from Cincinnati, than is Augusta.

The contention was that the charge of \$1.81, from Cincinnati to Social Circle, per 100 pounds, on first class freight, when only \$1.01 per 100 pounds on similar freight was charged from Cincinnati to Augusta, was in violation of the long and short haul clause, in section 4, of the Act to Regulate Commerce,

approved February 4, 1887, and known as the Interstate Commerce Act.

The order of the Commission in the case is given in full, and is as follows:

"It is ordered and adjudged:—That the defendants, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, do, from and after the 20th day of July, 1891, wholly cease and desist from charging, or receiving any greater compensation, in the aggregate, for the transportation, in less than carloads, of buggies, carriages, and other articles classified by them as freight of first class, for the shorter distance over the line formed by their several railroads from Cincinnati, in the state of Ohio, to Social Circle, in the state of Georgia, than they charge, or receive for the transportation of said articles, in less than carloads, for the longer distance over the same line from Cincinnati aforesaid, to Augusta in the state of Georgia; and that said defendants, the Cincinnati, New Orleans & Texas Pacific Railway Company, and the Western & Atlantic Railroad Company, do also, from and after the 20th day of July, 1891, wholly cease, and desist from charging, or receiving any greater aggregate compensation for the transportation of buggies, carriages, and said other first class articles, in less than carloads, from Cincinnati aforesaid, to Atlanta, in the state of Georgia, than one dollar (\$1.00) per 100 pounds."

In the case before this court, each and all of the defendants filed answers, which, in addition to the matter set up in their answers in the case before the Commission, are substantially as follows:

The defendant, Georgia Railroad Company, admit that the proceedings before the Interstate Commerce Commission were as stated in the petition here, but they deny that it was made to appear that the provisions of the Act to Regulate Commerce had been violated by them, in the respects charged in the petition before the Commission, or that the matters in controversy had been legally determined by the Commission; and they deny the legal or binding effect of the order passed by the Commission.

The answer of the Cincinnati, New Orleans & Texas Pacific Railway Company is substantially the same as that of the Georgia Railroad Company.

The answer of the Western & Atlantic Railroad Company contains the following: "That on the 27th of December, 1890, it became a body corporate, under the name and style of the Western & Atlantic Railroad Company, under an act of the legislature of Georgia, approved November 12, 1889, which provided for the lease of certain property of the state of Georgia, known as the Western & Atlantic Railroad, and that prior to said 27th day of December, 1890, this respondent was not in existence, and therefore had no notice of the proceedings before the Interstate Commerce Commission, in the matter of the petition of the James & Mayer Buggy Company, and had no connection with the matters therein complained of."

[Subsequently, by agreement, the present

Western & Atlantic Railroad Company was made party defendant in lieu of the old company.]

So that the matters for determination here, as will be perceived, are:

1. Whether or not the charge of a greater rate for transporting first class freight, in less than carload lots, per 100 pounds, from Cincinnati, Ohio, to Social Circle, Georgia, than is charged for transporting the same class of freight to Augusta, Georgia, a point 171 miles beyond, over the same line, and in the same direction, is a violation of the fourth section of the Interstate Commerce Act.

2. Whether or not the charge of \$1.07 on first class freight, per 100 pounds, in less than carload lots, from Cincinnati to Atlanta, Georgia, is unreasonably high: and a violation, for that reason, of the Act to Regulate Commerce.

I. The Commission, in the beginning, denies the power of this court to hear the case upon any other issues, pleadings, or facts, than those presented to the Commission. It is claimed that the case is to be determined with reference to what the Interstate Commerce Commission had before it, and that no additional issues, or questions should be raised, or other evidence taken.

The language of the Act of Congress does not support this contention. Section 16, which provides for the enforcement of the orders of the Commission by and through the courts, is in these words: "And said court shall proceed to hear and determine the matter speedily, as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode, and by such persons, as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearings, the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated."

It is impossible to believe that under this language of the Act, the powers of the court in the premises are restricted, as contended for by the Commission. The provision, "If it think fit, to direct and prosecute in such mode, and by such persons, as it may appoint, all such inquiries as the court may think needful, etc.," must necessarily authorize the court to provide for the taking and hearing of such additional evidence as may be proper. And the power is equally clear to permit such pleadings as will bring before the court, clearly, and in legal form, such matters as may be pertinent and proper, in view of the issues raised.

In the case of the *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 87 Fed. Rep. 567, Judge Jackson, discussing this question, uses this language: "The suit in this court is, under the provisions of the Act, an original and independent proceeding, in which the Commission's report is made prima facie evidence of the matters of facts therein stated. It is clear that this court is not confined to

a mere re-examination of the case as heard and reported by the Commission, but hears and determines the cause *de novo*, upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony, as either party may introduce, bearing upon the matters in controversy." See also *Interstate Commerce Com. v. Lehigh Valley R. Co.*, 3 Inters. Com. Rep. 796, 49 Fed. Rep. 177, and *Interstate Commerce Com. v. Atchison, T. & S. F. R. Co.*, 50 Fed. Rep. 295. In the latter case, the court holds: "On the proceedings in the circuit court, under section 16, to enforce an order of the Commission directing certain carriers to desist from charging greater rates for the shorter than the longer haul, the facts found by the Commission are not conclusive, but merely *prima facie*, etc." This question may be considered, therefore, as settled, not only by the language of the Act of Congress, but by authority, against the position assumed by counsel for the Commission.

II. The next question raised here, is as to whether the carriage of freight in the case now before the court by the Georgia Railroad, was such a carriage as to bring the shipment from Cincinnati to Social Circle within that part of the first section of the Act to Regulate Commerce, which is as follows: "That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement, for a continuous carriage or shipment."

The position assumed is that there is no such arrangement for the "continuous carriage or shipment" between the Georgia Railroad Company, the Western & Atlantic Railroad Company, and the Cincinnati, New Orleans & Texas Pacific Railway Company, as to bring the Georgia Railroad Company within the terms of the Act.

The facts appear to be that goods were shipped from Cincinnati to Social Circle, on through bills of lading, issued by the Cincinnati, New Orleans & Texas Pacific Railway Company, and were carried over the Cincinnati, New Orleans & Texas Pacific Railway, the Western & Atlantic Railroad, and the Georgia Railroad, to Social Circle. The rate charged on first class goods, such as were involved in this controversy, is \$1.07, being the through rate from Cincinnati to Atlanta, with the local rate of 30 cents, per 100, from Atlanta to Social Circle, over the Georgia Railroad, added thereto, making \$1.37. The rate charged from Atlanta to Social Circle is the rate authorized by the Railroad Commission of Georgia, and is the regular rate for local freight between those two points. When the freight is collected, the Georgia Railroad retains its entire local rate, and the remainder of the \$1.07 is divided between the other two roads, in proper proportion, according to an agreement between them.

The decision and order of the Commission, in this case, was made on the 29th day of June, 1891. On the 3d day of July, the following circular was issued by the Georgia Railroad:

"Augusta, Ga., July 3d, 1891.

["Circular No. 106, New Series.]

"To Connections:

"Dear Sir:—Lately we have had some complications, arising from connecting lines and their connections issuing through bills of lading, quoting rates to our local stations; and, to avoid such complications in the future, we earnestly request that hereafter, in issuing bills of lading to our local stations, no rates be inserted east of Atlanta. This, of course, does not apply to business to Athens, Gainesville, Washington, Milledgeville, Augusta, or points beyond. Please issue instructions to your Agents that this rule will be effective at once, and advise me if you will comply with this request.

"Yours truly,

"E. R. Dorsey,

"General Freight Agent."

In addition to this, it is entirely clear from other evidence, that the Georgia Railroad insists on its local rate from Atlanta, to points on its line between Atlanta and Augusta, on all freight shipped from Cincinnati. According to all the evidence, there is no agreement on the part of the Georgia Railroad for any such joint tariff, as implies a reduced rate from points in the west to points on its line, except to Augusta. The contention for this company, therefore, is, and in effect, in behalf of all the defendants, that there is no such arrangement for a continuous shipment, as brings the freight charge in this case, to Social Circle, within the language of the first section of the Act to Regulate Commerce, above quoted, and which controls the character of transportation to which the Act applies.

In this connection, the case of *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 52 Fed. Rep. 912, is interesting, and applicable. The decision in that case is by the Circuit Court of Appeals for the Eighth Circuit, Justice Brewer delivering the opinion of the court. The action, in the court below, was to recover damages for violation of the "long and short haul" clause of the Interstate Commerce Act. The facts, as stated by Justice Brewer, in that case, are as follows:

"The defendant owns and operates a railroad from Missouri Valley, a town on the western border of Iowa, to Chicago, Illinois. Scranton is a town in Iowa, on the line of this road, eighty-eight miles east of Missouri Valley, and therefore so much nearer Chicago. The Fremont, Elkhorn & Missouri Valley Railroad Company owns a railroad running east and west through Nebraska, and connecting with the defendant's road at the town of Missouri Valley. Blair, Nebraska, is a point on that road, thirteen miles west of Missouri Valley. While the Fremont, Elkhorn & Missouri Valley Railroad Company is an independent corporation, a majority of its stock belongs to the defendant company, and thus the defendant company controls its operations."

"During the month of January, 1888, there was in force a local tariff of rate charged on.

the defendant's road. This local tariff was duly published in Scranton. In accordance with it, the rate from Scranton to Chicago, on corn, was 18 cents per 100 pounds. All shippers shipping simply to Chicago, paid that rate. The plaintiff, among others, made sundry shipments, and was charged and paid such sum. There was, so far as appears, absolute uniformity of rate as to all such local shipments. At the same time, the tariff on corn shipped through from Blair, Nebraska, to New York City was 88½ cents; to Boston, Philadelphia, and Baltimore, sums slightly above, and below this figure. This through rate was made up in this way: By agreement between the defendant and eastern companies, corn was shipped through to New York, from Turner and Rochelle, two small stations on the defendants' road, one 30 and the other 70 miles west of Chicago, for 27½ cents; 8½ cents of which went to defendant, and the balance to the eastern companies; and by agreement between the defendant and the Fremont, Elkhorn & Missouri Valley Railroad Company, the rate from Blair, to Turner and Rochelle, on corn, shipped to New York, Boston, Philadelphia, or Baltimore, was 11 cents. In other words, by these agreements of the several companies, a through rate was fixed on corn shipped from Blair, to New York, and other eastern cities; and of that through rate, the defendant company received, for carrying the whole line of its road, less than the local tariff of 18 cents, charged from Scranton, to Chicago. This joint tariff was not published at Scranton, and no knowledge of it was given to, or possessed by the plaintiff, until February 24th; and, until that time, he made no application for shipment beyond Chicago. Thereafter he shipped to Boston, and received the benefit of a through tariff."

According to the decision in that case, upon the statement of facts just quoted, it is entirely clear that by the joint arrangement of the Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad, a new and independent "line" was formed, by the adoption of a joint through tariff from Cincinnati to Augusta; and that this line was distinct and separate, viewed in the light of the "long and short haul clause," from that of either of the railroads named. The court, in that case, distinguished clearly, and satisfactorily, between the term "railroad" as used in the other parts of the Act, and the term "line" as used in the fourth section. The language of the court on this subject, on page 915, 916, is as follows:

"The denunciation of the fourth section is against each separate common carrier, for its violation of the 'long and short haul' clause, on its own line. The language is: 'that it shall be unlawful for any common carrier, subject to the provisions of this Act, to charge or receive any greater compensation, in the aggregate, for the transportation of passengers, or of the like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line, in the same direct-

ion, the shorter being included within the the longer distance.'

"The use of the word 'line' is significant. Two carriers may use the same road, but each has its separate line. The defendant may lease trackage rights to any other railroad company, but the joint use of the same track does not create the 'same line,' so as to compel either company to graduate its tariff by that of the other.

"Further, by section 6, every common carrier is required to print, and publish at every depot along its own road, schedules, showing its rates and fares and charges. There is a prohibition against advancing rates without giving notice, and, in case of a reduction, notice thereof must be immediately posted; whereas, in reference to joint tariffs, the requisition is simply that each common carrier furnish to the Commission a copy of all contracts therefor, as well as copies of the joint tariffs; and power is given to the Commission, to determine the amount of publication that shall be required.

"Again, at the time of the passage of this Act, joint through tariffs were well known, as well as the fact that they were generally less than the sum of the local tariffs, and not distributed between the several companies making them, according to the mere matter of mileage. In this Act, joint tariffs are recognized; and if Congress had intended to make the local tariffs subordinate to, or measured by the joint tariff, its language would have been clear, and specific.

"It is worthy of note, that in the debates which attended the passage of this bill through the two houses, and while this matter was under discussion, it was again and again said by those participating in the debates, that the line formed under the joint tariff of connecting companies, was one separate and independent from that of either of the connecting companies; and also worthy of note, that in the actual administration of affairs by the Interstate Commerce Commission, the same thing has been constantly recognized."

The question then is, does the fact that goods are shipped through from Cincinnati to Social Circle, that a through rate of freight is given by the initial carrier, that the goods are continuously transported over the three roads until they arrive at Social Circle, make its transportation subject to the fourth section of the Interstate Commerce Act, notwithstanding the fact that the Georgia Railroad insists upon, and receives its local rate, and has no arrangement for a joint tariff from Cincinnati to Social Circle, except that it allows the initial road (Cincinnati, New Orleans & Texas Pacific Railway) to make the rate as has been indicated, and in which it acquiesces, by receiving the goods, and delivering them at Social Circle? In *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 52 Fed. Rep. 912, it is said:

"Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line."

Further on, this language is used:

"No power exists at common law, and none is given by the Act, to court, or Commission, to compel connecting companies to contract with each other, to abandon full control of their separate roads, or to unite in a joint tariff."

This correctly states the Act of Congress; and no railroad is compelled to enter into a through rate arrangement for transportation, unless it desires to do so. The fact runs through all the evidence in this case, appearing sometimes in the direct, and sometimes brought out by cross-examination, that the rate from Cincinnati to Social Circle is a combination of a through rate from Cincinnati to Atlanta, and the local rate of the Georgia Railroad from Atlanta to Social Circle. There is no difference as to shipments over the Georgia Railroad, to local stations, whether the goods come from Cincinnati, or whether the shipments originate in Atlanta; the rate is precisely the same, and as to the Georgia Railroad, so far as appears, the carriage is the same. A joint tariff for through traffic, such as will make a "new," or "independent line," under the decision in the Osborne case, *supra*, would seem to be charges made on a different basis, and usually, perhaps invariably, at a less rate than that of the sum of the local rates of the lines entering into the joint arrangement. If this be true, then the rate from Cincinnati to Social Circle would not be such a joint rate, or joint tariff, as makes a "new line," as indicated in the decision named. There must be a "common arrangement" between the roads making the "new line," and there is no such "common arrangement" by the Georgia Railroad, as to traffic to its local stations. There is express refusal to make any "common arrangement," if evidence is to have any weight. The evidence shows no express agreement, and none can be fairly implied from the facts.

Justice Brewer, in the Osborne case, makes this qualification:

"That we may not be misunderstood, we do not mean to intimate that the two companies with a joint line, can make a tariff from Turner to Cleveland, higher than from Turner to Buffalo, or to any intermediate station between Cleveland and Buffalo; for when the two companies, by their joint tariff, make a new, and independent line, that new, and independent line may become subject to the long and short haul clause; but what we mean to decide is, that a through tariff on a joint line is not the standard by which the separate tariffs of either company is to be measured or condemned."

It is contended in the argument here, that the effect of this restrictive language as applied to this case, is, that when the three railroads formed a line from Cincinnati to Augusta, by entering into a joint tariff for the transportation of goods between those points, no more could be charged for a haul from Cincinnati to any point between Atlanta and Augusta, than was charged from Cincinnati to Augusta; and that no more could be charged from Cincinnati to any point between Chattanooga and Atlanta, than was charged from Cincinnati to Atlanta. But

applying the Osborne case here: The Lake Shore Railroad runs from Chicago to Buffalo; and Cleveland, although a large city, is an intermediate station on that road. The joint rate in the Osborne case was made to Cleveland, the intermediate station; and that decision holds that where a railroad made a reduced joint rate to an intermediate station on its line of road, it could not charge less to any point beyond. The Lake Shore road had become part of a "new, and independent line," although the "new, and independent line," so far as the Osborne case is concerned, was to Cleveland. The facts in that case are, therefore, entirely different from the facts in this case; and the qualifying language of Justice Brewer does not seem to have any application here. The decision in the Osborne case has been quoted and applied, however, in one of the district courts since it was rendered.

The case of the *United States v. Mellen*, 4 Inters. Com. Rep. 247, 53 Fed. Rep. 229, decided by Judge Riner, in the district court for Kansas, November 28, 1892, was an indictment against Mellen and others for a violation of the long and short haul clause of the Interstate Commerce Act, and the decision of the court there, so far as applicable here, may be gathered from the first two head notes, which are as follows:

1. "The long and short haul clause of the Interstate Commerce Act (§ 4) does not apply to a case where the short haul rate is the combined local rates of two connecting lines, and the long haul rate is a joint rate made by the two lines, acting together; and an indictment alleging such rates is bad.

"*Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 52 Fed. Rep. 912, followed.

2. "An indictment alleging that the share of the joint rate taken by one company is less than its local rate for a shorter haul, etc., is bad.

"*Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 52 Fed. Rep. 912."

In the Mellen case the indictment alleged substantially, taking all the counts together, that the defendants were agents of the the Union Pacific Railway Company, and officers who had authority to establish rates of freight on the lines of said Company, and that on the 20th April, 1891, the Union Pacific Railway Company had entered into an arrangement with the Southern Pacific Railroad Company, also a common carrier, both being subject to the Act to Regulate Commerce, and established a rate, or joint tariff, for the transportation of refined sugar, by the two lines of railroad named, from San Francisco, Cal., to Kansas City, Mo.; that the rate under this joint tariff is 45 cents per 100 pounds, from San Francisco to Kansas City, and that of this, the Union Pacific received 32.4 cents, and the Southern Pacific 32.6 cents. It is further charged that the city of Salina is a station on the main line of the Union Pacific Railway Company, in Kansas, and is located 186 miles west of Kansas City, Missouri, and a shorter distance from San Francisco, by 186 miles. The indictment then charges the defendant with willfully

establishing a rate of 94 cents for each 100 pounds of refined sugar, in carload lots, transported or carried over the Union Pacific, and the Southern Pacific, from San Francisco, California, to Salina, Kansas, notwithstanding the rate of 65 cents per 100 pounds to Kansas City, Missouri. Then the charge is made that these shipments were "made under similar circumstances and conditions" to each place. The court sustained a motion to quash the indictment on all the counts in the indictment except one; and the count sustained alleged a shipment from Ogden, at a greater charge, in the aggregate, for the shipment from Ogden to Salina, than was charged from Ogden to Kansas City. Of that, the court says:

"In this count of the indictment there is no allegation of a joint rate to Kansas City, Missouri; and a joint rate is not made the basis by which the reasonableness of the local rate is to be determined, hence does not come within the principle announced in the case of *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 52 Fed. Rep. 912."

Afterwards, in the opinion, the court, in speaking of the count which is sustained, says:

"If, however, upon the trial of the cause it should be made to appear by the evidence that the joint rate to Kansas City was made the basis of adjusting the local rates, charged in this count of the indictment, the defendant would be entitled to acquittal."

That case is exactly in point here; except that there were only two roads involved there, while there are three here. The facts there were that the goods were received for shipment by the Southern Pacific, and were carried over its line from San Francisco to Ogden, and from Ogden, over the Union Pacific, to Kansas City. The rate from San Francisco, over the entire distance, to Kansas City, was 65 cents, while the rate from San Francisco to Salina, a station intermediate between Kansas City and Ogden, was 94 cents. It will be seen, therefore, that for the purpose of applying the principle ruled in the *Osborne* case, the case of *Mellen* and others, and the case here, are exactly alike. Judge Riner, in the *Mellen* case, says in the opinion:

"The allegation is that they charged the local rate from Ogden to Salina, which was less than their part of the joint rate to Kansas City, although Salina was a shorter distance. This, I think, they may do, for the reason already suggested. The joint rate does not, in any sense, effect, or govern the local rates to intermediate points. While, as stated by Mr. Justice Brewer, the two companies could not make a joint rate from San Francisco to Kansas City, which was less than a joint rate from San Francisco to Salina, yet they may make a joint rate to Kansas City, Mo., and that fact would not affect the local rate of either company to Salina."

[The word "less," italicized in the quotation, should evidently have been "more," as the report of the case shows that the rate from Ogden to Salina was 61 cents, which was more than the Union Pacific's part of the

joint rate of 65 cents from San Francisco to Kansas City.]

The foregoing decisions, which seem to properly construe the Interstate Commerce law, are conclusive of the matter now being considered, viz: whether the rate from Cincinnati to Social Circle, as shown in this case, can be compared with the rate from Cincinnati to Augusta, for the purpose of making the question presented under the "long and short haul clause" of the Act to Regulate Commerce.

The conclusions of the court, therefore, are:

1. That the traffic from Cincinnati to Social Circle in issue here, as to the Georgia Railroad Company, is local, and that Company is not, on the facts presented, made a party to a joint, or common arrangement, such as makes the traffic to Social Circle subject to the control of the Interstate Commerce Commission.

2. That the arrangement for a through rate—for there is unquestionably a joint tariff from Cincinnati to Augusta—constitutes a "new line" between Cincinnati and Augusta; and following *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 52 Fed. Rep. 912, and *United States v. Mellen*, 4 Inters. Com. Rep. 247, 53 Fed. Rep. 229, traffic to a local point on the Georgia Railroad, at strictly local rates, cannot be compared with traffic over the "new line" from Cincinnati to Augusta, for the purpose of raising the question under the long and short haul clause of the Interstate Commerce Act.

If this be not true, then a railroad must refuse to receive freight which comes over other lines of railroad and destined to local points on its road, for which the initial carrier has issued a through bill of lading, or, by receiving it, it must become a party to a joint arrangement. This result could not have been in contemplation by Congress in passing this Act, and no fair interpretation of its terms, or view of its intent, can lead to such a conclusion.

III. If the foregoing views are correct, it is unnecessary to go at any great length into the question so elaborately, and so ably argued in this case, as to the meaning of the words "under substantially similar circumstances and conditions," contained in the fourth section of the Act to Regulate Commerce, and its application to the facts of this case, namely, the charge of \$1.37 to Social Circle, and the less charge of \$1.07 to Augusta, the more distant point. Since the passage of this Act, and indeed before the bill which resulted in the Act became a law, there has been much discussion as to the meaning of this phrase. Widely different views have been entertained since the passage of the Act certainly, as to its meaning.

Taking the prohibitory part of the section in connection with the proviso, it has been insisted on the one hand, that the phrase "under substantially similar circumstances and conditions," referred to such conditions and circumstances as were connected immediately with the transportation of the goods,—connected with their carriage over any lines of roads, and that if extrinsic cir-

circumstances or conditions would justify the greater charge for the shorter than for the longer haul, in any case, the right to make it could only be obtained by first applying to the Commission for its approval.

The other view has been that this phrase included other circumstances and conditions than those connected with the carriage of the goods; and, that embraced in such circumstances and conditions, was competition.

A further contention is, that the court should give effect to this entire section, and that not only the main, or prohibitory part of the section should be considered, but also the proviso, and that the court must attribute to Congress an intent to give meaning to every part. The rule of construction claimed is undoubtedly correct. A part of the recognized history of this Act, however, is, that the proviso formed part of the bill before the words "like kind of property, under substantially similar circumstances and conditions" were inserted therein. If the section had been left without these last mentioned words, thereby establishing a hard and fast rule as to the long and short haul, the proviso would have clothed the Commission with great power over the subject-matter of the section. But after the introduction of the phrase, "under substantially similar circumstances and conditions," the authority of the Commission was undoubtedly very greatly restricted, and much more was left to the judgment and determination of the carrier in the first instance. But even after the insertion of the qualifying clause named, it was doubtless considered that the retention of the proviso was necessary, as special cases would arise requiring relief from the operation of the rule, even where the circumstances and conditions were substantially similar.

Judge Cooley, speaking for the Interstate Commerce Commission in *Re Louisville & N. R. Co.*, 1 Inters. Com. Rep. 278, 1, I. C. C. Rep. 53, states the question, and the general view the Commission entertained as early as June, 1887, in this way:

"The Louisville & Nashville Railroad Company was one of the first to apply for relief under the fourth section of the Act to Regulate Commerce, which, after declaring the general rule that more shall not be charged, or received, in the aggregate, by a common carrier subject to the law, for the transportation of passengers, or of the like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included in the longer, proceeds then to authorize exceptions, and confers upon the Commission certain powers in respect thereto. From the first there have been two opinions regarding the proper construction of this provision for exceptions, one view being that no exception can be lawful unless made with the sanction of the Commission; and the other, apparently better supported on the words of the statute, that an order of relief is not required when the circumstances and conditions are substantially dissimilar, since the carrier, in acting upon them, would commit no breach of law, though it would be

responsible in case it were found that the circumstances and conditions were misconceived, or misjudged. Under this last view the order for relief would be needful only when the case was not one of plainly dissimilar circumstances and conditions, but in which, nevertheless, there might be reasons and equities that would sanction such greater charge."

Afterwards, in that opinion, the Commission restricted the class of competition which would constitute dissimilar circumstances and conditions, to competition with Canadian railroads, with water lines of transportation, and with some qualifications (which were afterwards removed) to competition with railroads wholly within a state. It was also held, in that opinion, that competition with other lines of railroad, subject to the Act, would not, as a general thing, constitute such competition as would create dissimilar circumstances and conditions, but that there might be "rare and peculiar cases," which would do so. As to these four classes of competition, namely, competition with Canadian roads, with water lines, with roads wholly within a state, and in "rare and peculiar cases," with railroad lines subject to the Commission, the carrier might, each for itself, treat them as constituting dissimilar circumstances and conditions, and make the greater charge for the shorter haul, without first obtaining the consent of the Commission; as to other cases, the consent of the Commission was deemed necessary.

In the case of the *Georgia Railroad Com. v. Clyde SS. Co.*, 4 Inters. Com. Rep. 120, the Commission overruled so much of the decision in *Re Louisville & N. R. Co.*, 1 Inters. Com. Rep. 278, 1 I. C. C. Rep. 53, as allowed the carrier to judge in the first instance of the "rare and peculiar cases" of competition with railroads subject to the Act, and thereby justify itself in the charge of a greater rate for the shorter, than for the longer haul.

The general construction of this clause, which admits competition as constituting dissimilar circumstances and conditions, is fully sustained by decisions of the circuit courts, in cases which will be referred to, and which decisions are more comprehensive than the decisions of the Commission. It appears to be settled, so far as decisions have been rendered, and construction given this clause, that the broader of the two opposing views above referred to must be taken of the phrase "under substantially similar circumstances and conditions," and that competition, generally speaking, must be considered in applying this phrase in any given case.

The question which has been argued so extensively here, is whether competition of carrier with carrier, both subject to the terms of the Act, and competition of market with market, is such competition as will constitute dissimilar circumstances and conditions. The substance of the expressed views of the Commission on this subject is, that competition between two carriers, both subject to the Act, will not of itself constitute dissimilar circumstances and conditions—that it will not, presumptively, at least. The

opinion of the Commission seems to be, that where a carrier claims that competition with another carrier, both being subject to the Act, is such as to justify it in making a greater charge for the shorter than for the longer haul, the Commission can do much, by the exercise of its general powers of supervision over rates, in relieving the complaining carrier of such competition. At all events, it is clearly held that competition between carriers subject to the Act, will not be presumed to justify a less charge for the longer haul than for the shorter haul, by the carrier of its own motion; but that the right to do so must be granted by the Commission.

The Commission has decided that it has no authority to raise rates. It holds that it was not the intention of Congress to grant any such power; and the Commission so determined, in *Re Chicago, St. P. & K. C. R. Co.*, 2 Inters. Com. Rep. 187, 2 I. C. C. Rep. 281. If the carrier, subject to the Act, is met with competition from other carriers, also subject to the Act, and the Commission has no authority to require such other carriers to increase their rates, even when the competition is ruinous, where is the practical difference between such a case, and the case of competition with carriers not subject to the Act? If a line of railroad running along the Northern boundary of our country, is met with competition from Canadian railroads running parallel with it, the American railroad can treat such competition as a circumstance and condition justifying a less charge for the longer haul to a competitive point, than it makes for the shorter haul to a non-competitive point; but a line of railroad running through the interior of our country, and interstate, which meets with competition from another line of railroad running parallel with it, and interstate also, may not treat such competition as a circumstance and condition justifying a less charge for the longer haul, to a competitive point, than for the shorter haul to a non-competitive point on its line, notwithstanding the fact that it can have no direct relief from such competition. In the first named case, that is, competition with the Canadian road, the American road may, of its own motion, treat such competition as a dissimilar circumstance and condition; while the line of road running into the interior must await the action of the Commission, until it can ascertain whether, by examination and revision of rates of the line of which complaint is made, any relief can be afforded to the complaining line. Such condition of affairs could hardly have been contemplated by Congress in the passage of this Act. If the general conclusion is correct, that competition will constitute dissimilar circumstances and conditions, in the sense in which that term is used in the Act, there seems to be no good reason for drawing the line where it has been drawn by the Commission; but, on the contrary, it does seem that competition of carrier with carrier, both subject to the Act, is as much within the terms of section four, as competition with the carrier, not subject to the Act.

This section, and especially this clause, was before Judge Deady, in the United States

Circuit Court for Oregon, *Ex parte Koehler*, 1 Inters. Com. Rep. 317, 81 Fed. Rep. 315. The decision was on the petition of a receiver, for instructions as to his duty under the Act, and under this clause in section 4. Judge Deady, in holding that competition must be considered, uses this language:

"The judgment of the court is authority, then, for this proposition: Two or more corporations, in order to meet competition, may form a through line, and charge through rates for transportation thereon, which may be less than the sum of the local rates of the several roads constituting the line; and the portion of the through rate received by each corporation may be less than the local rate charged by said corporation for carrying freight over the whole length of its road."

"The Interstate Commerce Act is intended, among other things, to prevent discrimination between long and short hauls, except where they are made under substantially dissimilar circumstances and conditions. In my judgment, Congress, in limiting the prohibition contained in section 4 of the Act against discriminating charges between long and short hauls, to cases where such hauls are made 'under substantially similar circumstances and conditions,' has recognized the rule laid down in *Ex parte Koehler*, 28 Fed. Rep. 538, as a proper one. Freight carried to, or from, a competitive point, is always carried under 'substantially dissimilar circumstances and conditions,' from that carried to, or from, non-competitive points. In the latter case, the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than for a short one. When each haul is made to, or from, a non-competitive point, the effect of such discrimination is to build up one place, at the expense of the other. Such action is willfully unjust, and has no justification or excuse in the exigencies, or conditions of the business of the corporation. In the former case, the circumstances are altogether different. The power of a corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or, as was said in *Ex parte Koehler*, 'abandon the field, and let its road go to rust.'

"Competition may not be the only circumstance that makes the condition under which a long and short haul are performed substantially dissimilar; but certainly it is the most obvious and effective one, and must have been in contemplation of Congress in the passage of the Act."

In the case of *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 31 Fed. Rep. 862, which was also on the application of a receiver for instructions, Judge Pardee ruled as follows:

"Under section 4 of the Interstate Commerce Law, relating to the charges for long and short haul, it seems that where the circumstances and conditions are dissimilar, there is no prohibition; where the circumstances and conditions are similar, the prohibition attaches; and that where it is difficult to point out clearly the circumstances or conditions which produce the dissimilar-

ity, the doubt should go in favor of the object of the law, and the circumstances and conditions should be taken as substantially similar. Where the circumstances and conditions are similar, or substantially similar, and the result to the carrier is injurious, relief can be had only through the Commission."

"The bulk of the petition presented, of the evidence, and of the Master's report, is an argument against the Interstate Commerce Act, and a rather vivid showing of the disastrous effects of an enforcement of the Act, with the popular construction given to the long and short haul clause, so far as the lines of the Texas & Pacific Railway are concerned; and if any specific question is presented for the answer of the court, it is whether competition between carriers is a circumstance or condition of the carriage, in the sense in which those words are used in the fourth section of said law.

"The effect of the enforcement of the law upon the particular property in the hands of the receiver need not be considered, when the whole question is one of how to comply with the law. That competition, the life of trade, cuts an important figure in the conditions and circumstances attendant upon the transportation of passengers and property cannot be well overlooked nor denied. Nor can it well be denied that, as between the long and short haul, competition may exist to that extent, that what would otherwise be similar circumstances, and conditions will be dissimilar circumstances, and conditions. Whether in any particular case, there is that competition on the long haul, that will justify a lower charge for the long haul, than is charged for the short haul, under otherwise similar circumstances, and conditions, must be determined on the facts of the particular case, keeping in mind that, where the matter is not clear, the object, and policy of the law should prevail.

"As to competition, and its effects, and generally as to the question under the said Interstate Commerce Act, the receivers are referred to the late decision of the Commission upon the petition of the Louisville & Nashville and other railroads, delivered June 16th inst. This decision is elaborate, and well considered, and answers all the points made by receiver's petition herein, as specifically as their general nature will permit.

"The lights furnished by the Commission, with a disposition to enforce the law (giving the same an enlightened and liberal construction, to the end that the mischiefs at which the law is aimed may be prevented, without unnecessary injury to any species of property), ought to be sufficient to guide any railroad traffic manager, and to enable him to protect himself, and his company, against any serious complaint of unjust discrimination, or unlawful conduct."

In the case of *Interstate Commerce Com. v. Atchison, T. & S. F. R. Co.*, 50 Fed. Rep. 806, Judge Ross, in the opinion, uses this language:

"The common carrier cannot be required to ignore, or overcome existing differences in the transportation facilities of different

localities, created not by its own arbitrary action, but by nature, or by enterprise beyond its control. San Bernardino is situated in one of the most fertile and productive valleys in the world, and is a thriving and prosperous city, but it has not the transportation facilities that Los Angeles has. It is about 60 miles distant, and further inland. By reason of its nearness to Los Angeles, it receives the benefit of the competitive rates to that terminal, in proportion to its proximity thereto. But, not being a competitive point, it does not get the terminal rates. The proof shows, what is also a matter of common knowledge, that railroad companies do not make terminal rates, unless compelled to do so by competition. Wherever, and whenever, actual competition exists, the question the carrier has to deal with is, not so much what is a fair rate for the service, or what the traffic will bear, but what rate can be got for the service, as against the rate offered by the competitor. Especially is this true, when the competitor is a carrier by water, because that is the cheapest known kind of transportation, and is unrestricted by law. If, therefore, Los Angeles can be justly regarded as a competitive point in respect to the transportation of the commodities here in question, there is such dissimilarity of circumstances and conditions between it and the intermediate point of San Bernardino, as to make the long and short haul clause of the Interstate Commerce Act inapplicable."

Judge Shiras took a different view of this clause, in *Osborne v. Chicago & N. W. R. Co.*, 48 Fed. Rep. 54, when it was tried before him. His view of its meaning will appear from this quotation from his charge to the jury:

"Whether the railway company was justified by a cut rate, in making what was called in argument, 'illegitimate competition,' and circumstances of that kind, which grew out of the handling and management of the railroad business of the country by other competing lines, and its effect upon the business of the defendant company, in the judgment of the court, is a question that cannot be submitted to you. Questions of that kind are for the judgment and determination of the Board of Commissioners appointed under this Act, and the courts and juries when they are called to act upon particular cases arising under this Act, where it is claimed that the law has been violated, are only authorized to determine the question, whether in the service rendered, the character of the property, its conveyance and other facts which inhere in the carrying of the freight upon the particular line which is charged with the wrong doing, there existed dissimilar circumstances and conditions relieving the company from the charge of collecting a larger rate for the shorter haul over the same line, in the same direction, and under otherwise substantially similar circumstances, and conditions."

The case was reversed in the circuit court of appeals, Justice Brewer delivering the opinion; but the reversal was on the question of what constituted the "same line," and not because of any error in the charge of

Judge Shiras on this ground. There is no discussion whatever of the phrase, "under substantially similar circumstances and conditions," in the opinion by Justice Brewer for the appellate court. If the question was raised at all, it appears to have been passed without any decision.

It is contended, on behalf of the Commission, that the case of *Ex parte Kochler*, 1 Inters. Com. Rep. 317, 31 Fed. Rep. 315, and the San Bernardino case, were decided solely with reference to water competition; but by an examination of the facts of those cases, and of the views of the court as expressed in the opinions, it will be found that this contention is not justified. Both cases, as is true also of the case of *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 31 Fed. Rep. 862, appear to treat competition generally as embraced within the term "similar circumstances, and conditions," and do not restrict this competition to competition with water lines.

IV. The question of competition of market with market, as constituting dissimilar circumstances, and conditions, has been considerably discussed in this case. In the opinion by Morrison, *Commissioner*, in this case (*James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 682, 4 I. C. C. Rep. 744) the Commission alludes to competition of market with market, in this way:

"If the contention of the defendants is justified by the statute, and they can avail themselves of its exceptional provisions, and charge more for the shorter distance, for the purpose of equalizing commercial conditions, and adjusting trade relations, between the cities of Cincinnati, and Baltimore, in the Augusta market, the same thing may be done to place Cincinnati carriage makers on an equal footing with those of the Augusta market, or to relieve any city from any disadvantage in markets of other cities, or to deprive all cities, or places of production, of any advantage resulting from their location. Such an interpretation would make the fourth section of the Act practically inoperative, and with such license in rate making, carriers might give advantage to, build, or destroy the carriage, or other business, of any other city, or locality."

It is certainly true that competition of this character is more uncertain in its effect, and more difficult to ascertain in character and extent, than competition of carrier with carrier. In the case of competition of market with market, many questions of commercial facilities, and advantages of competing points, would have to be considered, and it is not perhaps as direct in its effect as competition of carrier with carrier. Still, illustrations have been given, by witnesses in this case, of competition of market with market, which would seem to be absolutely controlling with the railroads in rate making. In this case, it is contended that competition with the Baltimore market for the sale of buggies, is an element to be considered in making the rate from Cincinnati to Augusta; it is contended that if the rates were higher, the Cincinnati manufacturer would be de-

prived entirely of the trade with Augusta. And it is urged that this is true of other eastern cities, having communication by the ocean lines with southern seaboard, and thence by rail to Augusta. Competition of this character may not be so direct, in its effect, as competition of carrier with carrier; but it seems to be, when it does exist, influential, and perhaps as effective and controlling with the carriers, as to their rates, as other competition; and may constitute a part of the circumstances and conditions which a carrier can consider in fixing rates for transportation of goods.

V. As to the question of undue preference, under section 3 of the Act to Regulate Commerce, it may be stated that unless the traffic involved here is obnoxious to the fourth clause of the Act, it can hardly be said to be an undue preference in favor of Augusta, or an undue prejudice or disadvantage against Social Circle. In the party rate case, *Interstate Commerce Com. v. Baltimore & O. R. Co.*, 4 Inters. Com. Rep. 92, 145 U. S. 263, 36 L. ed. 699, the Supreme Court says: "But so far as relates to the question of 'undue preference,' it may be presumed that Congress, in adopting the language of the English Act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute."

In short, the substance of all these decisions is that railway companies are only bound to give the same terms, to all persons alike, under the same conditions and circumstances, and that any fact which produces an inequality of condition, and a change of circumstances, justifies an inequality of charge." So that, unless the rates complained of, as compared with each other, violate the fourth section of the Act, there seems to be very little ground for claiming that they violate the "undue preference" provision of the third section.

VI. It appears, from the evidence in this case, that nearly all the railroads south of the Ohio river and east of the Mississippi, including the three railroads, defendants here, are members of an association known as the Southern Railway & Steamship Association. The purpose of this association is claimed by counsel for the railroads to be to prevent ruinous and disastrous competition, and to keep the rates at a point where the railroads can be successfully operated. On the other hand, it is contended that the claim of the advocates of the association that the purpose of the railroads entering into it is self-preservation, is not correct, but that it is rather a combination to keep up rates. Whatever may be the fact about this (and discussion of that question is deemed unnecessary now) it seems unquestionably true, that the association, in making rates, is governed by competition. The same influences seem to control in the association, in making rates, as would control without it; and while the influences may not go to the same extent, and there may be produced by it more harmonious relations and understanding, still, it seems to be a fact that competition influences, and, to a large extent, controls, the rates agreed upon by the association.

VII. The evidence in this case shows several lines of railroads competing for the business between Cincinnati and Augusta, in this way; there are two direct lines between Cincinnati and Atlanta—one over the Louisville & Nashville and Western & Atlantic roads, the other over the Cincinnati, New Orleans & Texas Pacific Railway and the East Tennessee, Virginia & Georgia Railroad. Then there are other lines which could compete, but over which, as a matter of fact, there does not appear to be real competition between Cincinnati and Atlanta, as they are indirect routes, and are probably at a disadvantage as against the two more direct routes just named. All these different lines, however, from Cincinnati to Augusta, converge at Atlanta, and go thence over the Georgia Railroad to Augusta. This is competition of carrier with carrier, which is said to constitute dissimilar circumstances and conditions.

There is competition of Baltimore and other eastern cities with Cincinnati for the trade of Augusta—and that it is active and influential is quite clearly shown by the evidence. Indeed, it is much more satisfactorily shown than is the competition of carrier with carrier, from the point of shipment to the point of destination.

VIII. In view of the opinion expressed, that the carriage from Cincinnati to Augusta is not over the same line, in contemplation of the statute, as the carriage to Social Circle, a determination of the extent and effectiveness of the competition at Augusta, as constituting dissimilar circumstances and conditions, under the fourth section, is unnecessary. It may be added, that the competition from Cincinnati by way of the trunk lines to the seaboard, thence by water to Charleston and Savannah, and thence by rail or water to Augusta, seems hardly sufficient to justify its recognition in this connection. The same may be said of all water routes from eastern markets by the ocean and by the Savannah river to Augusta. The evidence fails to show any such amount of shipments, either way, as could at all affect the justice of the rates in this case.

IX. The only remaining matter to be disposed of is that of the reasonableness of the rate charged on first class goods, in less than carload lots, from Cincinnati to Atlanta.

This is a through rate, and it is interstate commerce subject to the control of the Commission. The Commission determined that the rate should be \$1.00, and ordered that the roads interested should not charge more than \$1.00. The following language is used on this subject by the Commission, in its report and opinion:

"The only testimony offered, or heard as to the reasonableness of the rate to Atlanta in question, was that of the Vice President of the Cincinnati, New Orleans & Texas Pacific Company, whose deposition was taken at the instance of said company."

"The witness testified that he had been in the railroad service about twenty-six years, and had much to do with rates during all that time, and that he considered \$1.01 per 100 pounds, in less than carloads, a reason-

able rate on first class freight from Cincinnati, Ohio, to Atlanta, Georgia.

"This statement, or estimate, of the rate from Cincinnati to Atlanta, we believe, is fully as high as it may reasonably be, if not higher than it should be, but without more thorough investigation than it is now practicable to make, we do not feel justified in determining upon a more moderate rate than \$1.00 per 100 pounds of first class freight, in less than carloads.

"The rate on this freight from Cincinnati to Birmingham, Alabama, is 89 cents, as compared with \$1.07 to Atlanta, the distances being substantially the same. There is apparently nothing in the nature and character of the service to justify such difference, or, in fact, to warrant substantial variance in the Atlanta and Birmingham rates from Cincinnati."

It will be perceived that the only finding of fact was the testimony of one witness, that the rate of \$1.01 was reasonable, and the comparative rate to Birmingham, on which the Commission seems to lay stress. It seems, that for a short time at least, a rate of \$1.01 was in force from Cincinnati to Atlanta, and that it was as to this rate, that the testimony of one witness before the Commission was taken. It appears in evidence here, that the rate from Cincinnati to Atlanta, in 1879, was \$1.89, and that afterwards it was \$1.10, and subsequently \$1.07, except, perhaps, as stated it was for a short time \$1.01. As to the rate to Birmingham, there is evidence before the court, which was evidently not before the Commission, namely: that the rate from Cincinnati to Birmingham, which seems previously to have been \$1.08, was forced down to 89 cents, by the building of the Kansas City, Memphis & Birmingham Railroad, which new road caused the establishment of a rate of 75 cents from Memphis to Birmingham, and by reason of water routes to the Northwest, such competition was brought about that the present rate of 89 cents from Cincinnati to Birmingham was the result. It seems to be no sufficient reason to determine the rate from Cincinnati to Atlanta unreasonable, because of the lower rate to Birmingham, when such lower rate is caused by conditions which do not operate as to Atlanta.

So far as the action of the Commission, in ordering a reduction of the rate from Cincinnati to Atlanta, is based on the fact that the same rate is charged to Augusta, that has perhaps been sufficiently discussed, in what has hereinbefore been said, with reference to the long and short haul clause. The rate to Augusta is caused by conditions which have been stated. No data is given the court from which it can judge whether the rate from Cincinnati to Atlanta on first class freight, taken in connection with the rates which can be charged, and are charged on other and lower classes of freight, gives more than a fair return to the railroads composing the lines, and the court is left to the findings of the Commission, and to the testimony of a number of railroad experts, who testified that the rate of \$1.07 is reasonable.

There is some difficulty in determining

what the duty of the court is, in a matter of this kind, under the Interstate Commerce Act. If the *conclusion* of the Commission that the rate is unreasonable is *prima facie* correct, under the language used that, "the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated," then the report of the Commission would have greater weight with the court, than if only *facts found*, strictly speaking, are to be deemed *prima facie* correct. But in either event, if this is, as has been held, a *de novo* investigation, and inquiry is to be instituted here, under new pleadings, and new evidence, the court must be satisfied on the whole case before it, that the rate of \$1.07 is unreasonable.

In the case of *Interstate Commerce Com. v. Lehigh Valley R. Co.*, 3 Inters. Com. Rep. 796, 49 Fed. Rep. 177, the court used this language:

"But then again, upon an analysis of the above quoted provisions of section 16, it is demonstrable that, in such a case as this, it is the duty of the court to investigate the merits of the whole controversy, and form an independent judgment. The court, upon a petition alleging the violation of a 'lawful' order, is to proceed to 'hear and determine the matter, as a court of equity, in such manner as to do justice in the premises,' and to this end, it may prosecute in such mode, and by such persons, as it may appoint, all 'needful inquiries' to enable it to 'form a just judgment,' in the matter of the petition; and finally, 'on such hearing, the findings of fact in the report of said Commission shall be *prima facie* evidence of the matter therein stated.' Nothing can be clearer than that the findings by the Commission are not here decisive of the questions of fact. We have only to add that our conclusion is in harmony with that of the circuit court, in the case of *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. Rep. 567."

The court is to "investigate the merits of the whole controversy, and form an independent judgment," according to this last de-

cision, and according to *Judge Jackson* in the above case of *Kentucky & I. Bridge Co.* the "court is not confined to a mere re-examination of the case as heard, and reported by the Commission, but hears and determines the case *de novo*, upon proper pleadings and proof; the latter including not only the *prima facie* facts reported by the Commission, but all such other, and further testimony, as either party may introduce, bearing upon the matters in controversy."

The conclusion of the Commission should undoubtedly be considered in connection with the facts on which that conclusion was based; and the principal fact which seems to have been in the mind of the Commission is satisfactorily explained here, as has been indicated. The evidence offered here on behalf of the railroads is, in the opinion of the court, sufficient to overcome any *prima facie* case that may have been made by the findings of the Commission. On the whole testimony, as now before the court, it is not believed that the Commission would have found the rate in question to be unreasonable. Certainly the court cannot so determine.

It has been earnestly insisted that the action of the Commission, as to the rate from Cincinnati to Atlanta, is, in effect, making or fixing a rate, and that the order of the Commission is, for that reason, beyond the authority granted it by the Act of Congress. In view of what has just been said, and the opinion of the court before expressed as to this rate, it is deemed unnecessary to go into a discussion of this subject. The conclusion is, that the court would not be justified in granting the order prayed for by the Commission, requiring the defendant corporations to desist from charging a greater rate than \$1 per 100 pounds, on first class freight, in less than carload lots, from Cincinnati to Atlanta. The court being of the opinion, therefore, that the complainants are not entitled to a decree enforcing either the order as to the Social Circle rate, or the rate from Cincinnati to Atlanta, and that being the only relief prayed for, a decree must be entered dismissing the bill.

UNITED STATES SUPREME COURT.

INTERSTATE COMMERCE COMMISSION, *Appt.*,

v.

THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY; THE ATLANTIC & PACIFIC RAILROAD COMPANY; THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY; THE CALIFORNIA CENTRAL RAILWAY COMPANY; THE CALIFORNIA SOUTHERN RAILROAD COMPANY; THE CHICAGO, KANSAS & NEBRASKA RAILWAY COMPANY; THE MISSOURI PACIFIC RAILWAY COMPANY; THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, and THE SOUTHERN CALIFORNIA RAILROAD COMPANY.

[No. 1275.]

(See S. C. 149 U. S. 264, 285, 37 L. ed. 727.)

• The Act of March 3, 1891, establishing United States circuit courts of appeals, repealed those clauses of the Act to Regulate Commerce which

relate to appeals from the circuit court of the United States in cases prosecuted under the Interstate Commerce Act.

APPPEAL from a decree of the Circuit Court of the United States for the Southern District of California, in a proceeding to enforce obedience to an order of the Interstate Commerce Commission, requiring the appellees to change and modify their freight rates which discriminated against San Bernardino, in violation of the Act of February 4, 1887, to regulate commerce.

On motion to dismiss. Dismissed.

See same case below, 50 Fed. Rep. 205.

STATEMENT: (From brief of appellees.) May 22, 1889, complaint was filed before the Interstate Commerce Commission against the appellees by the Board of Trade of San Bernardino, California, alleging said companies' maintenance of freight rates discriminative against San Bernardino, and in violation of the Act of February 4, 1887, to regulate commerce (24 Stat. at L. 879).

Upon hearing, order was entered by the Commission on July 19, 1890, requiring the appellees to change and modify such rates. The appellees failed to obey such order, whereupon the Interstate Commerce Commission commenced this proceeding to enforce such obedience in the United States Circuit Court for the

Southern District of California, on May 1, 1891, pursuant to section 16 of the Interstate Commerce Act (amended Act of March 3, 1889, 25 Stat. at L. 859). That court decreed in favor of the appellees on April 25, 1892, on the sole ground that upon the proof presented the alleged unlawful discrimination in rates did not exist (50 Fed. Rep. 295) and thereupon, on May 14, 1892, the commission appealed to this court.

Such decision was rendered and this appeal was taken after the creation of the circuit courts of appeals. The question is whether such direct appeal lies to this court.

Messrs. Geo. R. Peck, A. T. Britton, and A. B. Browne, for appellees, in favor of motion.

Mr. W. A. Day, for appellant, in opposition.

The Chief Justice: The motion to dismiss is granted. *McLish v. Roff*, 141 U. S. 661 [35: 893]; *Lau Ow Bie v. United States*, 144 U. S. 47 [36: 340]; *Hubbard v. Soby*, 146 U. S. 56 [36: 886]; *Chicago & N. W. R. Co. v. Osborne*, 146 U. S. 354 [36: 1002].

Appeal dismissed.

INTERSTATE COMMERCE COMMISSION.

THE BOARD OF TRADE OF TROY, ALABAMA,

v.

THE ALABAMA MIDLAND R. CO., THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA AND H. M. COMER AND OTHERS, THE RECEIVERS THEREOF; THE SAVANNAH, FLORIDA & WESTERN RAILWAY COMPANY; THE KANSAS CITY, FORT SCOTT & GULF RAILROAD COMPANY; THE KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY; THE LOUISVILLE & NASHVILLE RAILROAD COMPANY; THE MOBILE & OHIO RAILROAD COMPANY; THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY; THE WESTERN RAILWAY OF ALABAMA; THE MISSOURI PACIFIC RAILWAY COMPANY; THE WABASH RAILROAD COMPANY; THE SIOUX CITY & PACIFIC RAILROAD COMPANY; THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY; THE ILLINOIS CENTRAL RAILROAD COMPANY; THE EVANSVILLE & TERRE HAUTE RAILROAD COMPANY; THE JEFFERSONVILLE, MADISON & INDIANAPOLIS RAILROAD COMPANY; THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY; THE CLYDE STEAMSHIP COMPANY; THE OCEAN STEAMSHIP COMPANY OF SAVANNAH; THE PROVIDENCE & STONINGTON STEAMSHIP COMPANY; THE NEW YORK & TEXAS STEAMSHIP COMPANY; THE METROPOLITAN STEAMSHIP COMPANY; THE CITIZENS' STEAMBOAT COMPANY; THE HARTFORD AND NEW YORK TRANSPORTATION COMPANY; THE GRAND TRUNK RAILWAY COMPANY OF CANADA; THE NEW HAVEN STEAMBOAT COMPANY; THE PEOPLE'S LINE STEAMERS; THE MAINE STEAMSHIP COMPANY; THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY; THE CENTRAL VERMONT RAILROAD COMPANY; THE BRIDGEPORT STEAMBOAT COMPANY; THE NORWICH & NEW YORK TRANSPORTATION COMPANY; THE CANADIAN PACIFIC RAILWAY COMPANY; THE MINNEAPOLIS, ST. PAUL & SAULT STE MARIE RAILWAY COMPANY; THE HOUSATONIC RAILROAD COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE BOSTON & ALBANY RAILROAD COMPANY; THE BOSTON & MAINE RAILROAD COMPANY; THE NEW YORK & NEW ENGLAND RAILROAD COMPANY; THE OLD COLONY RAILROAD COMPANY; THE FITCHBURG RAILROAD COMPANY; THE MAINE CENTRAL RAILROAD COMPANY; THE CONNECTICUT RIVER RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE PHILADELPHIA & READING RAILROAD COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; THE PROVIDENCE & SPRINGFIELD RAILROAD COMPANY; THE CHESTER RAILROAD COMPANY; THE CONCORD & MONTREAL RAILROAD COMPANY.

1. The fact, that the property and affairs of a carrier have been placed by a United States court in the hands of a receiver, does not affect the jurisdiction of this Commission under a complaint charging such carrier with violations of the Act to Regulate Commerce.
2. The continuity of the carriage of freight over a line formed by two or more roads, is not broken *in fact* and cannot be broken in law by the charge of a local rate by one (or more) of such roads as its proportion of the through rate.
3. The successive receipt and forwarding in

ordinary course of business by two or more carriers of interstate traffic shipped under through bills for continuous carriage over their lines, is assent to a "common arrangement" for such carriage within the meaning of the Act to Regulate Commerce without previous express agreement between them, and the obligations imposed by the statute cannot be evaded by the demand of the local charge for the haul over its own road by one or more of such carriers or by the declaration on the part of one or more of said carriers that as to the transportation over its road it is a local and not a through carrier. (Re-affirming the doctrine laid down in *Georgia R. Com. v. Clyde SS. Co.* 4 Inters. Com. Rep. 120.)

4. A local rate, which presumably is adopted as covering both the initial and final expense of a local haul, is *prima facie* excessive as part of a through rate over a through line composed of two or more carriers.
5. Where a proportion of a through rate for part of a through haul is greatly disproportionate to the balance of the through rate,

the knowledge of the circumstances and conditions (if any) justifying such disproportionate rate being peculiarly in the possession of the carrier, the burden is on the carrier to make proof of such justifying circumstances and conditions.

6. The facts, that one city is much larger and has more important and extensive business interests than another and has been treated by the carriers in making rates to surrounding points as a "trade center," is no justification for a continuation of discriminatory rates in favor of such city. The object of the Act to Regulate Commerce was to eradicate the existing system of rebates and unjust discriminations in favor of particular localities, special enterprises and favored individuals.
7. Unjust discrimination as between localities or individuals cannot in the nature of things be essential to the business prosperity of the carrier, and it is no valid objection to the correction of unlawful rates to one point that it involves a like correction as to other points.

Complaint filed June 29, 1892.—Answers filed July 15 to August 31, 1892.—Heard at Troy, Ala., Nov. 11, 1892.—Briefs filed March 7 to May 1, 1893.—Decided August 15, 1893.

GREATER charge for shorter distances. Unjust discrimination and undue preference against localities.

Mr. W. C. Oates, for complainant.

Mr. A. A. Wiley, for the Alabama Midland Railway Company and the Savannah, Florida & Western Railway Company.

Mr. E. L. Russell, for the Mobile & Ohio Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

Clements, Commissioner :

The complainant, the "Board of Trade of Troy," is an association of citizens of Troy, Alabama, organized for the promotion of the business interests of that city. The defendants (hereinafter named) form several through lines between the points mentioned in the complaint, and, as members of such lines, are engaged in interstate commerce, wholly by rail or partly by rail and partly by water. The Alabama Midland Railway Company and the Central Railroad & Banking Company of Georgia reach Troy directly and are the initial carriers in all the lines from that point. These two roads for brevity are hereafter designated, respectively, as the Alabama Midland and the Georgia Central.

The general ground of complaint is, in substance, that, Troy, being in active competition for business with Montgomery and Columbus, the lines of defendants to Troy and those cities unjustly discriminate in their rates against the former and give the latter an undue preference or advantage in respect to certain commodities and classes of traffic. The specific charges, in-

sisted on at the hearing and to which the testimony relates, are:

1. That the Alabama Midland and the defendant roads connecting and forming lines with it from Baltimore, New York and the east to Troy and Montgomery charge and collect a higher rate on shipments of class goods from those cities to Troy than on such shipments through Troy to Montgomery, the latter being the longer distance point by 52 miles.

2. That the "Alabama Midland and the Georgia Central and their connections unjustly discriminate against Troy and in favor of Montgomery" in charging and collecting \$3.22 per ton to Troy on phosphate rock shipped from the South Carolina and Florida fields and only \$3.00 per ton on such shipments to Montgomery, the longer distance point by both said roads, and that all phosphate rock carried from said fields to Montgomery over the road of the Alabama Midland has to be hauled through Troy.

3. That the rates on cotton established by said two roads and their connections on ship-

ments to the Atlantic seaports, Brunswick, Savannah and Charleston, unjustly discriminate against Troy and in favor of Montgomery, in that the rate per hundred pounds from Troy is 47 cts. and that from Montgomery, the longer distance point, is only 40 cts., and that such shipments from Montgomery over the road of the Alabama Midland have to pass through Troy.

4. That on shipments for *export* from Montgomery and other points within what is termed in the complaint "the jurisdiction" of the Southern Railway & Steamship Association, to the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk, a lower rate is charged than the regular published tariff rate to such seaports, in that Montgomery and such other points are allowed by the rules of said Association to ship through to Liverpool *via* any of those seaports at the lowest through rate *via* any one of them on the day of shipment, which may be much less than the sum of the regular published rail rate and the ocean rate *via* the port of shipment; that this reduction is taken from the published tariff rail rate to the port of shipment; and that, this privilege being denied to Troy, is an unjust discrimination against Troy in favor of Montgomery and such other favored cities and that it is, also, a discrimination against shipments which terminate at such seaport in favor of shipments for *export*.

5. That Troy is unjustly discriminated against in being charged on shipments of cotton *via* Montgomery to New Orleans the full local rate to Montgomery by both the Alabama Midland and the Georgia Central.

6. That the rates on "class" goods from western and northwestern points established by the defendants forming lines from those points to Troy are relatively unjust and discriminatory as against Troy when compared with the rates over such lines to Montgomery and Columbus.

Answers to the complaint have been filed in behalf of the Alabama Midland; the Georgia Central; the Louisville & Nashville Railroad Company; the Savannah, Florida & Western Railway Company; the Western Railway of Alabama; the Louisville, New Albany & Chicago Railway Company; the Illinois Central Railroad Company; the Mobile & Ohio Railroad Company; the Kansas City, Memphis & Birmingham Railroad Company; the Kansas City, Fort Scott & Memphis Railroad Company; the Pennsylvania Railroad Company; the Philadelphia & Reading Railroad Company; the New York & New England Railroad Company; the Providence & Springfield Railroad Company; the Central Railroad Company of New Jersey; the Maine Central Railroad Company; the Boston & Maine Railroad Company; the Metropolitan Steamship Company; 4 INTER S.

the Connecticut River Railroad Company; the Providence & Stonington Steamship Company; the Fitchburg Railroad Company; the Concord & Montreal Railroad Company; and the Canadian Pacific Railway Company.

A few of the respondents deny all participation in traffic or through rates from or to Troy; some allege that their proportion of any charge over their own roads or a fixed amount, which remains the same no matter what may be the point of origin or destination of the traffic, and hence that they cannot be guilty of discrimination as against Troy or any other locality; and others contend, that although they receive a proportion of through rates on through shipments over their roads between the points named in the complaint, yet they are not "under a common control, management or arrangement for continuous carriage" with the other members of the through lines. These matters of defense may be disposed of before entering upon the discussion of the other and more material issues raised by the pleadings. Those of the defendants, who, it may appear, do not participate in the traffic or rates in question, are not amenable to, and cannot be affected by, any order which the Commission may make in this case. The fact, that a carrier's proportion of a through rate is its local for the haul over its own road or is a fixed amount, which remains the same for all points of origin or destination of traffic reached by the through line, cannot relieve it from joint responsibility as a component of the through line, if the entire rate be violative of the law. In the case of the *Georgia R. Co. v. Clyde SS. Co.*, 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324, it is said, "The total rate or charge for through carriage over two or more lines, whether made by the addition of established locals, or of through and local rates, or upon a less proportionate basis, is the through rate that is subject to scrutiny by the regulating authority; how the rate or charge is made is only material as bearing upon the legality of the aggregate charge, and how any reduction ordered may be accomplished, whether by lowering locals or proportions, is matter for the carriers to determine among themselves;" and again, "where two or more roads forming a continuous connecting line between points in different states bill and carry interstate traffic through to certain stations on the last road forming such line, neither the roads together nor any one of them can evade the obligations of the Act to Regulate Commerce by declaring that as to such traffic it is a local carrier." See also *James & Mayer Buggy Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 3 Inters. Com. Rep. 683, 4 I. C. C. Rep. 744. Goods cease to be a part of the general mass of property in a state when they have been shipped or entered with a common

carrier for transportation to another state. *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346. From that time until they reach their destination and "become incorporated add mixed up with the mass of property" in the state where delivered, they are subjects of interstate commerce, *Leisy v. Hardin*, 185 U. S. 110, 34 L. ed. 133, and the rates charged for their carriage are within the regulating power of this Commission under the Interstate Commerce Law. By sec. 7 of that law, it is made unlawful for carriers subject to that Act "to enter into any combination, contract, or agreement, express or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination," and that "no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intention to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act." The continuity of the haul is not broken in fact and cannot be broken in law by one or more carriers, members of a through line, charging local rates as their proportion of a through rate. If the continuity of the carriage may not be thus interrupted, can the exaction of local rates exempt the carrier from liability under the law by placing him in the attitude of a strictly local carrier, operating under no "common control, management or arrangement" with the other carriers participating in the through haul? If this be conceded, the most vital provisions of the law may be readily evaded and nullified. For instance, a terminal carrier, part of a continuous through line, could elect to charge on through traffic its local to one or any number of stations beyond, and no violation of law could be alleged because as to the short haul the carrier would not be subject to the Act. The charge of a local rate and declaration by a carrier that as to through transportation to certain points on its road it is a local carrier, *cannot alter the fact*. The law regards the substance of things, and a palpable device for evasion of the law will not be allowed to accomplish its purpose. The facts, that the carriage is continuous, that the traffic is through interstate traffic and that the carrier in due and ordinary course of business accepts and forwards it, are sufficient to establish responsibility under the law. As is said in the case of the *Georgia R. Com. v. Clyde SS. Co.*, 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 824: "The receipt

successively by two or more carriers for transportation of traffic shipped under through bills for continuous carriage over their lines is assent to a common arrangement for such continuous carriage or shipment, and *previous formal arrangement between them is not necessary to bring such transportation under the terms of the law.*"

The answer of the Georgia Central sets forth, among other things, that it is in the hands of a receiver, H. M. Comer, appointed "by order of the United States Court for the Eastern Division of the Southern District of Georgia," and that the receiver, "being an officer of the United States court, and subject only to its order, is not subject to the jurisdiction of this Commission in the premises." The main purpose of a receivership is, to preserve property in controversy *pendente lite*, and this devolves upon the court appointing the receiver the duty of protecting the possession of the property in his hands. It is a general rule, therefore, that before suit is brought against a receiver, leave of the court by which he was appointed must be obtained. "This rule is necessary to prevent one creditor from obtaining undue advantage over others in the enforcement of his claim; otherwise courts outside the jurisdiction of the court which appointed the receiver might proceed to judgment and sell the property within their reach under execution, and the appointing court would be powerless to prevent the injustice." Beach, *Receivers*, §§ 652, 655; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672. Complaints before this Commission do not fall within the reason of the rule requiring consent of the court appointing a receiver to be obtained before bringing suit. The main object of such complaints is the regulation or readjustment of rates alleged to be illegal because unjustly discriminative or unreasonable in themselves, and reparation for injury sustained by reason of such illegality; and the order of the Commission for reparation or other relief, if not voluntarily obeyed by the carriers, can only be enforced by suit in the proper court. The Commission renders no judgment upon which execution can issue and be levied on property in the hands of a receiver. The question whether property in the possession of a receiver can be made subject to an order of reparation issued by us would arise on proceedings in the courts for the enforcement of such order. *Loud v. South Carolina R. Co.* 4 Inters. Com. Rep. 205, 5 I. C. C. Rep. 529. No order of reparation is asked in the present case. It appears, moreover, that by Act of Congress of March 3, 1867 (U. S. Stat. 1836-87, p. 552) receivers appointed by United States Courts may be sued "without the previous leave of the court in which such receiver was appointed."

The answers of the defendants who admit participation in and responsibility for the rates

complained of, deny that those rates are unlawful or violative of any of the provisions of the Act to Regulate Commerce, the main ground upon which they are sought to be justified being that the circumstances and conditions attending transportation to Troy are not substantially similar to those attending transportation to Montgomery and Columbus because of water and rail competition at the latter points.

Facts and Conclusions.

Troy is situated at the intersection of the roads of the Alabama Midland and the Georgia Central companies. Montgomery is at the terminus of the Alabama Midland, fifty two miles north west from Troy, and shipments to Montgomery over that road from New York, Baltimore and northeastern cities, and from the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk, and from Port Royal, So. Ca. and Gainesville, Ocala and Tampa, Florida, pass through Troy.

The Savannah, Florida & Western Railway and the Ocean Steamship Company, and the Savannah, Florida & Western Railway and Merchants & Miners Transportation Company, form with the Alabama Midland Railway two through lines, the former from New York and the latter from Baltimore, over which traffic is carried on through rates and through bills of lading to Troy and through Troy to Montgomery. The Georgia Central forms through lines in connection with the Ocean Steamship Company and Merchants & Miners Transportation Company to Troy and Montgomery from New York and Baltimore. The class rates in cents per hundred pounds, except Class F, which is per bbl., over the above lines (sea and rail) from New York and Baltimore to Troy and Montgomery, respectively, are, as follows:

SEA & RAIL.

From New York.			From Baltimore.	
Class	To Montgomery	To Troy	To Montgomery	To Troy
1	114	136	106	129
2	96	117	90	111
3	86	108	83	98
4	73	89	70	84
5	60	74	57	70
6	49	61	46	58
A.	36	—	33	—
B.	48	—	45	—
C.	40	—	37	—
D.	39	—	36	—
E.	58	—	55	—
H.	68	—	72	—
F.(per bbl.)	78	—	65	—

There are also published "all rail" rates *via* the "Great Southern Despatch" line, from New York and Baltimore to Troy and Montgomery. On this line traffic is carried from New York to Harrisburg over the Pennsylvania road, from Harrisburg to Hagerstown over the Cumberland Valley road, from Hagerstown to

Bristol over the Norfolk & Western, and from Bristol to Chattanooga over the East Tennessee, Virginia & Georgia road. From Chattanooga the principal routes or lines to Troy and Montgomery appear to be, (1) to Atlanta over the East Tennessee, Virginia & Georgia road, from Atlanta to Montgomery over the Western Railway of Alabama, and from Montgomery to Troy over either the Alabama Midland or the Georgia Central; (2) to Birmingham over the Alabama Great Southern road, from Birmingham to Montgomery over the Louisville & Nashville road, and from Montgomery to Troy over the two roads named in route 1 above; (3) to Calera over the East Tennessee, Virginia & Georgia road, from Calera to Montgomery over the Louisville & Nashville road, and from Montgomery to Troy over the two roads named in route 1 above; and (4) over the line of the Georgia Central *via* Macon and Columbus to Troy and Montgomery.

The class rates in cents per hundred pounds (except Class F, which is per bbl.) over the above described "all rail" lines to Troy and Montgomery from New York and Baltimore, are as follows:

ALL RAIL.

From New York.			From Baltimore.	
Class	To Montgomery	To Troy	To Montgomery	To Troy
1	114	144	106	138
2	96	123	90	115
3	86	108	83	105
4	73	93	70	90
5	60	77	57	74
6	49	63	46	60
A.	36	—	33	—
B.	48	—	45	—
C.	40	—	37	—
D.	39	—	36	—
E.	58	—	55	—
H.	68	—	65	—
F.(per bbl.)	78	—	72	—

It appears that shipments of phosphate rock are made *via* the Alabama Midland, as the terminal road, to Troy and through Troy to Montgomery from Charleston and Port Royal, South Carolina, and from Gainesville and other points in Florida. The roads which connect, and constitute through lines, with the Alabama Midland, from those cities to Troy and Montgomery, are the following: from Charleston, the Savannah, Florida & Western and the Charleston & Savannah Railway; from Port Royal, the above two roads, and the Port Royal & Augusta (Cent. R. R. of Ga.); from Gainesville, the Savannah, Florida & Western Railway. The Georgia Central has a line from Troy and from Montgomery to Port Royal; it also forms lines in connection with the Charleston & Savannah Railway, or the Georgia Railroad and South Carolina Railroad, from those

points to Charleston, and with the Savannah, Florida & Western Railway, to Gainesville.

The rates in cents per ton on phosphate rock from Port Royal, Charleston and Gainesville, to Troy and Montgomery, respectively, are, as follows:

From	Port Royal	Charleston	Gainesville
To			
Troy	322	322	322
Montgomery	300	300	300

The following roads constitute through routes or lines in connection with Alabama Midland to the Atlantic sea-ports, Brunswick, Savannah, Charleston, West Point and Norfolk; to wit, to Brunswick, the Savannah, Florida & Western and the Brunswick and Western railways; to Savannah, the Savannah, Florida and Western Railway; to Charleston, the Savannah, Florida & Western and the Charleston & Savannah railways; to West Point, Va., the Western Railway of Alabama, the Atlanta & West Point Railroad and the Richmond & Danville Railroad; or (another route) the Savannah, Florida & Western Railway, the Charleston & Savannah Railway, the Northeastern Railroad of South Carolina, the Wilmington, Columbia & Augusta Railroad, the Wilmington & Weldon Railroad, the Petersburg Railroad, the Richmond & Danville Railroad; to Norfolk, the Savannah, Florida & Western Railway, the Charleston & Savannah Railway, the Northeastern Railroad of South Carolina, the Wilmington & Weldon Railroad, and the Seaboard & Roanoke Railroad.

In connection with the Georgia Central the roads forming through lines from Troy and Montgomery to these seaports are, as follows: to Brunswick, the East Tennessee, Virginia & Georgia Railway; (to Savannah, the Georgia Central has a line from Troy & Montgomery to Savannah); to Charleston, the Charleston & Savannah Railroad, or (another route) the Georgia Railroad and the South Carolina Railroad; to West Point (Va.) the Richmond & Danville Railroad, or (another route) the roads composing the Atlantic Coast Line and the Richmond & Danville; to Norfolk, the roads composing the Atlantic Coast Line, or (another route) the roads composing the Seaboard Air Line.

The rates in cents per hundred pounds on cotton from Troy and Montgomery respectively, to these ports are:

To	Brunswick	Savannah	Charleston	West Point	Norfolk
From					
Troy	47	47	52		
Montgomery	45	45	45	51	51

When the complaint was filed the cotton rate from Montgomery to Brunswick, Savannah and Charleston was 40 cts. per hundred pounds. It has since, as appears above, been raised to 45 cts. and the rate from Troy to Charleston has been raised to 52 cts.

The most available routes or lines between Troy and Louisville, Cincinnati and St. Louis, respectively, appear to be: (1), from Troy to Montgomery over the Alabama Midland or Georgia Central and from Montgomery over the Louisville and Nashville to Louisville, Cincinnati and St. Louis; (2), from Troy to Montgomery over the Alabama Midland or Georgia Central, from Montgomery to Atlanta over the Western Railway of Alabama and Atlanta & West Point Railroad, from Atlanta to Chattanooga over the Western & Atlantic or East Tennessee, Virginia & Georgia Railroad, and from Chattanooga to Cincinnati over the Cincinnati, New Orleans & Texas Pacific Railway; (3), from Troy to Montgomery over the Alabama Midland or Georgia Central, from Montgomery to Selma over the Western Railway of Alabama, from Selma to Lauderdale (Miss.) over the East Tennessee, Virginia & Georgia road, and from Lauderdale to St. Louis over the Mobile & Ohio road; (4), from Troy *via* Columbus to Chattanooga over the line of the Georgia Central, and from Chattanooga to Cincinnati over the Cincinnati, New Orleans & Texas Pacific road; (5), from Troy *via* Columbus to Chattanooga over the Georgia Central, from Chattanooga to Burgin, Ky., over the Cincinnati, New Orleans & Texas Pacific road and from Burgin to Louisville over the Louisville Southern Railroad; (6), from Troy *via* Columbus to Chattanooga over the line of the Georgia Central, and thence over the Nashville, Chattanooga & St. Louis and the Missouri Pacific railways to St. Louis. The first three of these routes are *via* Montgomery and the last three *via* Columbus.

None of the traffic involved in this case is carried by the Georgia Central either through Troy to Montgomery or through Montgomery to Troy. Its Mobile & Girard line runs in a southwesterly direction from Columbus to and through Troy towards Mobile (intersecting at Troy, as before stated, the Alabama Midland) and its Montgomery & Eufaula line runs in a direction a little north of west from Eufaula to Montgomery. These two lines (the Mobile & Girard and the Montgomery & Eufaula) cross each other at Union Springs, Ala., thirty one miles from Troy and forty from Montgomery and traffic from or to Troy over the lines of the Georgia Central is carried *via* Union Springs. Traffic for Montgomery coming *via* Columbus or Eufaula over these lines does not pass through Troy, and no departure, therefore, from the "long and short haul rule" of the 4th section of the Statute, as against

Troy as the shorter distance point and in favor of Montgomery as the longer distance point, appears to be chargeable to the Georgia Central. Shipments consigned to Troy *via* Columbus or Montgomery, the latter cities being as to such shipments the shorter distance points, can raise no question of a departure from the rule as against Troy.

But as to the Alabama Midland and its connections constituting through lines, the case is different. Interstate traffic is carried over that road to Troy and through Troy on to Montgomery, and in the opposite direction, from Troy, and from Montgomery through Troy, the haul to and from Montgomery being 52 miles greater; and in respect to this traffic the proof shows departures from the rule of the Statute, (1) as to class goods shipped from New York, Baltimore and the east; (2) as to phosphate rock, shipped from Port Royal and Charlestown, South Carolina, and Gainesville and other points of origin of such shipments in Florida; and (3) as to cotton shipped from Troy and from Montgomery to the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk. As will be seen from the tables given above, the "sea and rail" rates on class goods from Baltimore to Troy range from 12 cts. per hundred pounds on *Class 6* to 23 cts. on *Class 1* higher than those on such goods shipped through Troy to Montgomery, and from New York to Troy, from 12 cts. to 22 cts., and the "all rail" rates from Baltimore and New York to Troy, from 14 cts. to 30 cts. These class rates are applied to sugar and coffee, which are the heavy goods mostly shipped to Troy from the east, and also to dry goods, notions, and many other commodities. The rate on phosphate rock from Port Royal, Charleston, and Gainesville to Troy is 22 cts. per ton higher than that on such rock shipped through Troy to Montgomery, and on cotton the rate from Troy to the seaports, Brunswick and Savannah, is 2 cts. per hundred pounds and to Charleston 7 cts. per hundred higher than that from Montgomery *via* Troy.

Where substantial dissimilarity of circumstances and conditions is set up by defendant carriers in justification of departures from the "long and short haul" rule of the statute, the burden is upon them to establish such dissimilarity. *Re Louisville & N. R. Co.* 1 Inters. Com. Rep. 278, 1 I. C. C. Rep. 31; *Spartanburg Board of Trade v. Richmond & D. R. Co.* 2 Inters. Com. Rep. 193, 2 I. C. C. Rep. 304. Water competition at Montgomery *via* the Alabama river, is adduced as a justification in the answer of the Alabama Midland and by some of the other defendants. In the case of *Re Louisville & N. R. Co.*, *supra*, it was held that "actual" water competition "of controlling force in respect to

traffic important in amount" may constitute the dissimilar circumstances and conditions authorizing a departure from the general rule of the statute. In the case of *Harwell v. Columbus & W. R. Co.*, 1 Inters. Com. Rep. 631, 1 I. C. C. Rep. 236, the complaint alleged unjust discrimination against Opelika and in favor of Montgomery and Columbus. Water competition at Montgomery *via* the Alabama river was (as in the present case) set up by way of justification. This defense was not sustained and the Commission in overruling it said, "the mere fact that a point is situated upon a navigable stream does not of itself justify the lesser charge for the longer haul to such point," and that, in order to justify such lesser charge, the water competition must "control the carriage of the traffic on which the discrimination is made." In that case it is further said, "The Commission is aware that an independent and active line of steamers connects Montgomery with the Atlantic seaboard at Mobile," but that the fact "without more," that the "railroads have water competition and are compelled to meet it," is not held to be "sufficient to justify the lesser charge for the longer distance." Conceding that there is a line of boats running between Montgomery and Mobile (of which fact, however, there is no proof, in this case) that alone would not be sufficient to justify the greater charge to Troy than to Montgomery. At the conclusion of the taking of the testimony, it was agreed between counsel, that "each side should, within two weeks from the date of the taking of the testimony, file an affidavit with the Commission setting forth the volume of business of Troy and Montgomery, respectively, and also the number of inhabitants of each." In the affidavit filed by counsel for the defendants is a statement that "the business on the Alabama river, according to the report of the United States Engineer, for the year, 1891, was 52,349 bales of cotton carried by boat and 44,500 tons of other freight." This statement is outside the agreement, but aside from that fact, it purports to give the entire cotton and other business on the river for the year named without stating the point or points at which it originated, or the direction in which it was moved. How much of it went from Montgomery or points above or below Montgomery down the river towards Mobile, or from Mobile and points above that city up the river to Montgomery does not appear. As showing water competition of controlling force at Montgomery on traffic to that city from New York, Baltimore and other northeastern cities, or from the South Carolina and Florida phosphate beds, or from Montgomery to the Atlantic sea-ports, Brunswick, Charleston and Savannah, the statement is valueless. (This is true, also, as to the traffic from St. Louis and

from Louisville, Cincinnati and other Ohio river points, hereinafter to be considered.) There are regular lines of ocean steamers from those ports to New York, Baltimore and other cities on the northeast coast, but there does not appear to be such line from Mobile, either to those cities or to any foreign port. The only witness questioned by counsel for the defendants as to the effect of water competition at Montgomery on shipments of cotton to the Atlantic ports testified that "the river competition plays no great part." An attempt was made to show that some shipments of phosphate rock had been made from the Florida points, Ocala and Tampa (the latter on the Gulf coast) *via* Mobile and the Alabama river to Montgomery, but the witness testified that he had never known such shipments to be made, that he himself had "tried to get a rate by that line to Montgomery and had been unable to get it," and that he thought it impracticable as "the goods would have to be transferred at Mobile to get to Montgomery and then would have to be hauled to the works." No attempt is made to establish substantial dissimilarity of circumstances and conditions at Montgomery on the ground of rail competition further than by proof of the fact that there are a number of railway lines running to and through that city connecting with different parts of the country. This alone, it is scarcely necessary to say, is not sufficient. *Re Louisville & N. R. Co.* 1 Inters. Com. Rep. 278, 1 I. C. C. Rep. 31.

Our conclusion is that no justification has been shown for the departures, complained of and established by the proof, from the general rule of the 4th section of the Act to Regulate Commerce.

The evidence also sustains the allegation of the complaint, that on shipments for export to the Atlantic ports, Brunswick, Savannah, West Point and Norfolk, from Montgomery and other localities within what is termed in the complaint "the jurisdiction" of the Southern Railway & Steamship Association, Montgomery and such other points are allowed, under the rules of that Association, to ship through to Liverpool *via* any one of those ports at the lowest through rate *via* any of them at the date of shipment—in other words, at the lowest combination of inland and ocean rates from the interior point to the foreign market. This may result in a less through rate than the sum of the regular published tariff rail rate to the port of transshipment and the ocean rate thence. For example, if at the date of shipment the regular rail rate to Savannah be 40 cts. and the ocean rate from that port to Liverpool 58 cts., making a through rate of 98 cts., and the rail rate to Norfolk be 45 cts., and the ocean rate from that port to Liverpool 85 cts., making a through rate of 80

cts., Montgomery is allowed on a shipment *via* Savannah the latter rate of 80 cts., or 18 cents less than the sum of the regular inland rate to that port and the ocean rate on. This 18 cts. is taken from the published inland rail rate to Savannah and not from the ocean rate. This privilege is denied to Troy, and the result is that on two shipments to Savannah for export made the same day, the one from Montgomery (the longer distance point both over the Alabama Midland and the Georgia Central) and the other from Troy, the rate charged the Troy shipper is 45 cts. and that charged the Montgomery shipper is only 82 cts. This discrimination would also exist between a shipment from any interior point consigned to the domestic port and one for export consigned to a foreign market.

The question, whether the making of export rates through the port of New York of which the inland proportion accepted by the carriers was less (often 10 cts. or more per hundred pounds) than the published tariff rates charged on like traffic at the same time from interior points to the same port as its final destination, was unlawful as being an unjust discrimination against the latter, was presented to the Commission in the case of *New York Produce Exch. v. New York Cent. & H. R. R. Co.*, 2 Inters. Com. Rep. 553, 1 I. C. C. Rep. 188. The Commission decided that the difference made by the carriers between the proportion of the through rate from interior points to New York on export traffic consigned to foreign countries and the rate charged contemporaneously on the like kind of traffic from the same interior points consigned to New York, "was not shown to be justified by any circumstances tending to show that it was just and proper, and that it must therefore be deemed an unjust and unlawful discrimination as against the transportation terminating at that port." It was further held that under the amendment of March 2, 1889, to the Act to Regulate Commerce, requiring ten days' previous notice of advances and three days' previous notice of reduction in rates, they cannot be varied from day to day, or oftener, to meet fluctuations in ocean rates and that the only practicable mode yet devised for making through export rates, is to add to the established inland rates from the interior to the seaboard the current ocean rates. On the 28d of March, 1889, the Commission issued a general order in reference to publication under the amendment of March 2, 1889, of advances and reductions in joint rates and fares, in which, among other things, it was stated, that tariffs, whether joint or individual, for merchandise billed or intended for export by sea were subject to the requirement of notice of any change therein, the same as in the case of other tariffs. After the pub-

lication of this order, a hearing was had before the Commission at the request of a large number of interstate carriers south of the Potomac and Ohio rivers, as to the application of this order to export traffic through our Atlantic and Gulf ports from the Chesapeake Bay to those in Texas. At this hearing it was insisted, in substance, that, the vessel service at the Trunk Line ports being ample, no material difficulty was found in the transportation of exports to them at established tariff rates, but that, on account of the scarcity of sea-going vessels at these southern ports and the consequent absence of competition, vessels at the latter were able to a larger extent to exact terms to suit themselves and this resulted in great fluctuations in ocean rates affecting the stability of the inland proportions of the through rates. These and other matters were presented as justifying the exemption in respect to export rates of these carriers from the order as to publication of notice of advances and reductions and from the general rule requiring the inland proportion of a through export rate to be not less than the rate on domestic traffic to the same point. It is said in our Third Annual Report, that "in consequence of these conditions, a method came into use, and has since prevailed over a large number of the southern states, of an export rate made every day to be in force as to the export rates for the succeeding twenty-four hours, based on the vessel facilities in the southern ports and their ocean rates, and on the lowest combination of the inland and ocean rates from the interior point of shipment to the foreign market, the through rate thus made having no reference to the established inland rate for consignment at the seaboard." In view of the matters set forth and proven by the southern carriers and of the fact that the Commission had intimated in reference to the export rate *via* the port of Boston (*Re Export Trade of Boston*, 1 Inters. Com. Rep. 25, 1 I. C. C. Rep. 24) that there might be substantially different circumstances and conditions affecting export traffic in different parts of the country, the Commission, while not expressly sanctioning this method of making export rates through the southern ports, forbore to condemn it, and held the question presented for further investigation and consideration. In the same report the Commission also stated that it expressed no opinion on the subject, but deemed it proper to lay before Congress the substance of the evidence taken at the hearing granted the southern carriers. Third Annual Rep. pp. 64-69.

The main cause of complaint on the part of Troy, however, in connection with this system of making export rates, as disclosed by the evidence, is, that while its benefits are given by the roads composing the Southern

Railway & Steamship Association to Montgomery and other favored localities on their lines, they are denied to Troy, and it is contended that this is an unjust discrimination against Troy. This contention is apart from and independent of the question, whether the system is itself lawful and justified as applied to Montgomery and other points. If it be lawful in itself, it cannot lawfully be so applied as to unduly favor one locality, to the prejudice of another. Both the Alabama Midland and the Georgia Central are members of the Southern Railway & Steamship Association, and Troy as well as Montgomery is located on those roads. The haul from Montgomery over the Georgia Central to the Atlantic ports named is about ten miles longer than from Troy over that road, and the haul from Montgomery to those ports over the Alabama Midland is fifty-two miles longer than from Troy, and is also through Troy. The charge of the lesser rate from Montgomery than from Troy over the Georgia Central would seem to be a discrimination against Troy and over the Alabama Midland, also, a departure from the "long and short haul rule" of the statute. The principal article of export shipped from Troy and Montgomery over these roads to the Atlantic is cotton. The cotton business of Troy is large, amounting in 1892 to 38,500 bales, aggregating in value \$1,500,000, nearly a third of its total business of all kinds. No excuse is offered, and we are unable to conjecture any valid reason, why Troy is excluded from the benefit of the export system of rate making applied to Montgomery. The fluctuations in ocean rates at the southern ports and other matters set up by the southern carriers as rendering necessary or justifying this system, would seem to apply to shipments from Troy as well as from Montgomery.

It appears, as alleged in the complaint, that on shipments of cotton from Troy *via* Montgomery to New Orleans, the shipper is charged the full local rate to Montgomery both by the Alabama Midland and the Georgia Central. The local from Troy to Montgomery is 23 cts. per hundred pounds and the rate from Montgomery on is 45 cts., making a total through rate from Troy to New Orleans of 68 cts. The testimony is that under this rate Troy is debarred from shipping cotton *via* New Orleans for Europe and is left only the outlet *via* Savannah and other Atlantic ports, and that this is a disadvantage to Troy inasmuch as cotton shipped *via* New Orleans is classed "New Orleans cotton," which is valued at from $\frac{1}{8}$ to $\frac{1}{4}$ of a cent per pound higher than other cotton.

The haul from Troy to Montgomery may be made either over the Alabama Midland or *via* Union Springs over the lines of the Georgia Central and from Montgomery to New Or-

leans it is made over the Louisville & Nashville road.

In the case of *Harwell v. Columbus & W. R. Co.*, 1 Inters. Com. Rep. 631, 1 I. C. C. Rep. 236, cited in his brief by counsel for complainant, it was charged that through rates and through bills of lading were unjustly denied to Opelika on shipments of cotton *via* Montgomery to New Orleans, and the Commission held that such through rates and bills, being important facilities in the transportation of cotton and being given on other commodities and to other points similarly situated, should be given Opelika and that the refusal of the same in the absence of a valid excuse for such refusal was an unjust discrimination against Opelika. In the present case, however, it is neither alleged nor proven that through rates and billing are denied Troy on shipments of cotton *via* Montgomery to New Orleans, but that on the haul from Troy to Montgomery over either the Alabama Midland or the Georgia Central, the local rate between those points is charged and collected as a part of the through rate to New Orleans. The charge is in legal effect that the aggregate through rate thus arrived at is unjustly discriminatory against Troy. "While," as was said in the case of the *Railroad Com. of Florida v. Savannah, F. & W. R. Co.*, 8 Inters. Com. Rep. 638, 5 I. C. C. Rep. 13, "the complainant has no interest in the division the defendants may make between themselves of a through rate and that division does not determine what the charge to the public should be, yet 'it is not without significance in determining what are reasonable rates for the whole distance on the lines in question.'" See *Brady v. Pennsylvania R. Co.*, 2 Inters. Com. Rep. 78, 2 I. C. C. Rep. 181. The distance from Troy to Montgomery over the Alabama Midland (the short line) is 52 miles and from Montgomery to New Orleans over the Louisville & Nashville road, 320 miles. The rate of 23 cts. per hundred pounds from Troy to Montgomery is 4.42 mills per mile; the rate of 45 cts. from Montgomery to New Orleans is 1.40 mills per mile; the rate of 47 cts. from Troy to Savannah (359 miles) is 1.30 mills per mile; and the rate of 45 cts. from Montgomery to Savannah (411 miles) is 1.09 mills per mile. There is, also, a through rate on cotton from Columbus, Ga., to New Orleans of 50 cts. per hundred pounds. The distance from Columbus to New Orleans over the Georgia Central *via* Union Springs to Montgomery and thence over the Louisville & Nashville road is 414 miles, and this rate of 50 cts is 1.20 mills per mile. It thus appears that the rate of 23 cts. from Troy to Montgomery is, on a mileage basis, four times as large as that from Montgomery to Savannah and more than three times

as large as the rates from Montgomery and from Columbus to New Orleans, and from Troy to Savannah. The aggregate through rate from Troy to New Orleans of 68 cts. yields 1.80 mills per mile.

Through rates, it is true, are not required to be made on a strictly mileage basis, but mileage is as a general rule an element of importance and "due regard to distance proportions should be observed in connection with the other considerations that are material in fixing transportation charges." *McMorran v. Grand Trunk R. Co. of Canada*, 2 Inters. Com. Rep. 604, 3 I. C. C. Rep. 252. The cost of the services in railway transportation is the expense of the two terminals and the intermediate haul. The terminal expenses remain the same without reference to the length of the haul. A local rate covers the expenses of both terminals, but a division of a through rate allotted to either of the terminal carriers of the through line can only embrace the expense of one terminal, and because of this difference in expense among other reasons, local rates are made as a general rule much higher in proportion to the length of haul than through rates or any division thereof. A local rate, which presumably is adopted as covering both the initial and final expenses of the haul, is *prima facie* excessive as part of a through rate over a through line composed of two or more carriers. The rate of 23 cts. from Troy to Montgomery is admitted to be the local between those points, which is charged on a haul originating at the former and ending at the latter and hence covers the expense to the carrier (either the Alabama Midland or the Georgia Central) at both terminals.

The evidence does not show what the expense at Troy is, but the relatively disproportionate charge for the haul and expense from Troy to Montgomery as shown above cast the burden on the carrier of justifying it, and hence of showing what the expense is. It is a matter lying peculiarly within the knowledge of the carrier. In the case of *McMorran v. Grand Trunk R. Co. of Canada*, *supra*, it is said: "The evidence does not show with any precision what these several expenses [terminal among others] are. . . . The defendants assume in their brief that the burden of showing these expenses was upon the petitioner; but this assumption is altogether erroneous. It would impose on persons conceiving themselves aggrieved by carriers a difficult and onerous rule of evidence. It would be impossible for the petitioners to show such facts otherwise than by the defendants' agents, and it was clearly the province of the defendants to make them appear. No presumption arises that a rate is reasonable from the mere

fact that it has been put in effect; and when it is *prima facie* disproportionate or relatively unequal, the *onus* is on the carrier to justify its charges when challenged on these grounds. The knowledge of the justifying circumstances and conditions relied on is peculiarly in possession of the carrier."

On the hauls from Montgomery to New Orleans, from Montgomery to Savannah, from Troy to Savannah and from Columbus to New Orleans, there are the expenses of both terminals as well as the haul from Troy to New Orleans. It cannot be assumed that on a haul from Troy to New Orleans the initial expenses at Troy are greater than at Montgomery on haul from that point to New Orleans or to Savannah, or at Columbus on haul from that point to New Orleans, or at Troy itself on a haul in the opposite direction to Savannah. No reason has been shown, and we can conceive of none, why a higher proportionate rate should be charged on cotton from Troy to New Orleans than from Montgomery, or from these other points on the several hauls mentioned. The disproportion, as we have seen, is attributable to the charge, as a part of the through rate to New Orleans, of the local from Troy to Montgomery, and the truth appears to be that this exaction of the local rate is an incident and in pursuance of what is termed the "trade center," or "basing," or "distributing point" system, which the Commission has more than once condemned as unjust discrimination and in violation of law, and which we will be called on to refer to more at length in connection with the class rates from Louisville, Cincinnati and St. Louis to Montgomery, Columbus and Troy, hereafter to be considered.

A rate from Troy to New Orleans based on the present mileage rate from Montgomery to that city would amount to 52.21 cts. As a general rule, however, while the aggregate through rate steadily increases as the distance increases, the rate per ton or hundred weight per mile decreases. Under this rule, the distance from Troy being 52 miles greater than from Montgomery, the rate per hundred pounds per mile from Troy, in the absence of exceptional conditions, should be slightly less than that from Montgomery. In view of this rule, and of the rate of 50 cts. from Columbus, a longer distance point by 42 miles than Troy, our conclusion is that the through rate on cotton from Troy *via* Montgomery to New Orleans should not exceed 50 cts. per hundred pounds.

The class rates in cents per hundred pounds (except Class F, which is per bbl.) to Troy, Montgomery and Columbus from Louisville, Cincinnati and St. Louis, are given in the following table:

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Classes.	1	2	3	4	5	6	A	B	C	D	E	H	F
From Louisville, Ky.													(per bbl.)
To Troy, Ala.	140	130	113	95	75	62	45	50	37	32	69	59	66
Montgomery, Ala.	98	92	78	63	52	41	28	31	24	20	48	33	40
Columbus, Ga.	107	92	81	68	56	46	28	36	29	25	50	55	50
From Cincinnati, O.													
To Troy, Ala.	150	140	123	103	82	68	49	52	39	34	73	63	70
Montgomery, Ala.	108	102	88	71	59	47	32	33	26	22	52	37	44
Columbus, Ga.	117	102	91	76	63	52	32	38	31	27	54	59	54
From St. Louis, Mo.													
To Troy, Ala.	168	153	133	109	87	72	52	58	44	37	77	69	80
Montgomery, Ala.	126	115	98	77	64	51	35	39	31	25	56	43	54
Columbus, Ga.	135	115	101	82	68	56	35	44	36	30	58	65	64

The local class rates in cents per hundred pounds (except Class F, which is per bbl.) from Montgomery and Columbus, respectively, to Troy, are as follows:

Classes.	1	2	3	4	5	6	A	B	C	D	E	H	F	per bbl.
From Montgomery to Troy.	49	46	40	33	27	21	19	21	16	15	27	33	32	
From Columbus to Troy.	58	55	48	39	31	24	22	24	19	17	31	39	38	

It was testified at the hearing by Mr. Bashinsky, a witness for the complainant, that on goods shipped on through bills of lading from Louisville and the west to Troy, the Troy merchant is charged the full local rate from Montgomery to Troy, and the counsel for the Alabama Midland states in his brief, that "the through rate from Troy to any western market is made up by adding the local rate from Troy to Montgomery to the through rate from Montgomery to the west." From a comparison of the above local rates with the difference between the rates from Louisville and the other cities named to Montgomery and Troy, respectively, it will be found that this is true only as to rates on goods of Class 6. The difference between the Class 6 rate to Montgomery and that to Troy from all these points is 21 cts., which is the local rate on that class from Montgomery to Troy. On the other classes the local rate from Montgomery to Troy exceeds the proportion of the through rate between those points as follows:

Classes.	1	2	3	4	5	6	A	B	C	D	E	H	F
Excess of local rate over through.	7	8	5	13	1	—	2	2	3	3	6	7	6

The distance from Louisville to Montgomery over the Louisville & Nashville road is 490 miles and from Montgomery to Troy over the Alabama Midland, 52 miles. The following table shows the mileage rate on the different classes in mills per hundred pounds yielded by the through rate from Louisville to Montgomery and by the additional charge on through shipments from Louisville to Troy for the haul from Montgomery to Troy:

Classes.	1	2	3	4	5	6	A	B	C	D	E	H	F
Louisville to Montgomery.	2	1.8	1.6	1.3	1.06	.88	.57	.83	.49	.40	.98	.07	.40
Montgomery to Troy.	8	7.1	6.7	5.9	3.8	4	2.6	3.6	2.5	2.3	4	5	2.5

The testimony is that the Troy merchant gets the most of his heavy goods from the west. The class 6 (on which the through rate from Louisville, St. Louis & Cincinnati to Troy is made by the addition of the local from Montgomery to Troy) embraces sugar, coffee, flour, buckwheat, animal food, cement, axle and car grease, green hides, iron architecture, agricultural implements, nails, spikes, and many other heavy as well as light articles in constant demand, too numerous to be set forth here. Classes 4 and B on which the difference between the local rate and proportion of through rate from Montgomery to Troy as shown above is only 1 and 2 cents, are applied, the former, among numerous other articles, to machinery of all kinds, agricultural implements, earthenware, mouldings, engines, castings, axes, cotton seed oil mills, dry hides, window glass, ale, beer, porter, canned beef and pork, canned fruit and potatoes; and the latter, among many other articles, to salted beef, pork and bacon. It seems probable, that the statement above referred to, made by the witness and counsel, that the through rate from Louisville and the west via Montgomery to Troy is made up of the rate to Montgomery plus the local on to Troy, is substantially true as to the goods constituting the bulk of the traffic from those points to Troy. When the mileage rate from Louisville (which point is taken as an illustration) to Montgomery, is compared with that from Montgomery on to Troy, it seems clear that the rate to Troy on all the classes is made from Montgomery as a "basing point." This comparison, it will appear from the table given above, shows that the proportion of the rate from Montgomery to Troy is from four to seven times as large per mile as that from Louisville to Montgomery.

The following table shows the sum of the rates on class goods from Louisville to Mont-

gomery and Troy, respectively, plus the rates from those points on re-shipment to Brundidge, Ozark, and Dothan:

FROM LOUISVILLE, KY.
(In cents per 100 lbs. except Class F, which is per bbl.)

Classes.	1	2	3	4	5	6	A	B	C	D	E	H	F
To Brundidge, Ala. Re-shipped from Montgomery, Ala.	146	136	117	98	81	65	52	52	38	38	72	68	(per bbl.)
To Brundidge, Ala. Re-shipped from Troy, Ala.	168	154	136	115	98	76	59	62	46	40	83	84	
To Ozark, Ala. Re-shipped from Montgomery.	156	144	122	108	84	67	54	54	40	35	74	72	
To Ozark, Ala. Re-shipped from Troy, Ala.	176	161	143	122	95	80	59	66	49	43	87	90	
To Dothan, Ala. Re-shipped from Montgomery.	162	147	126	106	88	71	57	57	40	35	78	72	
To Dothan, Ala. Re-shipped from Troy, Ala.	188	174	152	130	104	86	69	71	51	45	93	94	

Brundidge, Ozark and Dothan are towns and stations on the Alabama Midland Railway, all east of Troy and shipments to them over that road from Montgomery pass through Troy. Brundidge is 17 miles from Troy and 69 from Montgomery; Ozark, 40 miles from Troy and 92 from Montgomery; and Dothan, 68 miles from Troy and 120 from Montgomery.

The sum of the rates from Louisville to Columbus and Troy, respectively, plus the rates on re-shipments from those cities to Brantley, in cents per 100 lbs., except Class F, which is per bbl., are as follows:

FROM LOUISVILLE.			
Classes.	To Brantley, Ala. re-shipped from Columbus.	Ala. re-shipped from	To Brantley, Ala. re-shipped from Troy.
1			1.76
2	1.73		1.64
3	1.58		1.43
4	1.32		1.19
5	1.10		95
6	90		78
A	78		60
B	52		66
C	65		50
D	50		44
E	84		80
F (per bbl.)	92		92

Brantley is on the Georgia Central road 26 miles south of Troy and 111 miles from Columbus, and goods shipped from Columbus to Brantley over that road pass through Troy. A like disparity in rates on re-shipments prevails

as to points west of Troy on the Alabama Midland and north of Troy on the Georgia Central, the distances of which from Troy are much less than from either Montgomery or Columbus; and the situation in this respect is the same, when the shipments originate at Cincinnati, and other Ohio river points, and at St. Louis, as when they come from Louisville.

The fact that the sum of the rates from points of origin to points of destination, as shown in the above tables, on re-shipments from Montgomery, Columbus and Troy, are greater in cases of such re-shipments from Troy than from Montgomery and Columbus, is attributed by the complainant to alleged relatively unjust through rates to Troy as compared with those to Montgomery and Columbus. There is no allegation and no proof that the rates to Montgomery and Columbus are unreasonable in themselves. The through rate to Troy is, therefore, the object of attack.

The differences in rates as against Troy, it will be noted, are much smaller on re-shipments from Columbus than on re-shipments from Montgomery, and the local rates from Columbus to Troy are much greater than the difference between the through rates to Columbus and those to Troy. It is not shown that there are through rates from Louisville, St. Louis and Ohio river points *via* Columbus to Troy based on the Columbus rate, and the natural course of the traffic from those points to Troy appears to be *via* Montgomery. As before stated, the through rates to Troy are based on the Montgomery rates and in making them Montgomery is treated as a "trade center" or "basing" point and Troy as a local. This is conceded on the part of the defendants. The vice in the through rate to Troy, if any, arises from this fact and from the consequently greatly disproportionate charge for the haul from Montgomery to Troy, when compared with that from Louisville and the west to Montgomery.

The "trade center" or "basing point" system has been in many cases pronounced unlawful by this Commission. *Re Louisville & N. R. Co.* 1 Inters. Com. Rep. 289, 290, 1 I. C. C. Rep. 84, 85; *Martin v. Chicago, B. & Q. R. Co.* 2 Inters. Com. Rep. 38-40, 2 I. C. C. Rep. 44-47; *Harwell v. Columbus & W. R. Co.* 1 Inters. Com. Rep. 631, 1 I. C. C. Rep. 286. In the Louisville & Nashville case, it is said in this connection, that the Act to Regulate Commerce "aims at equality of right and privilege, not less between towns than between individuals, and will no more sanction preferential rates for the purpose of perpetuating distinctions than of creating them;" and in the Martin case, the statute is declared to be one "enacted in the interest of equality as between large and small interests," under which "there can be no unjust discrimination in giving to

large and small towns relatively equal rates." It is further said in the latter case, that "a fatal difficulty with the theory that a trade center as such is entitled to specially favorable rates is found in the fact, that it is in conflict with the spirit and purpose of the Act to Regulate Commerce—one of the reasons for the passage of which was, that by means of rebates and other contrivances, large towns and heavy dealers secured advantages which gave them a practical monopoly of markets and shut out the small towns and small dealers." In a recent decision by the Supreme Court of the United States in a case brought up from the U. S. Circuit Court, for the District of Colorado (*Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 896) Mr. Justice Brown, in speaking of the purpose of the Colorado act under consideration as being the same as to intrastate commerce as that of the Act to Regulate Commerce as to interstate commerce, says very forcibly, that it was designed "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations," and pertinently refers to the fact, that carriers being dependent upon the will of the people for their corporate existence, are "bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all their patrons upon an absolute equality." Citing *Seofield v. Lake Shore & M. S. R. Co.* 48 Ohio St. 571; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 878; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407; *McDuffee v. Portland & R. R. Co.* 52 N. H. 480. The fact, therefore, insisted upon by counsel for the roads as a matter of defense, that Montgomery is a much larger city with more extensive business interests than Troy, and is and has been treated by the roads in making rates to Troy and other surrounding towns as a "trade center" or "basing point," is no justification for discriminations in those rates in favor of Montgomery.

Water and rail competition at Montgomery are also set up as justifying the disproportion in the rates in question as between Troy and Montgomery. Here, as we have shown in connection with the violations of the long and short haul rule of the statute, these defenses are not sustained by the proof. Water competition *via* the Alabama river, in order to control rates from St. Louis and Louisville, Cincinnati and other Ohio river points, on traffic from those cities stopping at Montgomery, must, it is obvious, grow out of transportation of such traffic *via* Mobile up the river to Montgomery. The carriage of goods by river from or *via* Montgomery to Mobile would be limited in its effect to rates to the latter city. Water transportation may be possible from localities on the Ohio and Mississippi rivers *via* those

rivers to the Gulf at New Orleans, on the Gulf to the Alabama river at Mobile and up that river to Montgomery, and the Mobile & Ohio Railroad carries freight from St. Louis to Mobile, which might be transported thence up the Alabama river to Montgomery. No competition by either of these routes is shown in this case on traffic from St. Louis or Ohio river points to Montgomery, and it does not seem probable that such competition of controlling force is likely to arise. That it does not now exist would appear to be indicated by the lower rates from St. Louis, Cincinnati and Louisville to Mobile than to Montgomery at present prevailing as shown in the following table:

furnished by proof of cost of service or other matters proper to be considered in determining what rates are just and reasonable from the standpoint both of the carrier and shipper. If there is an expense incident to the continuation of the through haul to Troy, which calls for and justifies exceptional rates, the burden, as we have seen, is upon the carrier to show it. The roads, however, do not claim that there is anything in the nature of the service of transportation to Troy which justifies the disproportionate rates charged to that city, but base their defense of those rates on another and distinct ground (which we hold not to be established) namely, dissimilarity of circumstances

Distances.	Classes.	1	2	3	4	5	6	A	B	C	D	E	H	F
644 miles <i>via</i> M. & O.....	From St. Louis to Mobile	90	75	65	50	40	35	25	25	25	20	28	25	45
805 miles <i>via</i> L. & N.....														
625 miles <i>via</i> L. & N.....	From St. Louis to Montgomery.....	126	115	98	77	64	51	35	39	31	25	56	43	54
669 miles <i>via</i> L. & N.....	From Louisville to Mobile	90	75	65	50	40	35	25	25	25	20	28	25	45
490 miles <i>via</i> L. & N.....														
	From Louisville to Montgomery.....	98	92	78	63	52	41	28	31	24	20	48	33	40
779 miles <i>via</i> L. & N.....	From Cincinnati to Mobile	98	88	78	64	44	39	28	27	27	22	31	28	49
600 miles <i>via</i> L. & N.....														
	From Cincinnati to Montgomery.....	108	102	88	71	59	47	32	38	28	22	52	37	44

Note.—The above rates are in cents per 100 lbs., except Class F, which is per bbl.

Although over the lines of the Louisville & Nashville Company the distances from all three of the above cities to Mobile is 180 miles greater than to Montgomery, and the haul to Mobile is through Montgomery, the rates to the latter are materially higher than to the former. The higher rates to Montgomery than to Mobile shown in the above table seem inconsistent with the claim that the rates to Montgomery are controlled by water competition *via* Mobile up the Alabama river to Montgomery.

What we have said in reference to the through rate on shipments of cotton from Troy to New Orleans, as to the charge of a local as part of a through rate and as to the burden of proof where rates are shown to be disproportionate and preferential, is applicable in connection with the rates now under investigation.

Our conclusion on this branch of the case, is, that the through class rates from Louisville, St. Louis, Cincinnati and the west to Troy are relatively unjust to that city, when compared with those to Montgomery, and that this injustice arises from the practice of basing the Troy rates on the rates to Montgomery as a "trade center."

The question remains to be determined, what the rates to Troy shall be. In arriving at a conclusion on this point, no light is

and conditions resulting from water and rail competition at Montgomery. In the absence of proof of exceptional conditions, the transportation from Montgomery to Troy, including terminal expenses, will be presumed to be not more costly to the carrier than for like distances in the same or like territory. On examination we find, that the class rates from Louisville, Cincinnati and St. Louis and Ohio river points generally, are the same to Columbus, Eufaula and Opelika. The distances from Louisville and St. Louis to Columbus by the shortest available route (that *via* Birmingham and Opelika over the Columbus & Western road) are nine miles greater and by the routes *via* Montgomery are about 42 miles greater than to Troy. The distance from Cincinnati to Columbus by the shortest route appears to be about 14 miles less than to Troy. The distances to Eufaula are greater than to Troy, and to Opelika, they are somewhat less. The distances from the cities named to Columbus and Eufaula being on the average greater than to Troy and other things being equal, the rate to Troy should, if anything, be slightly less than to those cities. No substantial dissimilarity of circumstances and conditions justifying a higher rate to Troy, has been attempted to be shown. The class rates in cents per hundred pounds (except Class F,

which is per bbl.) to Columbus, Eufaula and Opelika, and to Troy, from Louisville, and the excess of the Troy rates over those to Columbus, Eufaula and Opelika are given in the following table:

Classes.	1	2	3	4	5	6	A	B	C	D	E	H	F
From Louisville to Columbus, Eufaula & Opelika.	107	92	81	68	56	46	28	36	20	25	50	55	50
From Louisville to Troy	140	130	113	95	75½	62	45	50	37	32	69	59	66
Excess of Troy rates	33	38	32	27	19½	16	17	14	8	7	19	4	16

The excess of the Troy rate is the same under the rates from Cincinnati and St. Louis.

The above rates to Columbus, Eufaula and Opelika, if applied to Troy, yield the following rates in cents per ton per mile on the different clauses:

Classes.	1	2	3	4	5	6	A	B	C	D	E	H	F
Rate per ton per mile.....	3.94	3.39	2.99	2.50	2.06	1.69	1.06	1.32	1.07	.92	1.84	2.06	.92

These mileage rates average on all the classes 1.97 cents, and are somewhat greater than are realized on the application of the same through rates to the hauls to Columbus and Eufaula. The above average of 1.97 cents and the above mileage rates on 8 out of the 13 classes are greater than the average receipts per ton per mile and estimated cost of carrying a ton a mile for the years ending June 30, 1891 and 1892, as reported by the Louisville & Nashville R. Co., the Alabama Midland and Georgia Central, and which are given in the following table:

Name of Road.	1891.		1892.	
	Average receipts.	Estimated cost.	Average receipts.	Estimated cost.
Louisville & Nashville R. Co.	cts. .968	cts. .614	cts. .948	cts. .621
Alabama Midland Ry.	1.745	.990	1.356	1.400
Central R.R. of Georgia.	1.529	1.012	*	*

*Report for four months by the receiver of the Richmond & Danville Railroad does not give these items.

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Columbus and Eufaula are located in or are contiguous to the territory in which Troy is situated, and the former, at least, is in active competition with Troy for business in the country immediately around Troy. We are of the opinion that the class rates to Troy from Louisville, Cincinnati and St. Louis should be as least as low as those above given to Columbus and Eufaula.

It is claimed on the part of the roads, that the establishment of lower rates to Troy will disarrange and call for a re-adjustment of the rates to the localities around Troy in order to prevent unjust discrimination in favor of Troy and against such localities. It appears from the tariffs on file with the Commission, that the through rates to these points around Troy are made on the basis of the rates to Montgomery plus the local rates from Montgomery on—in other words, that Montgomery is given the undue advantage of a "trade center" as against these points. This being the case, these rates now call for re-adjustment with a view of remedying the unjust discrimination thus appearing. The adjustment of the rates to these points so as to make them conform to the reduced rates which we have ordered for Troy,

will tend to bring them in line with the law and do away with the unjust discrimination in favor of Montgomery already existing under them. It certainly cannot be held to be a valid objection to the correction of unlawful rates to one locality, that it involves a like correction as to other localities. Unjust discrimination as between localities or individuals cannot be essential to the business prosperity of the roads; on the contrary, we believe that in the end, if not immediately, their financial welfare would be promoted by the application in the matter of rate making of the principle of absolute fairness as between all interests, large and small, enjoined by the statute. Rates should in the first instance be fixed upon a fairly remunerative basis and then so applied as to result in no undue advantage or disadvantage to any interest. It will devolve upon the roads to make whatever changes in rates to surrounding towns may be incidental to, and a necessary consequence of, compliance in good faith with our order in reference to the rates to Troy.

In pursuance of the conclusions arrived at in this case, it is ordered, that the roads participating in the traffic involved cease and desist, (1), from charging and collecting on class goods shipped from Louisville, St. Louis and Cincinnati to Troy a higher rate than is now charged and collected on such shipments to Columbus and Eufaula; (2), from charging and collecting

on cotton shipped from Troy *via* Montgomery to New Orleans a higher through rate than 50 cts. per hundred pounds; (8), from charging and collecting on shipments of cotton from Troy for export *via* the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk, a higher rate to those ports than is charged and collected on such shipments from Montgomery; (4), from charging and collecting on cotton shipped from Troy to Brunswick, Savannah and Charleston, a higher rate than

is charged and collected on such shipments from Montgomery through Troy to those ports; (5), from charging and collecting on class goods, shipped from New York, Baltimore and the northeast, to Troy, a higher rate than is charged and collected on such shipments to Montgomery; and (6), from charging and collecting on phosphate rock shipped from the South Carolina and Florida fields to Troy a higher rate than is charged and collected on such shipments through Troy to Montgomery.

PHELPS & COMPANY

v.

THE TEXAS & PACIFIC RAILWAY COMPANY.

1. The rates which carriers are required by the sixth section of the statute to publish, file, and adhere to without deviation cover not merely the carriage, but services rendered in receiving and delivering property as well.
2. The lien of carriers upon freight for charges earned is satisfied by the payment of rates for their services which they are lawfully entitled to demand, and a guaranty executed to a carrier by consignees or third parties, which might be construed to enable the carrier, in consideration of freight delivery before settlement of transportation charges, to exact for services rendered in moving and delivering the freight whatever it chooses to demand, cannot be used by the carrier to force payment of charges in excess of those it would be entitled to collect or receive if previous freight delivery had not been made.
3. The Interstate Commerce Act does not recognize indefinite or uncertain transportation charges, the idea of unequal compensation for like service, or discrimination in the treatment of persons similarly situated, is repugnant to every requirement of that law, and a party to an interstate shipment cannot be excluded by the carrier from privileges afforded to other patrons in the same locality because of his refusal to pay excessive freight charges, even though an agreement to subsequently refund the excess should accompany the demand.
4. When actual weights of cotton shipments cannot be ascertained without great inconvenience to the shipper or carrier, and when transportation charges are promptly adjusted by the carrier upon the basis of actual weights furnished by the consignee, a practice of billing the cotton at a proper estimated weight per bale should not be deemed unlawful.
5. The retention of an overcharge has all the effect of extortion and unjust discrimination against the person from whom its payment has been required, and when the refund of an excessive charge has been unnecessarily delayed for a considerable period the officials responsible therefor become fairly chargeable with willful intention to violate the law.

Complaint filed March 2, 1892.—Answer filed April 13, 1892.—Amendment to complaint filed April 22, 1892.—Amended answer filed June 4, 1892.—Hearl at New Orleans, La., March 13, 1893.—Brief for Defendant filed August 18, 1893.—Decided October 16, 1893.

UNJUST discrimination in delivery of cotton. Tariff rates. Carrier's lien. Overcharges. See complaint, *ante*, 44; answer, *ante*, 104.

Mr. Ashton Phelps, for complainants.

Messrs. John S. Blair, T. J. Freeman and Howe & Prentiss, for defendant.

REPORT AND OPINION OF THE COMMISSION.

Knapp, Commissioner:

The principal grievance alleged in the complaint is that unjust discrimination arises from the refusal of defendant to deliver uncompressed cotton consigned to complainants at New Orleans upon the same terms as it delivers such cotton for other consignees in that

city; in other words, that the defendant delivers uncompressed cotton to compress companies, except the Alabama & Factors' Press Company, without requiring the payment of freight charges before delivery, such compress companies having previously, by a guaranty in writing, made themselves responsible for

freight charges in case payment thereof should be refused by the consignees, while the defendant refuses to deliver complainants' cotton to the Alabama & Factors' Press Co., or the cotton of other consignees dealing with that company, except upon the payment of transportation charges before delivery, and also declines to accept or recognize a similar guaranty of freight charges from said Alabama & Factors' Press Co.

The defendant admits the discrimination, but contends that it is justified by the refusal of complainants to pay freight charges demanded, and by the subsequent refusal of the compress company to carry out its guaranty to promptly pay freight charges demanded by defendant in case complainants should fail to do so. The position of the defendant is clearly stated in the following extract from its answer: "Your respondent denies that in requiring payment before delivery of shipments to certain consignees or their agents, who decline to carry out the guarantee above mentioned, they are nullifying any provision of law relating to common carriers, and it further denies that in waiving its right of lien to other consignees or their agents who do observe such guarantees it is guilty of any unjust discrimination."

On the other hand, complainants assert that neither they nor the compress company refused to pay proper and just rates of freight; that the charges over which this controversy arose were excessive and unjust, as is shown by their subsequent correction; and that these guarantees by compress companies are "given under duress, as a refusal to do so would be followed by arbitrary measures, attended by an immense amount of practical inconvenience, as has actually happened in the case of your petitioner and the presses where they store their cotton." "Your petitioner submits that a railway company cannot assume, through an extorted agreement of this kind, to nullify the provisions of the law relating to common carriers."

Another feature of the complaint is that defendant demands unlawful rates on cotton carried by weight by estimating such cotton at 535 pounds per bale when a copy of the original invoice of the cotton or the certificate of a public weigher is not produced. This branch of the case was not made prominent at the hearing, except as tending to show that the rule of estimated weights, in connection with the guaranty of prompt payment of charges above referred to, results in numerous claims of overcharge, and as a basis for the additional allegation that these claims are exceedingly difficult to collect. Indeed, one of the complainants admitted that since the commencement of this proceeding there had been little

cause for complaint against the defendant for basing charges upon excessive weights.

FACTS.

There is little disagreement between the parties as to the material facts in this case and they can be very briefly stated:

1. The complainants are a firm of commission merchants extensively engaged in buying and selling cotton in the city of New Orleans, and their solvency is not questioned in this proceeding.

2. It is a general custom in that city for cotton dealers or "factors" to have uncompressed or "flat" cotton consigned to them delivered direct by the railroad to drays of the cotton presses which they patronize, and the railroads do not require payment of freight charges before such delivery, provided the compress company has previously executed and delivered a guaranty making itself responsible for such charges. This arrangement insures the prompt removal of a bulky class of freight from the yards and depots of the carriers, and the compress company's guaranty saves them from any loss which might arise from the relinquishment of their lien for freight charges resulting from delivery of the cotton before payment of such charges. It also saves much time, trouble and expense to consignees and the cotton presses they employ. This method of facilitating the quick delivery of cotton is advantageous to all parties concerned.

3. The form of guaranty required by the defendant was as follows:

"THE TEXAS & PACIFIC RAILWAY CO.
Office of Frt. Agt. New Orleans.

STATE OF LOUISIANA, }
CITY OF NEW ORLEANS. }

"In consideration that the Texas & Pacific Railway Company shall deliver to the Alabama & Factors' Cotton Press, its Agents or Draymen, from time to time, any cotton without insisting on the freight and charges thereon being first paid by the respective consignees, whereby the said railway company may lose its lien,

"We hereby agree to and do guarantee the payment of such freight and charges on any cotton so delivered to said press, or to any draymen or agent of ours, and bind ourselves to pay the same on demand in case the respective consignees fail to do so. It is well understood that such freight and charges shall be paid under this guaranty in full without any delay, and without waiting for the discussion or settlement of any claims by any person with respect to such cotton for overcharge, damage, bad order, or any other cause—all such claims upon any ground of complaint whatever to be made after the payment of such bills of freight and charges, and according to the rules of the

Texas & Pacific Company governing such cases."

There is nothing in the case which tends to show that the management of the Alabama or the Factors' Press is not pecuniarily responsible, and no such claim was made by the defendant.

4. The authority of the defendant to deliver cotton after the press had given its guaranty is shown by the following exhibits:

"THE TEXAS & PACIFIC RAILWAY CO.
"Office of Freight Agent.

"New Orleans, La., August 15th, 1890.

"To Manager Ala. & Factors' Press:

"Tchpls. St., bet. Henderson & Robin, New Orleans, La.

"Dear Sir:—Will you please indorse hereon the name of the drayman that is authorized to haul 'Flat Cotton' from this Railway to your press, and have drayman indorse hereon the names of his clerks that have authority to sign for same.

"Yours truly,
"F. M. Folger, M. C.
"Freight Agent."

"Mr. A. McLaughlin will dray 'Flat Cotton' to be stored in our press.

"P. P. S. Hayward,
"J. D. Hayward,
"Alabama and Factors'
Managers Press."

"Mr. Jno. T. Barry is authorized to dray and sign for 'Flat Cotton' to be drayed to ——— Press.

"A. McLaughlin,
"Drayman."

"THE TEXAS & PACIFIC RAILWAY CO.
"Office of Frt. Agt., New Orleans, La.
8, 16, 90.

"Messrs. Phelps & Co., 192 Gravier.

"Cotton Factors, New Orleans, La.

"Dear Sir:—Will you please indorse hereon the name of the press you desire this Railway to deliver your 'Flat Cotton' for the season of 1890 and 1891.

"Yours truly,
"F. M. Folger, M. C.
"Freight Agent."

"Deliver 'Flat Cotton' consigned to us to the Factors Press, unless otherwise ordered.

"Phelps & Co."

5. Early in 1891 the defendant carried three lots of flat cotton to New Orleans, which had been shipped to complainants from points on the Red River in Arkansas, to wit: one lot of four bales consigned by H. A. Hawkins, from Hawkins' Landing, Ark., and one lot of one bale and another of sixteen bales shipped by Gaffney & Brigrance from Opah Place, Ark. The shipments were all made in January, 1891,
4 INTER 8.

and carried by the steamer "Belle Crooks" to Fulton, Ark., where they were turned over to the St. Louis, Iron Mountain & Southern for transportation to New Orleans by that road and the Texas & Pacific Railway, the defendant herein. The steamer Belle Crooks issued through bills of lading to the shippers, specifying that the through charge to New Orleans would be \$4.00 per bale from Hawkins' Landing and \$4.50 per bale from Opah Place. The bills of lading were sent by the shippers to Phelps & Co., the complainants. The steamer did not give copies of the bills of lading to the Iron Mountain agent. Those rates made the expense of transportation to New Orleans \$16.00 on the four bales from Hawkins Landing and \$76.50 on the twenty-one bales from Opah Place, a total of \$92.50. By notices dated February 7 and 20, 1891, the defendant notified complainants of the arrival of these lots of cotton, and after delivery to the Factors' Press, according to complainants' standing order, defendant's agent presented expense bills at complainants' office specifying \$18.00, or \$4.50 per bale, for the four bales from Hawkins Landing, and \$85.00, or \$5.00 per bale, for the seventeen bales from Opah Place, a total of \$103.00. The difference between the bills of lading and expense bills was therefore \$10.50, or 50 cents per bale. Complainants refused to pay more than the through bills of lading called for. Defendant's agent then demanded payment from the Factors' Press under the terms of its guaranty. The manager of the press also refused to pay charges in excess of those named in the bills of lading, but offered to deposit the whole amount claimed until the matter should be adjusted. The agent declined this offer and reported the facts to the general office of the defendant at Dallas, Texas, from whence he was instructed to cease delivering cotton to the Factors' Press (and also to the Alabama, under the same management,) for Phelps & Co., the complainants, or any other consignees, unless the freight charges were paid prior to delivery. This order was at once put into effect. The expense bills were not paid as demanded and so the matter stood for about a year, that is, until shortly after this complaint was filed, when the defendant presented bills corrected to the bill of lading charges, and they were promptly paid by complainants. The evidence does not show why it was thought necessary to defer for more than a year the settlement of a dispute over freight bills covering the charges of but three carriers, or rather only two carriers, for the railroads were operating under a joint tariff.

The charges from the point of shipment to New Orleans were made by adding the charge of the vessel to the joint tariff rate of the railroads from Fulton to New Orleans. The

shipment was through, however, and the carriage over the connecting lines was continuous. This joint tariff rate of the roads was \$3.00 per bale, and, in the absence of any joint rate with the vessel, the charges of the latter according to its own bills of lading must have been \$1.00 from Hawkins Landing and \$1.50 from Opah Place. The through bills of lading of the steamer did not, as before stated, accompany the shipment when delivered to the Iron Mountain road, and the Texas & Pacific did not have actual knowledge of their contents until complainants produced them. Upon delivering the cotton to the Iron Mountain road the steamer line demanded and received for its charges the sum of \$1.50 per bale from Hawkins Landing and \$2.00 per bale from Opah Place, and these charges added to the \$3.00 joint tariff rate of the railroads made the sum per bale demanded exceed the bills of lading rates by 50 cents per bale, and this accounts for the overcharge. After correspondence with the railroad companies, the steamer line refunded the overcharge of \$10.50 to the Iron Mountain road, and the Texas & Pacific, upon being advised thereof, made the expense bills agree with the bills of lading. The new expense bills, showing the refund by the steamer line, were presented to complainants on March 19, 1892, and immediately paid. So the overcharge was settled. But the defendant has nevertheless kept its order forbidding delivery to the Alabama and Factors' Presses before payment of freight in full force and effect, with the exception of a few shipments for consignees other than Phelps & Co., the delivery of which occurred through the oversight of a clerk.

6. The defendant insists upon payment of the freight charges specified in its expense bills when presented to the consignee, leaving the amount of any excess collected to be afterwards determined and refunded upon the filing by the consignee of claim for overcharge. Sometimes the cotton is transported at so much per bale. This was the case with these shipments from Opah Place and Hawkins Landing to New Orleans. Cotton Tariff No. 425 of the Texas and Pacific, effective Oct. 12, 1891, names rates per hundred pounds on uncompressed cotton and bears this notation:

Minimum Weights on Cotton.

"In all cases where the certificate of a public weigher, or a certified invoice of the actual gross weight, is not furnished at point of shipment, the minimum weight to be charged on cotton shall be 585 pounds per bale on shipments to the Mississippi river and the Missouri river, and to Houston and Galveston, the cotton to be billed at actual weight subject to the minimum as above, any overcharge that

may arise to be refunded only on presentation of original invoice of the cotton or certificate of the public weigher."

"Cotton for domestic points and foreign ports shall be taken at actual gross invoice weight."

"In all cases where a certificate of a public weigher or a certified invoice of the actual gross weight is furnished at point of shipment, agents will note on face of billing: This Cotton Billed at Actual Gross Invoice Weight."

It is claimed by defendant that until the actual weight is ascertained, either at the point of shipment or point of destination, shippers should pay for a prescribed minimum weight and have any excess returned to them afterwards, and that complainants have no just cause of complaint when the defendant is willing to accept their weights. One of the complainants testifies, however, that claims for overcharge, besides not being promptly adjusted, do not even receive early attention, and two accounts of overcharges presented a year prior to the hearing were put in evidence as not having been paid or, so far as complainants could learn, even considered. In this connection the following uncontradicted testimony of Mr. Phelps is pertinent: "It is very slow work to collect an overcharge. I would like to file with the Commission a statement of overcharges which arose on shipments a year ago, and which we paid with the assurance that in the event of there being an overcharge the money would be refunded without the formality of putting a claim into the company. It is against the Texas & Pacific Company. We have written to Mr. Fenby at Dallas, and he never had the courtesy to reply. Mr. Reese, commercial agent of the T. & P. road at the time, assured us that when the cotton was sold they would refund the overcharge without the formality of making a claim. We have never got the money yet. While the amount of money in this case is small, it might in some cases be very large. We do a large business, and drafts are drawn against those shipments payable at sight, and unless the bill of lading is conclusive we cannot tell where we stand. In these transactions if we do not know what freight we have to pay we cannot form a basis of calculation." Defendants' agent testified that great care is taken to revise way-bills from published tariff's before the expense bills are made out, and that the bills are afterwards revised in the auditor's office. It is fairly deducible from the evidence, and we so find, that, while great care is exercised by defendant to insert only proper charges in expense bills which it presents to consignees of flat cotton, complainants have experienced much difficulty in getting their overcharge claims promptly adjusted

Conclusions.

The main point to be decided is whether the discrimination admitted in this case is unjust.

The defendant, upon the refusal of complainants, and subsequently of the compress company, to pay the freight charges demanded on three lots of cotton, prohibited future delivery of "flat" cotton to the compress company for complainants or other consignees except upon the payment of transportation charges due thereon, notwithstanding the custom of defendant and other carriers to deliver such cotton to compress companies in New Orleans without requiring previous payment of charges. This prior delivery is unconditional and amounts to a surrender of the carrier's lien on the freight for charges earned, but the carrier requires and obtains, in consideration of such surrender of lien, a guaranty or contract from each compress company whereby it agrees to pay the freight charges on demand, in case consignees refuse to make such payment. The guaranty set out in the third finding contains this clause: "It is well understood that such freight and charges shall be paid under this guaranty *in full* without any delay and without waiting for the discussion or settlement of any claims by any person with respect to such cotton for overcharge, damage, bad order, or any other cause—all such claims *upon any ground of complaint whatever* to be made after the payment of such bills of freight and charges, and according to the rules of the Texas & Pacific Company governing such cases." The complainants and the guaranteeing compress company refused to pay the charges demanded on the three lots of cotton above mentioned upon the ground that such charges were excessive. Thereupon the defendant chose to regard the guaranty as canceled, and, although soon after the filing of this complaint the charges were admitted to be excessive and settled according to complainants' claim, the order prohibiting delivery to the compress company before payment of freight charges has never been rescinded.

The object of the guaranty or contract, as expressed therein, is to secure immediate transfer of the cotton from the carrier's depot or yards to the warehouse or press of the compress company, and to indemnify the carrier against such loss as the relinquishment of its lien upon the property for freight charges might entail. Such quick removal of large quantities of bulky freight is an advantage to the carrier as well as to the owner and the compress company, and there is nothing in the evidence which warrants a finding that this transfer of possession constitutes additional service for which the carrier is entitled to additional charge; and it is due to the defendant to say that it does not make any such preten-

sion. It is proper also to point out that if this were the fact any additional charge in this case would still violate the law, for carriers are required to publish, file, and adhere to their rates without deviation, and such rates cover not merely the carriage, but services rendered in receiving and delivering property as well; and there is nothing in defendant's tariffs which, either as carrying or terminal charges, refers to this matter of delivering facilities in New Orleans.

Considered without any reference to its duties as a public carrier, the above quoted terms of the guaranty might entitle the defendant to immediate payment of whatever sums it should see fit to demand as freight charges; but the provisions of the Act to regulate commerce prohibit it from collecting any excessive charge, and we fail to see how, through relinquishment of its lien or under the most strongly worded guaranty, it can justify even a temporary departure from the law.

The lien of carriers upon freight for charges earned is satisfied by the payment of rates for their services which they are lawfully entitled to demand, and a guaranty executed to a carrier by consignees or third parties, which might be construed to enable the carrier in consideration of freight delivery before settlement of transportation charges, to exact for services rendered in moving and delivering the freight whatever it chooses to demand, cannot be used by the carrier to force payment of charges in excess of those it would be entitled to collect or receive if previous freight delivery had not been made.

The Interstate Commerce Act does not recognize indefinite or uncertain transportation charges; the idea of unequal compensation for like service, or discrimination in the treatment of persons similarly situated, is repugnant to every requirement of that law, and a party to an interstate shipment cannot be excluded by the carrier from privileges afforded to other patrons in the same locality, because of his refusal to pay excessive freight charges, even though an agreement to subsequently refund the excess should accompany the demand.

Therefore, if the charges demanded first of the complainant and subsequently of the guaranteeing compress company were greater than the defendant would have been entitled by law to collect and retain if it had not parted with its lien, an order against the defendant is clearly indicated without consideration of any of the other questions connected with defendant's refusal to continue delivering to the compress company before payment of its charges.

The facts demonstrate that the charges originally demanded by defendant were excessive. There was an over-charge of 50 cents per bale on these three lots of cotton amounting to-

\$10.50, and this excess, when investigation was seriously undertaken by defendant and the other carriers, was readily discovered. The existence of error was, moreover, plainly indicated to defendant's agent when, at the time of the original demand, complainants produced the bills of lading issued by the steamboat company. Those bills of lading indicated through charges per bale less than those named in the expense bills. There was no through joint tariff showing the entire rate for the whole distance; the through charge was based upon a combination of the unpublished steamboat charge with the joint tariff rate of the defendant and the Iron Mountain Railroad Company, and defendant's agent and complainants and the compress company all knew of this combination. Now, while the steamboat charges were not published and therefore unknown to the public, the joint tariff of the railroad was published and a matter of common knowledge; therefore, a simple deduction of the joint tariff rate of \$3.00 per bale from the per bale charges specified in the bills of lading was sufficient to point out the probability of error on the part of the steamboat. It was not a case of transportation over half a dozen or more lines charging independent rates; there was here nothing more than the inflexible joint rate of the roads added to the charge of the steamboat, and the steamboat company had itself issued the bills of lading wherein lower total charges were specified than those named in the expense bills of the defendant. No tracing or examination was necessary therefore to determine the overcharge. The discrepancy between the contract through rate of the steamboat and the sum of the carriers' charges as shown in the expense bills was quite sufficient to establish a presumption that the steamboat had exacted from the Iron Mountain road a rate per bale in excess of that to which it was entitled under its own agreement with the shipper. This, it seems to us, warranted the complainant and the compress company in demanding a correction of the expense bills, and the offer of the compress company to deposit the whole amount claimed, pending verification or correction of the charges, certainly indicates that it sought no improper advantage and manifested no disposition to be captious or unfair.

The defendant contends that there was no common arrangement for continuous carriage or shipment between the boat line and the railroad carriers, and that therefore the steamboat transportation is not a proper subject for our consideration. But this Commission has repeatedly held that the receipt, forwarding, and delivery of traffic by connecting carriers clearly establishes the existence of a common arrangement between the carriers for continuous carriage or shipment. *Mattingly v. Pennsylvania Co.* 2 Inters. Com. Rep. 806, 3 I. C. C. Rep. 4 INTER S.

592; *Boston Fruit & P. Exch. v. New York & N. E. R. Co.* 3 Inters. Com. Rep. 493, 4 I. C. C. Rep. 664; *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 682, 4 I. C. C. Rep. 744; *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324; *Board of Trade of Troy v. Alabama Midland R. Co.* ante, 348.

Moreover, we do not perceive how the defendant's case would be strengthened if its position as to our jurisdiction of the steamer line should be sustained. Even if the steamboat company was not subject to the law as to this transportation, the fact remains that the rail lines are subject to the statute, and that the defendant did demand of complainants and the compress company higher charges than it was entitled to collect and retain for the joint account of itself and the Iron Mountain, upon a showing that the steamboat had made an overcharge above the amount it declared itself willing to accept in the bills of lading which it issued; and the subsequent action of the steamboat in refunding the overcharge is conclusive upon this point. Moreover, this whole case relates to the action of defendant in New Orleans, and its object is the discontinuance of a discriminating order which defendant would apparently have put in force just as promptly if the overcharge had been made by a connecting carrier concededly subject to the federal statute; for the defendant broadly contends that it can lawfully make a discrimination of this character whenever for any cause a compress company fails to observe the terms of its guaranty. The defendant does not endeavor to justify the discrimination upon any ground which has reference to the character of any carrier concerned with the cotton on which the overcharge was made. Its reason for exacting prior payment of charges before delivery of cotton for consignees to this compress rests wholly upon its contention that the compress company refused to carry out to the letter the terms of its guaranty; but, as we have ruled above, it was not entitled to require this when by doing so it would compel the payment of an excessive freight charge.

It would seem that this controversy might have been satisfactorily settled by the aid of the telegraph in a few hours, but, as is too often the case, each party believing themselves in the right, obstinately refrained from any attempt to adjust or explain. The defendant took refuge in reprisal; the complainants finally brought this complaint, and a few weeks afterwards the demand of the defendant was correctly modified to conform to the bill of lading charge, the expense bills so reduced were paid, and the excessive character of the original charges was thereby admitted. But it took thirteen months to settle a matter that might easily have been adjusted in as many

hours, and the discriminating order of defendant against this compress company and the complainants and others as customers of the compress company was and still is continued. That order having been issued pending a controversy which has been settled, and the complainants and the compress company having been shown guilty of no fault upon which the discriminating order can be justified, it should be rescinded, and we shall direct accordingly.

In what has been said no attack whatever is intended upon the propriety of exacting a sufficient guaranty in return for the surrender of defendant's lien, nor do we impute to the carrier any intention to evade the provisions of the law. This whole matter is merely a misunderstanding which, under the attitude of the parties, authoritative action is required to correct; and for that reason we have carefully confined ourselves to the single consideration whether *upon the exact facts in this case* the defendant was justified in making the discrimination.

As to the other branch of the case we do not think that a plan of billing cotton at a proper estimated weight per bale should be deemed unlawful when actual weights cannot be ascertained without great inconvenience to the shipper or carrier, and when charges are promptly adjusted by the carrier upon the basis of actual weights furnished by the consignee. But complainants vehemently assert that they encounter great difficulty in securing the return of overcharges collected by defendant, and if this is true as a rule, the defendant should immediately alter its practice in this regard. Delays in the settlement of overcharges have become a common source of complaint from all sections of the country, and a large portion of the correspondence of this Commission has reference to the adjustment, in an informal way, of claims of this character. It is our experience that these delays are mainly caused through the failure of railway officials to promptly dispose of such claims by either

ascertaining which carrier is responsible for the excess or demonstrating to the claimant that no overcharge has been made. Many of these officials do not appreciate the full force of the fact that the retention of an overcharge has all the effect of unjust discrimination against the person from whom payment has been required, and when the refund of an excessive charge has been unnecessarily delayed for a considerable period, that the officials responsible therefor become fairly chargeable with willful intention to violate the law.

As to the charge of unjust discrimination which we find sustained the defendant will be ordered to cease and desist, while it continues to deliver flat or uncompressed cotton in the city of New Orleans to any cotton press or any compress company before payment of transportation charges, upon the guaranty of such press or company to pay such charges on demand after such payment shall have been refused by said consignees, from refusing to make such previous delivery of flat or uncompressed cotton for complainants or other consignees to the Alabama Press or the Factors' Press in said city of New Orleans upon a previously executed and sufficient guaranty from the said presses or the owners thereof to pay on demand the transportation charges due on such cotton after payment thereof has been demanded of complainant or said other consignees and such payment has been refused; and said defendant will be further required to abstain from any discrimination whatsoever using said Alabama or Factors' Press and the consignees using other cotton presses in New Orleans for or on account of any refusal of the owners or managers of said Alabama or Factors' Press to pay on demand any sum as freight charges on cotton delivered to said presses or either of them in excess of such charges as may be legally due thereon at the time of such demand.

THE INDEPENDENT REFINERS' ASSOCIATION, OF TITUSVILLE, PENNSYLVANIA,
and THE INDEPENDENT REFINERS' ASSOCIATION OF OIL CITY, PENNSYLVANIA,

v.

THE PENNSYLVANIA RAILROAD COMPANY and THE WESTERN NEW YORK &
PENNSYLVANIA RAILROAD COMPANY.

[No. 163.]

Petition of the Pennsylvania Railroad Company for Rehearing.

Report and opinion of the Commission filed Nov. 14, 1892.—Petition of Pennsylvania R. R. Co. for Rehearing filed Feb. 15, 1893.—Brief and affidavits in support of Petition filed April 13, 1893.—Briefs for complainants in opposition to Petition filed April 24, 1893.—Memorandum filed Oct. 19, 1893.

PETITION for Rehearing, see *ante*, p. 163.

Mr. James A. Logan, for Pennsylvania Railroad Company, petitioner for rehearing.
Mr. Mark J. Heywang, for complainants, in opposition to petition for rehearing.

MEMORANDUM.

BY THE COMMISSION:

On November 14, 1892, the Commission reported its findings of fact and conclusions in this and two other cases, and thereupon issued an order, bearing the same date, by which the defendants, among other things, were directed and required to take action as follows, to wit:

"That said defendants be and they severally are hereby required to wholly cease and desist from charging or collecting any rate or sum for the transportation of the barrel package on shipments of oil in barrels over their respective roads or lines from the oil regions of Western Pennsylvania to New York and New York harbor points, or to Boston and Boston points; or, on reasonable notice, promptly furnish tank cars to complainants and other shippers who may apply therefor for the purpose of loading and shipping oil therein to such New York harbor and Boston points as said shippers may direct; and that, on or before the 9th of January, 1893, said defendants notify the public accordingly by publication in their tariffs of rates and charges, pursuant to the provisions of section 6 of the Act to Regulate Commerce, and also file copies of said tariffs with this Commission as required by the provisions of said section. And defendants are further hereby directed and required to refund to the several parties legally entitled thereto, within 60 days after notice of this decision and demand thereof by such parties, all sums received by them for the transportation over their respective roads or lines of the barrel package on shipments of oil in barrels when the use of tank cars has not been open to shippers impartially and the shipper claiming reparation has been thereby deprived of their use."

It was further stated in the order that "inasmuch as the amounts wrongfully received from complainants and others who may be entitled to such reparation cannot be ascertained from the evidence already taken, these proceedings will be continued for such further action or inquiry in that behalf as may become necessary."

Only one order was issued for all three cases.

On February 15, 1893, the Pennsylvania Railroad Company filed a petition for rehearing, reciting the first above quoted part of the Commission's order and claiming that the same, if intended to apply to it, was based on certain findings and conclusions of law relating to the special circumstances of the petitioner which it believes to be erroneous. The petition then proceeds to challenge the correctness of the following finding, also shown on page 11 of the report and opinion of the Commission:

lowing finding, also shown on page 11 of the report and opinion of the Commission:

"From this state of facts it appears that while about 450 tank cars of the Pennsylvania Railroad Company may be 'open to shippers indiscriminately' it is only upon the conditions of shipment to Communipaw for delivery thereto to the National Storage Company, and that the facilities owned by this storage company for bulk shipment are not available to shippers in general."

The following statements in the report and opinion are also termed findings in the petition for rehearing and claimed to be error:

"The complainants . . . allege that 'if the demand for these cars is no greater than is stated it is because the Pennsylvania Railroad Company will not permit them to go to any other place on the seaboard at New York Harbor than Communipaw, and only there at the docks of the National Storage Company which is allied to the Standard Oil Trust.'" (Report and Opinion, p. 10.)

"This Storage Company has facilities at Communipaw for unloading tank cars into bulk steamers or vessels but these facilities are not open to complainants, and a witness (Confer) testified that in order to get oil shipped in bulk from Communipaw, the independent refiner has to sell it to the Standard Oil Company.'" (Report and Opinion, p. 11.)

Obviously, the first of these statements is only a recital of an allegation of complainants, and by reference to the report and opinion this will be found set forth in connection with allegations made in behalf of the Pennsylvania Railroad Company upon its application to submit additional testimony. As to the second statement, only the first portion can properly be termed finding; that which cites the testimony of a witness is certainly significant, but it is not so declaratory of fact that, standing alone, it should be given the weight of finding. Moreover, the facts set out in the finding first above quoted cover both of these minor statements, and the petition for rehearing, so far as it alleges errors in fact, may therefore be considered as directed only against that finding.

The Pennsylvania Railroad Company, some sixteen months after the cases had been argued, applied for leave to submit additional testimony. For reasons cited on pages 5 and 6 of our report and opinion, and as further shown by admissions of complainants' counsel in answer to such application and by the applicant's reply thereto, which are duly set out on page 10 of

said report and opinion, the application to take further testimony was denied. We think that said application, under the answer of complainants' counsel thereto, and the applicant's reply to such answer, was properly denied. The decision of these long pending cases should not, without stronger showing than was presented on the application, have been longer delayed. The fact is that the petitioner did not take advantage of its opportunities and put in its evidence at the proper time and in the regular way. As to the finding of fact in the petition for rehearing we hold, after careful re-examination of the evidence, that it was not erroneous upon the proof before the Commission.

The petitioner now comes, however, and declares its ability to establish as a matter of fact that, notwithstanding any evidence that was before us, this important finding was untrue, and presents in support of this assertion the affidavits of its general freight agent and the secretary of the National Storage Company. The petitioner is not now merely seeking after the close of testimony but prior to decision, to rebut evidence favoring the complainants' side of the case; it is attacking a finding of an authoritative body based upon that evidence, and which militates strongly against the legality of the petitioner's conduct as a common carrier. As shown by our report in these cases this carrier includes in its own equipment 1180 of the 1842 tank cars owned by railroads throughout the country, and it claims, without formal denial on the part of complainants, though there is some testimony in conflict therewith, (Report and Opinion, p. 11), that it furnishes 450 tank cars, or such part thereof as may be necessary to meet demands therefor, to shippers indiscriminately, when the shipments are made to points on its own or affiliated lines of railroad. Compared with car facilities provided by other carriers its action in this respect, if its claim is well founded, is commendable. The stated desire of the petitioner is to show that its tank cars are and have been impartially furnished to all shippers to its New York Harbor terminus and other points reached by its own and affiliated lines, and that the facilities for delivery at that terminus are open to the use of all shippers without any discrimination whatsoever, and without the imposition of conditions upon the shipper in respect to the sale of oil or other disposition thereof. In other words the petitioner contends that its action is and has been in line with the provisions of our order forbidding discrimination in the matter of facilities to shippers of oil. Our rules of practice provide for rehearing on proper showing, the petition is in form, and the affidavits filed in support thereof make out a prima facie case in favor of the petitioner's claim (*Proctor* 4 INTER 8.

v. *Cincinnati, H. & D. R. Co.* 8 Inters. Com. Rep. 181, 4 I. C. C. Rep. 448); and the petitioner may be able to show by competent proof that the finding attacked in this petition is erroneous. *Riddle v. Pittsburgh & L. E. R. Co.* 1 Inters. Com. Rep. 778, 1 I. C. C. Rep. 490. Note should be taken, however, of the fact that the affidavit of the secretary of the storage company in support of this petition is confined to the facilities of the storage company for "unloading oil by lighters in bulk or tank steamers." There is some proof in this case to the effect that tank oil carried to the seaboard is unloaded from the tank car into storage tanks, and pumped from the storage tank through a pipe into the bulk steamer. Whether the affidavit was intended to embrace the transshipment of oil by this method as well as by lighter does not appear.

We cannot infer from its petition that the carrier has any other object than to disburden itself of the charge of unjust discrimination which the finding certainly sustains, and we think, under all the circumstances, that it should not be denied the opportunity of correcting the record in this respect. Neither, in view of the fact that such a showing by the petitioner would put it in the attitude of observing the above described portion of our order, do we see how such showing can be other than beneficial to the interests of the complaining independent shippers of refined oil.

The reply brief of complainants, after citing the testimony of Ramage and Motheral as strongly supporting the finding, in addition to anything testified by the witness Confer, states as to the compulsory sale of oil to the storage company, that Mr. Confer perhaps referred to a practice of that company, or of that company and the petitioner, "of buying up refined oil from the independent refiners of this region, through an agent kept here for years for that purpose, for shipment in bulk over the Pennsylvania Railroad for delivery to the National Storage Company (Standard Oil Trust). In no other way did oil manufactured by the independent refiners go to that terminal in bulk for export. It was never claimed by complainants or any of them that the National Storage Company imposed an express or published condition that the independent refiner must sell his oil to the Standard Oil Company in order to get it transhipped in bulk to a bulk vessel. The express condition was unnecessary."

The complainants further allege against this petition that "it being the established fact and not controverted by the respondent that the National Storage Company is an ally of the Standard Oil Trust, and that the respondent will not carry oil for export for complainants to any other point at New York Harbor but to

this trust ally, what more need be said? Of course the independent refiners would not ship to such a terminal for export, nor use the alleged idle tank cars of a railroad that will go to no other than such terminal, no matter what the offered facilities of such a terminal are. The inland refiner who entrusts his oil to a storage company at the seaboard with a view to exporting, puts himself completely into the power of such concern. The exactions that may be unfairly imposed in individual cases for 'loss by leakage,' 'dumping and mixing for off color or off test,' 'cost of water-white oil for mixing,' 'tares,' 'tares guarantee,' 'commission on sales,' 'interest on goods until loaded and paid for,' 'incidental expenses,' and many other known matters of charge, may amount to a partial confiscation of the cargo. See reference to charges of this nature in printed exhibits, p. 4, and statement National Oil Company, p. 5."

Again, the complainants say, that it is significant that these carefully prepared papers and affidavits speak only of conditions now existing; that they evidently speak of a situation that has been recently arranged, and that it would be more satisfactory if they showed when the change was made and gave assurance that the equal facilities would continue beyond the proposed investigation.

The petitioner will unquestionably feel bound to cover all of these matters in its proposed showing, and if such new evidence shall result in the actual and satisfactory assurance to complainants and other independent refiners of the use, without any discrimination whatsoever, of a very large quantity of tank cars and the important and convenient terminal facilities for oil delivery and transshipment at Communipaw, it would seem that granting such leave to the petitioner will be doing the complainants a real and effectual service.

This Commission has not the power, even in a case of unjust discrimination in terminal facilities, to order the carrier to make a through route and through rate to another terminal, such, for instance, as Perth Amboy, in this case. The remedy lies in a different direction. We can order the unjust discrimination to cease, and if it is persisted in by a carrier, the law prescribes severe penalties for such perseverance.

We find on examining the claims for reparation which have been filed, in this and the other two cases mentioned, that comparatively few shipments went to Communipaw, that is to say, Communipaw shipments represent only about 7 per cent of the total number to New York harbor and Boston points, so that even if the petitioner shall be able to show that the finding referred to was wholly erroneous, such showing will not greatly affect these claims as a whole. We

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nevertheless desire to state our dissatisfaction with this method of practice. The proper time to put in evidence, and all the evidence, which parties are able to produce before the Commission is before the case has been submitted. The new testimony should be carefully limited to the finding attacked in the petition and be taken in the form of deposition and filed within a limited time.

We now take up the error in law alleged by the petitioner. It is assumed in the petition for rehearing that the portion of our order which requires the defendants to cease charging for the barrel in barrel shipments, or, as an alternative, furnish shippers with tank cars for shipping oil to such *New York harbor points as the shippers may direct*, is intended, among other things, to compel the petitioner to furnish its tank cars for shipments to New York harbor points not reached by its own lines. This assumption is entirely erroneous. In this order, drawn with considerable care, the defendants in all three cases are, as before stated, included within its provisions. This petitioner, one out of seven defendants, does not carry oil either in barrels or tanks to any other point on New York harbor than Communipaw, nor does it engage with other roads in the through transportation of oil either in barrels or tanks to any other New York harbor point. Some of the other defendants *do* reach and carry to other points on that harbor, but they *do not* carry to Communipaw. There was no more intention to compel the Pennsylvania Railroad and the Lehigh Valley Railroad to make a route to Perth Amboy than there was to compel the other defendants and the Pennsylvania Railroad to make connecting through lines to Communipaw. This we think should be evidenced by the terms of the order itself. We were dealing with existing routes and existing rates. Moreover, the report and opinion, on page 18, distinctly declares (with reference to the abrogation of certain through rates to Boston & Maine Railroad points) that the Commission has no power to order through routes and through rates. The provisions of the order would not be satisfied if the Pennsylvania, or any of the defendants carried oil by the barrel method over a through route composed of its own and another defendant's road, and charged for the weight of the barrel, but refused to allow its tank cars to go over the through route to the point where the barrel shipments were destined. But, as above set forth, the Commission is informed that the petitioning defendant does not carry oil either in barrels or tanks to any other point on New York harbor except Communipaw. It is also proper to add, as matter of suggestion merely, that a serious question of unlawful discrimination might arise in case of refusal to receive and carry barrel or tank oil over a through

route on which other commodities are transported by the connecting carriers.

Under existing 'circumstances, if the Pennsylvania Railroad Company furnishes tank cars to applying shippers to its New York harbor oil terminal without discrimination, and the facilities at that terminal for the delivery of oil to consignees and bulk steamers are also provided and controlled without discrimination or prejudice as against any shipper or consignee,—and this company declares its ability, and, upon leave being granted, its intention to show this,—we think it is discharging its duty in this respect under the requirements of our order.

We therefore decide on this petition for rehearing that the petitioner, the Pennsylvania Railroad Company, have leave to take testimony by deposition with sole reference, as indicated in this memorandum, to the finding on page 11 of our report and opinion, to wit:

"From this state of facts it appears that

while about 450 tank cars of the Pennsylvania Railroad Company may be 'open to shippers indiscriminately,' it is only upon the conditions of shipment to Communipaw for delivery there to the National Storage Company and that the facilities owned by this storage company for bulk shipment are not available to shippers in general."

Provided, however, that such testimony by deposition be taken upon not less than ten days' notice to complainants' counsel and be filed in the office of this Commission on or before the 1st day of December next; and upon the further condition that the petitioner shall, prior to the taking of such testimony, publish in its oil tariffs the notification to the public required by our order of November 14, 1892.

This leave is granted solely for the purpose of affording the petitioner an opportunity to correct the record as affecting the finding above quoted, and for no other purpose.

THE F. SCHUMACHER MILLING COMPANY, AND ITS SUCCESSOR, THE AMERICAN CEREAL CO.,

v.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Defendant*,
and

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY; THE ST. LOUIS, KEOKUK & NORTHWESTERN RAILROAD COMPANY; THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS RAILROAD COMPANY; THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY; THE ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, *Intervenors*.

No. 294.

1. The fact that different rates and classifications are in force in different sections of the country will not of itself warrant an extension of the lower rate and classification to the section where the higher rate and classification are applied. There must be proof of unlawful discrimination or disadvantage, or of unreasonably high rates, to procure an order directing changes in classification.
2. Cost of service is only one of the elements to be considered in determining proper classification and relative rates for different articles. While the difference in cost to the carrier in transporting cereal products and flour is not in itself sufficient to warrant a higher classification upon cereal products, these products range higher in value than flour, and in the matter of volume of traffic afforded there is a very wide difference in favor of flour; and there are other conditions compelling a low rate upon flour which do not apply in the transportation of cereal products. It appears, moreover, that the complaining company controls the production of half the cereal products manufactured in this country and, under the present classification and rates, is an active competitor of other manufacturers of cereal products whose mills are located nearer to the points of destination involved in this case.
3. When an article of traffic does not move on account of burdensome rates, and the carrier is hauling a considerable number of empty cars in the direction such article would naturally move if accorded a lower rate, the carrier may be justified in carrying at a rate sufficient to induce the movement of such traffic, provided no extra or additional charge is in consequence put upon other articles carried; but the fact that freight will furnish return loads for empty cars is not a reason for the reduction of rates on such freight when it does not appear that the rates are unreasonable.
4. A mixed carload rate for cereal products or for cereal products and flour that would have the effect of throwing out of the trade many competitors of complainant who manufacture only certain kinds of cereal products, and of centralizing the business in the hands of one or more dealers, should not be granted when, without it, no wrong is done to any one and the market is open to all competitors. To obtain the abrogation of a rule in a classification denying a mixed carload rate upon specified articles the rule should be shown unreasonable, unfair or unjustly discriminative.
5. The complaining company has shown no reason why roads using the Western Classi-

fiction should adopt the Official Classification as to cereal products. Neither is there sufficient evidence in this case to justify an order directing the defendants to establish the mixed carload rate prayed for in the

complaint. But this will not preclude the filing of another complaint based on other grounds, and raising the question of unreasonable or relatively unreasonable rates on cereal products.

Complaint filed April 1, 1891.—Answers filed from May 7 to September 23, 1891.—Heard at Chicago, Ill., September 23, 1891.—Proposed Findings and Arguments filed from October 23, 1891, to January 26, 1892.—Decided October 20, 1893.

CLASSIFICATION of General Products. Mixed Carloads. See Complaint and Answer, 3 Inters. Com. Rep. 658.

Messrs. Oviatt, Allen & Cobbs, for Complainant.

Mr. Thos. S. Wright, for Chicago, R. I. & P. R. Co.

Messrs. Britton & Gray, for Atchison, T. & S. F. R. Co.

Mr. John W. Cary, for Chicago, M. & St. P. R. Co.

Messrs. J. W. Blythe & C. M. Daves, for Chicago, B. & Q. R. Co., Hannibal & St. J. R. Co., St. Louis, K. & N. W. R. Co. and Kansas City, St. J. & C. B. R. Co.

REPORT AND OPINION OF THE COMMISSION.

McDill, Commissioner:

The demand of the complainant is that the Chicago, Rock Island & Pacific Railway shall change the classification and rate upon which it carries cereal products westward from Chicago by classifying such products with and carrying them for the rate charged for flour, and that the same rate shall be granted to a carload whether it contains a single product, or smaller quantities of several products.

The original and intervening respondents admit that the classification and rate on flour upon the railway lines using what is known as the Western Classification are different from the classification and rate in use on the lines using what is known as the Official Classification, as alleged by complainant, and also admit that they do not grant a carload rate to loads of mixed products.

The reasons given by the complainant in support of, and by the respondents against the claim, will be considered hereafter.

Finding of Facts.

1. Complainant, the F. Schumacher Milling Co., and the American Cereal Co., which as its successor is substituted as complainant, are corporations duly organized under the laws of Ohio for the purpose of dealing in all kinds of cereals and manufacturing the various products of such cereals, and their principal office and place of business is the city of Akron, in the state of Ohio.

2. The defendant, the Chicago, Rock Island & Pacific Railway, and the intervening defend-

ants, the Chicago, Burlington & Quincy; Hannibal & St. Joseph; St. Louis, Keokuk & North Western; Kansas City, St. Joseph & Council Bluffs; Atchison, Topeka & Santa Fé, and the Chicago, Milwaukee & St. Paul railroads, are common carriers engaged in the transportation of passengers and property between points in the states of Illinois, Iowa, Missouri, Kansas, Nebraska and Colorado, and are all subject to the requirements of the Act to Regulate Commerce.

3. Complainant manufactures and deals largely in pearl barley, crushed barley, cracked and rolled wheat, farina, farinose, buckwheat grits, buckwheat flour, hominy, corn meal, oatmeal, rolled oats and flour. Complainant has five mills at Akron; two flour mills, one corn meal mill, one barley mill and one hominy mill. It also has mills at Iowa City, Cedar Rapids, Rockford, Cleveland and Chicago. It annually consumes in all its mills from 14,000,000 to 15,000,000 bushels of grain, and, with the exception of flour, it manufactures about one half of all the cereal products made in the United States.

4. There are rival and competing manufacturing of cereal products at Chicago, Kansas City, Indianapolis, Terre Haute, Elgin, Mazon, Cedar Rapids, Muscatine and other points, and these competitors make the other half of the product of the United States.

5. The original and intervening defendants are members of a certain association known as the Western Classification Committee, and that

association has arranged for the members of the association schedules, classification, and rules for the carriage of articles of interstate commerce west of Chicago. Its classification, schedules, rates and rules were announced Dec. 21, 1890, and the carriers adopted the same January 1, 1891, and they were practically in use prior to that time.

6. Under this classification pearl barley in sacks, cracked and rolled wheat in sacks at owner's risk, farina, buckwheat grits in sacks, hominy in sacks, oatmeal and rolled oats in paper sacks at owner's risk, are placed in the second class.

Pearl barley in boxes, barrels or kegs; cracked and rolled wheat in boxes, barrels and kegs; flour in paper sacks at owner's risk of waste and wet; buckwheat flour in paper sacks at owner's risk of wet and waste; buckwheat grits in boxes, barrels and kegs; hominy in boxes, barrels or kegs; corn meal in paper sacks or boxes, and oatmeal and rolled oats in cotton sacks at owner's risk of wet and waste, are placed in the third class.

Flour in cotton sacks or boxes at owner's risk of wet and waste, in pails with covers well secured or in barrels, buckwheat flour in cotton sacks or boxes at owner's risk of wet and waste, or in barrels, corn meal in cotton sacks or barrels, oatmeal and rolled oats in boxes or kegs at owner's risk of wet and waste, or in barrels or half barrels, are placed in the fourth class.

Pearl barley, cracked and rolled wheat at owner's risk, buckwheat grits and hominy in sacks, boxes, barrels or kegs, in carload lots, are placed in the fifth class. Farina is not mentioned in the carload classification. Farinose not mentioned in the classification is a product similar to farina and crushed barley, not so mentioned, is similar to pearl barley.

Buckwheat flour in carloads and all other cereal products not mentioned take the wheat tariff rate. This rate is lower than that granted to articles in the fifth class, and whatever the wheat tariff rate may be at the time of shipment is the rate for the products last above named.

By a rule of the Western Classification carloads of mixed products do not take the rate of either product, but the shipper in such case pays the ordinary, less than carload, rate for the quantity of each product placed in the car.

7. Carriers by lines of railroad running east from Chicago and Mississippi river points and north of the Ohio and Potomac rivers are governed by the Official or Trunk Line Classification, and flour and cereal products are classified together and take the flour rate per carload. Mixed carloads are allowed a carload rate under the following rule:

" 8 A. When a number of different articles of the same class are shipped at one time by 4 INTER 8.

one shipper to one consignee at one point of delivery in full carloads, they shall be taken at the rate per hundred pounds for *such class in carloads*. If the articles are of more than one class the carload rate and minimum carload weight for the article of the highest class shall be charged on all the articles that make up the carload."

8. In December, 1890, complainant shipped *via* Chicago to Colorado Springs, Colo., over the Chicago, Rock Island & Pacific Railway,—

220 boxes and 43 barrels of Oatmeal, weighing 27,700 pounds, upon which the charge from Chicago was 54 $\frac{1}{2}$ cents per 100 lbs. \$150.18, and 10 boxes farinose, 10 boxes wheat and 5 boxes barley, weighing 3800 pounds, for which the charge from Chicago was \$1.46 $\frac{1}{2}$ per 100 lbs. 48.25,

Making a total charge of \$198.88

And in the same month over the same road *via* Chicago to Denver, Colorado, 250 kegs barley, weighing 24,700 lbs. for which the charge from Chicago was 95 $\frac{1}{2}$ cents per 100 lbs. \$235.14, and 50 boxes farina, 20 boxes farina and 1 box samples, weighing 3800 pounds, for which the charge from Chicago was \$1.72 $\frac{1}{2}$ per 100 lbs. 56.88.

Making a total charge of \$291.97.

And in January, 1891, complainant shipped *via* Chicago to Denver, over the Atchison, Topeka & Santa Fé Railroad,—

105 barrels of flour, weighing 21,500 pounds, upon which the charge from Chicago was 35 $\frac{1}{2}$ cents per 100 lbs. \$ 76.97, and 25 boxes wheat, 12 barrels of hominy, 10 barrels farinose and 1 barrel Mt. Sax, weighing 4000 pounds, for which the charge from Chicago was \$1.01 $\frac{1}{2}$ per 100 lbs. \$ 40.60,

Making a total charge of \$117.57.

And in the same month over the Chicago, Rock Island & Pacific Railway *via* Chicago to Pueblo, Colo.,—

21,550 pounds of oatmeal for which the charge from Chicago was 54 $\frac{1}{2}$ cents per 100 lbs. \$116.80 900 pounds of wheat for which the charge from Chicago was \$1.46 $\frac{1}{2}$ per 100 lbs. 13.16 and 1250 pounds of farina and farinose for which the charge from Chicago was \$1.72 $\frac{1}{2}$ per 100 lbs. 21.53,

Making a total charge of \$151.49

And each of these several charges, so far as made upon cereal products, exceeded the charge upon an equal weight of flour by reason of said products being placed in a different class and charged a different rate from flour.

Conclusions.

There are two questions involved:

First, Should cereal products be carried westward from Chicago at the same rate as flour?

Second, Should the rule of the western roads as to mixed carload lots be abrogated, and the same rate extended to mixed carloads as is given to a carload of a single product?

The claim of the complainant involves a change of classification, with a view of affecting a change in rates, to be ordered by the Commission in what is known as the Western Classification, governing shipments west of Chicago. As to the change in classification proposed by the complainant, it may be remarked that there is no presumption in favor of the official against the Western Classification. The fact of a difference in rate and classification establishes nothing of itself in favor of either rate or classification.

An approximation toward uniformity of classification, so far as it can be reached in justice to all interests, is generally conceded to be desirable.

Classification is recognized as a necessary method of adjusting the burdens of transportation equitably upon the various articles of traffic, in view of differing circumstances and conditions, and *but* for the necessity of such adjustment, considerations based alone on weight and distance of haul would probably determine rates, except as modified by competition. This method, while securing practical uniformity, would probably deprive many articles which are now important factors in commerce of the benefit of transportation to distant points. A system of rate-making upon each article without classification, it is said, "has proven to be so cumbersome and inconvenient that the arrangement of freight into classes is deemed by the roads an essential part of rate-making, and it is so treated by the Act to Regulate Commerce, which requires that the schedule of charges which every carrier must keep open to the public 'shall contain the classification in force.'" *Coxe v. Lehigh Valley R. Co.* 3 Inters. Com. Rep. 460, 4 I. C. C. Rep. 559.

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While the nearest approximation to uniformity of classification is desirable, all agree that great caution should govern attempts to bring it about. The Commission has said, "to force it at once was undesirable," and "while one dealer might be greatly benefited another might be ruined," and that "the final adjustment of a uniform classification must necessarily be the arrangement of a number of compromises." And it was said in *Pyle v. East Tennessee, V. & G. R. Co.* 1 Inters. Com. Rep. 770, 1 I. C. C. Rep. 473, that occasional inequalities of rate, and slight and occasional differences in the rates charged would not prove that the whole system is wrong and that "when comparison is attempted to be made of classifications and rates, different conditions of transportation cannot be ignored."

An attempt to reform a classification by a selection of isolated cases and single classes, and changing them without a study of the entire scheme, would be dangerous. The entire effect of a proposed change can only be known by comprehending the relation of each particular article or class to the combined scheme.

Therefore a complainant asking a change in classification, as in this case, with reference to a single group of articles, should be required to show a case of unjust discrimination or wrong done to procure a change.

Complainant, as a reason for the change asked for, claims that the value of cereal products does not greatly exceed that of flour. In reference to the place where values should be computed the parties differ. Complainant contends for the value at Akron, the principal point of its manufacture, while respondents claim Chicago as the point, because the proof shows that complainants manufacture their products principally at Akron and ship them in bulk to agents at Chicago, who ship westward in carload lots to customers upon orders sent in by them.

From complainant's testimony the following tables of values of flour and cereal products estimated at Akron, Ohio, the point contended for by complainant, have been prepared, and are here set forth.

Statement of comparative values of flour and other articles milled by complainant, at wholesale, based on the average of the current prices at Akron, Ohio, on the following dates, viz : April 3, 1891, and September 2, 1891.

(Arranged from testimony of complainant.)

The percentages show the increase, or decrease from the cost of flour.

Flour,.....	2½	cts. per lb.							
Pearl Barley,.....	8½	"	"	"	"	"	"	"	"
Crushed ".....	4	"	"	"	"	"	"	"	"
Cracked Wheat,.....	3½	"	"	"	"	"	"	"	"
Rolled ".....	3½	"	"	"	"	"	"	"	"
Farina,.....	8½	"	"	"	"	"	"	"	"
Farinose,.....	4½	"	"	"	"	"	"	"	"
Buckwheat Grits,.....	4½	"	"	"	"	"	"	"	"
" Flour,.....	8	"	"	"	"	"	"	"	"
Oat Meal,.....	8.08½	"	"	"	"	"	"	"	"
Rolled Oats and Avena,.....	8½	"	"	"	"	"	"	"	"
Hominy,.....	2½	"	"	"	"	"	"	"	"
Corn Meal,.....	1.95	"	"	"	"	"	"	"	"

At the price named a carload of flour (30,000 lbs.) would be worth \$825, while the other articles would be worth more or less, respectively as follows:

Pearl Barley.....	Worth \$262.50	More per car.
Crushed ".....	375.00	"
Cracked Wheat.....	112.50	"
Rolled ".....	215.00	"
Farina.....	187.50	"
Farinose.....	562.50	"
Buckwheat Grits.....	450.00	"
" Flour.....	75.00	"
Oat Meal.....	101.25	"
Rolled Oats and Avena.....	195.00	"
Hominy.....	131.25	Less
Corn Meal.....	240.00	"

The complainant admits that the average value of cereal products is about 25% greater than flour. The respondent claims that the difference amounts to 40%.

Farinose, upon complainant's showing, exceeds flour in value 68%, buckwheat grits, 54%, while buckwheat flour falls to 9.1% excess of value, and corn meal shows 29.1% and hominy 15.9% less value than flour.

A table prepared from data found in this office is set forth in this report on page 9 showing the comparative rates prevailing on cereal products from Mississippi river points to Denver, 916 miles, and on similar articles from Chicago to New York, 912 miles, the western rates being made according to the Western and the eastern according to the Official Classification. The times chosen are April 1, 1891, the time when this complaint was filed; April 1, 1892; and the date when comparison was made, March 29, 1893. From this it is seen that at each date corn meal and hominy, the two articles falling in value below flour, have constantly taken the flour rate, or even a lower rate.

Therefore the question presented by complainant is, whether the other cereal products exceeding flour in value, the highest 68.2%, the lowest 9.1%, and giving an average excess in 4 INTER S.

value of 33.4%, should take the same classification, and therefore the same rate, as flour, values alone being considered?

It is a conceded rule of classification that value, on account of enhanced risk and ability to pay a greater proportion of the aggregate return upon investment, may justify a higher classification, and in view of this rule the difference in values here shown is sufficiently great to justify the conclusion that the comparison as to value alone furnishes no sufficient reason for a classification with flour. Complainant also urges as a reason for granting its prayer that the actual cost of the service rendered in transporting cereal products does not greatly differ from the cost of transporting flour.

The nature of the service as well as the evidence in the case leads to the belief that, in this particular, the difference between flour and cereal products is not of itself any justification for a different classification; but this fact must be considered in connection with other conditions to be noted, and from the combined situation we must seek to draw a just conclusion.

When we come to a consideration of the volume of business, there is a marked difference in favor of flour. The entire tonnage of cereal products is only about four per cent of the tonnage of flour, the ratio being as four to one hundred.

The evidence shows that at times the movement of empty cars westward from Chicago is very large, and that this is the case when flour and grain are moving eastward in large quantities; and complainant urges this fact as a reason for the classification of cereal products with flour.

The heavy tonnage of flour and grain eastward bound concentrates at certain periods large numbers of cars at Chicago, and it is not always practicable to obtain return loads for all of them at current rates. This may be one reason why cereals now have a relatively low

rate. We find that none of the products are placed higher than fourth class, some in fifth class, some taking flour rate, and in one instance one product having even a lower rate than flour.

But the question is, whether the entire group of articles known as cereal products involved in the complaint should be carried at the flour rate. The complainant contends that the situation should result in granting to cereal products the rate for carrying flour, when such products move in the same direction as the empty cars. The outcome of this reasoning would be that until the return cars were all filled by such stimulation of movement every article moving westward should take the flour rate.

That a large movement of return empty cars may rightfully under certain circumstances justify a lower rate is undoubtedly true. When articles of traffic do not move on account of a rate which constitutes too great a burden and the carrier is moving empty cars in the direction in which such articles would naturally move, at a lower rate, the carrier may be justified in carrying at a rate sufficient to bring about their movement, even at a rate barely remunerative. But no extra or additional charge in consequence can justly be put on other articles carried.

We therefore conclude, that before complainant could maintain its contention it should show that the rate now charged is unreasonably high, or that the articles are now charged a rate practically prohibitory. The fact shown by tables accompanying this report that in a comparison of eastern with western rates, the excess charge on cereal products in the west over charges on cereal products in the east is not equal to the average excess of western over eastern rates, seems to prove that such products are enjoying exceptional advantages over the average articles of commerce moving in the two regions. Whether or not the general excess of westbound over eastbound rates is relatively too great, is (as we shall hereafter show) now undergoing investigation in another case pending before the Commission, and upon other considerations we conclude that the complainant is not discriminated against by the present rates, without at this time passing upon the question of whether the present rate on cereals is unreasonably high. Its relation to other rates does not seem out of proportion, upon the record made in this case. The fact that such articles do now move in considerable quantities, is proof that the rate is not prohibitory. We, therefore, are unable to say, from the evidence before us, that the rate charged on cereal products now is unreasonably high, and it is not apparent from any evidence offered in this case that the rate is pro-

hibitory in character and there is, as has been said, some movement of the articles.

The changed classification and rate, we think, could only be justified if, after full consideration of the situation and interests of competing manufacturers located at Kansas City, Terre Haute, Elgin and many other points, and its effect upon their business, it was made apparent that it would not injure or subject them to undue disadvantage. The territory served by the roads carrying eastward from Chicago may justify the rates and classification prevailing in the region traversed by their lines, while it may also be true that the circumstances and conditions prevailing in the territory served by the western roads are a justification of different classifications and rates on their lines. It must be manifest, however, that if present rates are unjust and unequal to the complainant, it would be entitled to a change giving it equal and just rates without considering the effect of such change on competitors. In that case its advantage would result from its situation, of which competitors would have no right to complain.

It seems probable that the western classification was originally made because it was supposed to meet the demands and requirements of the region to be served. Presumably in the matter now under inquiry it has done so, for no complaint has come from the manufacturers of cereal products in that territory. If in two regions there are different modes of treatment, that different treatment is to be reached to a large extent by different rates. If this is the reason of the different rate, and this is claimed in the argument, and we think the situation justifies such a claim, there should be no change unless to relieve complainant from an unjust discrimination resulting from the differing classifications and rates, and to this situation we turn our attention.

The complainant, by virtue of a very large plant and numerous mills located at Akron and other points (See 8d Finding of Facts) controls about one half of the trade in cereal products. One witness said "We (the complainant company) acknowledge no competitor west of Chicago." Complainant manufactures about one half of all the cereal products made in the United States. It is probable that because of the magnitude of production by complainant the cost is greatly reduced.

The annual output of complainant's several mills is as follows:

Flour in barrels	275,000
Oatmeal "	125,000
Rye "	35,000
Barley "	50,000
Other cereal products in barrels.....	65,000

Complainant's advantages in competition are obviously great and controlling to a large degree.

The remaining half of the product made in the United States is the output of manufacturing located at Chicago, Kansas City, Mason, Cedar Rapids, Muscatine, Terre Haute, Indianapolis, Elgin and other places, principally in the west.

It may be assumed that these competitors being nearer the western market procure grain at a less cost than complainant. The shipments of flour made by complainant are not made westward in very great quantity. It makes an occasional shipment but its specialty is cereal products. The competitors of complainant are equally with complainant interested in a proper classification of these products. It can scarcely be doubted that the classification has been to them a matter of careful consideration with reference to the business in which they are engaged.

In the case of *Bates v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 719, 8 L. C. C. Rep. 447, it was held unjustifiable to change a classification when such change would materially injure an important industry, and a class of shippers who have at any given point built up an industry in reliance upon a continuation of the classification, unless the existing classification and rate is shown to operate injuriously to the complaining shipper and to give undue advantage to the other shippers.

In the case just cited two of the great lines serving the territory east of Chicago petitioned for a rehearing and upon reconsideration the Commission found "that the cost of service to the carrier, including terminal expenses properly chargeable as freight charges, is greater on the product than on the raw corn." The cost of handling the product being greater than that of handling the corn, and the corn being carried in train load lots, while the product was not so carried, were mentioned as justifying the different rate on corn from that on corn products.

The committee of expert railroad men, who some time since in response to a general desire for uniform classification, reported and recommended a classification for all the railways of the United States, placed flour in barrels and sacks, at owner's risk; grain, flour in boxes, cracked and rolled wheat in barrels, and hominy and oatmeal in barrels, in the ninth class; cracked and rolled wheat, hominy and oatmeal in boxes, pearl barley in packages and farina in barrels, in the seventh class; while corn meal was classified with and accorded the same rate as flour.

This classification, although never adopted, indicates the average judgment of practical railroad men that there is no demand in the nature of things for a classification which shall include flour and each and every one of the articles included in the general class known as cereal products.

4 INTER 8.

It is like kinds of traffic under similar conditions of transportation which should have the same classification; and in this case, on account of material differences in value and volume of business, and differing conditions of transportation, and what seems to us a failure to show that the present rate and classification on the western roads works injustice to complainant, or are in any degree discriminative or preferential, we conclude that no reason has been shown why the western roads should abandon the Western and adopt the Official Classification as to cereal products. It may be that complainant's competitors in business derive some advantage from being nearer the grain supply and the western markets named by complainant, and thus procuring grain at less cost, but if so, this is a natural advantage of situation to which they are entitled. The complainant seems to be an active competitor in the region in question with the other manufacturers of cereal products. The great economies resulting from an extensive plant and the fact that, although much farther removed from the territory in question west of Chicago, it keeps up an active trade, show that complainant also has advantages. Both complainant and its competitors are entitled to immunity from any artificial lessening of their respective advantages by classification or other device.

Much that has already been said is applicable to the prayer of the complainant that cereal products should have the same rate as flour.

To reduce a given rate it should be shown to be unjust, unreasonable, or unequal. Plaintiff's contention is that cereal products moving westward should take the flour rate. The proper determination of the question raised requires a comparison of flour as an article of traffic with cereal products. It is well known that flour is generally treated as an exceptional article of transportation, there being, as it is claimed, special reasons for its taking a very low rate. These reasons are that it is a staple article of almost universal consumption; that the original article, wheat, has both weight and low value; that it is produced in very large amounts in some parts of the country at considerable distance from a portion of the consumers; that its ratio of tonnage to cereal products is as one hundred to four; and that a very large surplus over what is necessary to meet the home demand is produced, which is compelled to seek a foreign market, and in doing so comes into sharp competition with flour manufactured abroad. These facts and the fluctuations of ocean rates, if the product shall be marketed necessitates a very low rate upon flour, which has been put much below the class rates, and thereby it has taken what is technically styled a commodity rate.

The cereal products do not come into such

general use as flour. They are not shipped abroad in such quantities. The testimony shows that complainant ships only an occasional carload to foreign markets.

The following table made from the Report of 1889 prepared by the Bureau of Statistics under the direction of the Treasury Department shows the comparative value of the exports of flour and preparations from grain used for food from 1880 to 1889 inclusive:

Flour 1880	\$35,833,197
1881	45,047,257
1882	36,875,055
1883	54,824,459
1884	51,139,696
1885	52,146,836
1886	38,442,955
1887	51,950,082
1888	54,777,710
1889	45,296,485

Products of grain or cereal products.

In 1880 Corn Meal	\$ 981,861
All other products	2,439,098
In 1881 Corn meal	1,270,200
Other products	1,443,580
In 1882 Corn meal	994,201
Other products	655,142
In 1883 Corn meal	980,798
Other products	967,829
In 1884 Corn meal	818,739
Oat meal	771,471
Other products	846,119
In 1885 Corn meal	816,459
Oat meal	1,036,011
Other products	780,855
In 1886 Corn meal	858,370
Oat meal	755,973
Other products	813,207
In 1887 Corn meal	705,343
Oat meal	456,028
Other products	672,438
In 1888 Corn meal	765,086
Oat meal	130,488
Other products	741,150
In 1889 Corn meal	870,485
Oat meal	273,173
Other products	780,549

These figures show the value of flour exported from 1880 to 1889 inclusive to have been \$465,833,232 As against cereal products including corn meal for same period.... 22,644,098

The flour of the country is manufactured at Minneapolis, Duluth, and other points in the United States, and its movement to foreign markets, as well as a very large movement for home use, is in an easterly direction. The cereal products are very largely used at home, and they move along rail and water routes in almost every direction. The tonnage if therefore diffused and not concentrated, and necessarily does not upon any of the lines produce that volume of traffic which is one of the reasons for giving a low rate to flour.

Again, the record shows, what is otherwise a matter of general knowledge, that the terri-

tory principally served by the trunk lines, in which the Official Classification prevails, is engaged quite largely in rendering transportation service to manufacturing enterprises, while the western roads, governed by the Western Classification, are much more largely engaged in serving agricultural, mining, and lumber regions, and the desire upon the part of the railways to serve the necessities of their respective territories may have led to a material difference in the basis of rates for the eastern and western regions. In the east the attempt has probably been to arrange rates so as to favor manufactured goods, while in the west there may have been an incentive to favor the heavier articles and agricultural products. Whether equal and exact justice has been attained is a question under consideration on a complaint now pending before the Commission. In that investigation the whole subject in all its details can be fully considered, while in this case attention is called to a single group of articles, and no light is thrown upon the intricate relation of the question to the whole body of articles involved in an intelligent determination of the true relation of eastern and western rates. The fact that class rates are much lower on eastern than western lines is well understood. Tables are set forth (see pages 9, 10 and 11) which show at three dates, April 1, 1891, the date of complaint; April 1, 1892; and the date of comparison; the rates on cereals, class rates east and west, and the comparative rates both as to classes and the group of articles under consideration. They show the average excess of rates in western over eastern territory to be 151½%, and the average excess of rates on cereal products over western as compared with eastern roads to be 94½%, and that since April 1, 1892, the average on cereal products westward has been reduced 9½%. Thus it is seen that no greater difference prevails in western rates on cereal products, as compared with eastern rates, but rather less than prevails as to the general body of articles moved. We therefore hold that such difference as to circumstances and conditions has been shown, in a comparison between flour and cereal products, as to lead us to decline making an order reducing the rates on cereal products to the rate upon which flour is carried.

The movement of flour in every direction from place of manufacture to market, mainly on and towards the seaboard and from coast to foreign markets, has been one of many conditions supposed to justify its low rate; and complainant having failed to show such similar conditions and circumstances attending the shipment of cereal products, the Commission does not feel authorized to grant an order extending the flour rate to cereal products.

Statement Showing Rates on Cereals.

ARTICLES.	FROM AKRON, OHIO, TO MISSISSIPPI RIVER (East St. Louis).				FROM MISSISSIPPI RIVER (St. Louis) TO DENVER, COLO.				FROM CHICAGO, ILL., TO KANSAS CITY, MO.				FROM CHICAGO, ILL., TO NEW YORK.			
	MILES, 642.				MILES, 916.				MILES, 483.				MILES, 912.			
	April 1, 1891.	April 1, 1892.	Present Rate.	Rate per ton per mile.	April 1, 1891.	April 1, 1892.	Present Rate.	Rate per ton per mile.	April 1, 1891.	April 1, 1892.	Present Rate.	Rate per ton per mile.	April 1, 1891.	April 1, 1892.	Present Rate.	Rate per ton per mile.
	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.
	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.	Rate per 100 lbs.
Rolled Oats.....				.0109			.0109	.0109	23	.0094		.0098				
Oat Meal.....				.0109			.0109	.0098	23	.0094		.0098				
Hodiny.....				.0109			.0109	.0098	25	.0102		.0098				
Buckwheat.....				.0109			.0109	.0109	23	.0094		.0098				
Flour.....				.0109			.0109	.0109	23	.0094		.0098				
Grits.....	15	15	15	.0109			.0109	.0098	25	.0102		.0098				
Wheat.....				.0109			.0109	.0109	23	.0094		.0098				
Rolled Wheat.....				.0207			.0207	.0098	25	.0102		.0102				
Pearl Barley.....				.0207			.0207	.0153	25	.0102		.0102				
Cracked Wheat.....				.0207			.0207	.0102	25	.0102		.0102				
Corn Meal.....				.0098			.0098	.0098	23	.0094		.0098				

Statement Showing Class Rates.

	MILES.	IN CENTS.					
		1	2	3	4	5	6
From Akron, O., to Miss. River (East St. Louis).....	542						
Rates in effect April 1, 1891, per 100 lbs. }		43	38	28	20	18	15
1, 1892, " " }							
Present Rates, " " }							
Rate per Ton per Mile.....		.0159	.0140	.0103	.0074	.0066	.0055
From Miss. River (St. Louis) to Denver, Colo.....	916						
Rates in effect April 1, 1891, per 100 lbs. }		2.12	1.70	1.42	1.15	.95	
1, 1892, " " }							
Rate per Ton per Mile.....		.0463	.0371	.0310	.0251	.0207	
Present Rates (in effect July 22, 1892), per 100 lbs.....		1.80	1.35	1.12	.90	.70	
Rate per Ton per Mile.....		.0393	.0295	.0244	.0196	.0153	
From Chicago, Ill., to Kansas City, Mo.....	488						
Rates in effect April 1, 1891, per 100 lbs. }		75	60	42	30	25	
1, 1892, " " }							
Present Rates, " " }							
Rate per Ton per Mile.....		.0307	.0246	.0172	.0123	.0102	
From Chicago, Ill., to New York.....	912						
Rates in effect April 1, 1891, per 100 lbs. }		75	65	50	35	30	25
1, 1892, " " }							
Present Rates, " " }							
Rate per Ton per Mile.....		.0164	.0142	.0110	.0077	.0066	.0055

Comparative Statement showing Rates on Cereals, per hundred pounds and per ton per mile in Official and Western Classification Territories.

ARTICLES	MISSISSIPPI RIVER (ST. LOUIS) TO DENVER, COLO., WESTERN CLASSIFICATION, 916 MILES.						CHICAGO, ILL. TO NEW YORK, N. Y. OF- FICIAL CLASSIFICA- TION, 912 MILES.	
	Rate April 1, '91.		Rate April 1, '92.		Present Rate.		Rate since April 1, '91.	
	Rate in cents per 100 Lbs.	Rate per ton per Mile.	Rate in cents per 100 Lbs.	Rate per ton per Mile.	Rate in cents per 100 Lbs.	Rate per ton per Mile.	Rate in cents per 100 Lbs.	Rate per ton per Mile.
Rolled Oats....	50	.0109	50	.0109	50	.0109		
Oat Meal	50	.0109	50	.0109	44	.0096		
Hominy	50	.0109	50	.0109	44	.0096		
Buckwheat	50	.0109	50	.0109	50	.0109		
Flour	50	.0109	50	.0109	50	.0109		
Grits	50	.0109	50	.0109	44	.0096	25	.0055
Wheat	50	.0109	50	.0109	50	.0109		
Rolled Wheat..	95	.0207	50	.0109	44	.0096		
Pearl Barley...	95	.0207	95	.0207	70	.0153		
Cracked Wheat	95	.0207	50	.0109	44	.0096		
Corn Meal	45	.0098	45	.0098	44	.0096		
AVERAGE.	61 $\frac{1}{2}$	.0184 $\frac{1}{2}$	53 $\frac{1}{2}$	.0116 $\frac{1}{2}$	48 $\frac{1}{2}$	.0105 $\frac{1}{2}$	25	.0055

The above table shows that the present average rate on cereals from the Mississippi river to Denver, Colo., under Western Classification, is 23 $\frac{1}{2}$ cents or about 94% greater than the present rate from Chicago to New York, under Official Classification, an equal distance. Also, that the present average rate per ton per mile on cereals from the Mississippi river to Den-

ver, Colo., is .00501¢ or about 92% greater than that for the same distance — Chicago to New York. Rates in the East remain the same, while in the West an average reduction of 8 $\frac{1}{2}$ cents or more than 13% is seen from 1891 to 1892

and 5 $\frac{1}{2}$ cents or about 9 $\frac{1}{2}$ % from 1892, to the present time. The rate on flour, Mississippi river to Denver, remains the same, while hominy shows a reduction of 6¢ or 12%, and corn meal 1 cent or 2 $\frac{1}{2}$ %.

Similar Comparison of Class Rates.

RATES COMPARED IN CENTS PER HUNDRED POUNDS.

FROM MISSISSIPPI RIVER TO DENVER, COLO., 916 MILES.				CLASSES.	FROM CHICAGO, ILL., TO NEW YORK, N. Y., 912 MILES.	
Rates Effective July 22, 1892.		Rates in Effect April 1, 1891 and 1892.			Rates in Effect Since April 1, 1891.	
Per 100 lbs.	Rate per Ton per Mile.	Per 100 lbs.	Rate per Ton per Mile.		Per 100 lbs.	Rate per Ton per Mile.
Cents.	Cents.	Cents.	Cents.		Cents.	Cents.
180	3.98	212	4.68	1.	75	1.64
185	2.95	170	3.71	2.	65	1.43
112	2.44	142	3.10	3.	50	1.10
90	1.96	115	2.51	4.	35	.77
70	1.58	95	2.07	5.	30	.66
				6.	25	.55
117½	2.56½	146½	3.20½	Average.	46½	1.02½

The above table shows that the average rate from the Mississippi river to Denver, Colo., under Western Classification, is 70 $\frac{1}{2}$ cents or 151 $\frac{1}{2}$ % greater than the present average rate from Chicago to New York under Official Classification, an equal distance. The average rate per ton per mile for the same territory west is therefore \$1.53 $\frac{1}{10}$ or 150% greater than that for the corresponding territory east as above. Rates in general in the east remain the same, while in the west an average reduction of 29 $\frac{1}{2}$ cents or about 20% appears.

With regard to the question of allowing the same rate on mixed carloads which is given to carloads of a single product, it may be remarked that it is almost inextricably involved in the question of the rate. A rule which might work well when the load was composed of articles bearing the same rate would be very difficult to formulate where the different articles took differing rates. The questions, which rate should govern; whether the highest or lowest; whether the proportion of different articles should influence the car load rate; whether the mixed rate should follow the highest or lowest class rate, would all be involved, and it would probably be found difficult to formulate an equitable rule which should fix the rate upon such a load.

The matter should, moreover, be considered upon the theory of complainant, which contemplates a common rate for flour and each

one of the cereal products. That in such case an abrogation of the rule of the Western Classification as to mixed carloads would result in pecuniary benefit to the complainant cannot be doubted. Respondents however claim that such an order as complainant asks would be unjust.

The rule of the Official Classification which complainant wishes adopted for western service reads as follows:

"8. A. When a number of different articles of the same class are shipped at one time by one shipper to one consignee at one point of delivery in a full carload, they shall be taken at the rate per hundred pounds for such class in carloads. If the articles are of more than one class the carload rate and minimum carload rate for the article of the highest class shall be charged on all the articles that make up the carload."

It is apparent that the adoption of this rule by the western roads would not greatly benefit the complainant unless the rate for transportation of cereal products is made the same as that charged for the transportation of flour, for under the rule quoted above, with a differing rate on the articles making the load, the entire load would take the rate charged for the highest classed article which would be found as part of the load, without reference to its proportion of the full carload.

The Western Classification denying a rate to

mixed carloads of these products is defended by the respondents as necessary in order that the manufacturers of a single cereal product may have fair treatment and be allowed to compete in the market. It is claimed that as the complainant manufactures all the cereal products, while his competitors manufacture as a rule one or more, but not all the articles, to grant a mixed carload rate would enable complainant to crush out all competition on the part of those who make only one or two of the products in controversy.

This is illustrated in the case of oatmeal in this manner. There are mills which manufacture oatmeal alone. A dealer would not usually wish to order a full carload of oatmeal if he could purchase a part load on as favorable terms. He would be required to invest less capital, and would get quicker returns from his investment, if he could buy a smaller quantity than a carload of oatmeal, and if allowed to ship a mixed carload of cereal products at a very low rate, or at the carload rate for a single product, he would purchase from a manufacturer that could give him a carload of the several products in smaller quantities, rather than from one who could only furnish a single article, so that the single product manufacturer could not so successfully engage in the trade. This would likely be the result, and counsel for complainant in argument virtually admits it, but alleges that such a result is one with which the carriers can and ought to have no concern, or at any rate that it is not within their province to remedy such an evil; that the states could not without the consent of Congress levy a tonnage tax to meet such a situation; that the railroads, as the creatures of the state, have no right to do what it could not do, and that the denial of the mixed carload rate is substantially the levy of a tax on tonnage, and as such is an unlawful interference with interstate commerce.

But it can hardly be successfully argued that a prohibition against the states, intending to keep them from interfering with interstate commerce, can apply to a question involving the proper method of regulation of interstate commerce by the Federal Government.

It is undoubtedly true that neither the Commission nor carriers are charged with any parental oversight over localities, or authorized to stimulate them with artificial helps to prosperity. But when a method of regulation would have the effect of throwing many competitors out of the trade, and centralizing it in the hands of one or more dealers, it would not be permissible if another method, without doing wrong to any one, would have the effect of leaving the market open to all competitors; for it is undoubtedly true that both the law and good business principles favor all fair competition. The rule is simply a limitation put up-

on the extension of the carload rate, and should be proven by complainant to be unfair, unjust and discriminative, if its abrogation is sought.

Complainant urges that the "rates, classifications, schedules and rules of defendants are so oppressive, unreasonable and unjust that it is wholly prevented from shipping any products except flour, oatmeal and rolled oats, from Chicago to any points in Iowa, Nebraska, Missouri, Kansas and Colorado, and especially to the cities of Denver, Colorado Springs and Pueblo, in the state of Colorado."

This is denied by the defendants, and they say that giving to this complainant the advantages asked by it would be to give it a rate from Chicago to Denver 97 cents per 100 lbs. better than is given those shipping small lots to Denver, and a proportional advantage would be given on shipments to other western points, resulting in serious injury to the business of the smaller shippers. It is said that complainant, if granted its prayer, could ship from Chicago to Denver 5000 lbs. pearl barley in boxes and barrels, and 15,000 lbs. cracked wheat in boxes and barrels, making a carload, at 55 cts. per 100 lbs., being the carload rate on flour; while a manufacturer of pearl barley alone, shipping from Chicago to Denver 5000 lbs. pearl barley in boxes and barrels, would pay the 3d class rate, \$1.52 per cwt., which is 97 cts. more per cwt. than the rate complainant demands.

There is thus brought into question the relation of rates between mixed carloads of cereal products, and less than carload shipments of a single cereal product. But upon this important matter of regulation, namely, the preservation of proper relations between the differing kinds of shipments above mentioned there has been no evidence offered. The proper relation of rates, if not preserved, introduces into transactions in transportation confusion and discrimination; and whatever may be the facts with regard to the rates now charged complainant on mixed carloads, it has not, in making out its case, offered any evidence nor furnished the Commission with any data upon which a comparison of such rates can be made. Without, therefore, passing upon the question raised in such a manner as to determine it upon its merits, we hold that in this case there has been no sufficient evidence to justify the order as to mixed carloads asked by complainant. This conclusion is reached, however, with the reservation that it does not preclude the Commission from entertaining another complaint against the rates on cereals based on other grounds, and raising the question either as to the reasonableness of such rates in themselves, or as to their relation to other similar rates.

BLANTON DUNCAN

THE ATCHISON, TOPEKA & SANTA FÉ RAILROAD COMPANY, THE ATLANTIC & PACIFIC RAILROAD COMPANY, and THE SOUTHERN CALIFORNIA RAILROAD COMPANY, known as the Santa Fé System.

BLANTON DUNCAN

THE SOUTHERN PACIFIC COMPANY and THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

[Nos. 270, 271.]

1. The remedy of a party for injury to goods shipped resulting from delay, detention, loss, breakage, rotting or other deterioration or damage, not attributable to a violation of any provision of the Act to Regulate Commerce, is by appropriate action in the courts.
2. Where a contract is made with a shipper by a carrier, member of a through line, for shipment of goods over the line at a less than the published lawful rate charged shippers in general, it is not a violation of the Act to Regulate Commerce for the delivering carrier to exact payment of the full lawful rate before delivery. Where, however, the shipper did not enter into the contract willfully for the purpose of securing a rate which he knew, or by the exercise of reasonable diligence might have known, to be illegal, but was an innocent party to it and made the shipment on the faith of the rate named, the courts seem inclined to hold (and it is a matter for their determination) that justice to the shipper requires that the goods be delivered on payment by him of the amount specified in the contract.
3. There is no necessary connection or relation between the rates on traffic of the same kind or class transported between the same points in *opposite directions* over the same road or line, and the fact that such rate in one direction is materially higher than that in the opposite direction does not, as in case of hauls over the same line in the *same direction*, establish prima facie the unreasonableness of the higher rate. This is especially true where the hauls are of great length.
4. The rates charged on "household goods" will not be declared unlawful on the mere fact that as a condition of granting them the defendants require the shipper to release all claim for damages in case of loss to the amount of \$5.00 per 100 lbs. or \$1000.00 per carload of 20,000 lbs., there being no proof showing that such rates are unreasonable in view of said limitation. In cases of loss, the shipper's remedy is at law, and the question of the reasonableness or validity of a contract limiting the carrier's liability is to be determined in the courts on the facts in each case.
5. Unless within the authorized exceptions to the general rule of the statute, discriminations in charges upon like shipments of the same commodities based solely upon the purpose or "business motive" of the shipper are unlawful, whether effected directly, or indirectly by methods of classification.
6. Under the Western Classification and tariff there are two west bound carload rates from Mississippi river points to Pacific coast terminals on goods termed "Emigrants' Movable" (including "household goods") one a general class rate and the other designated a "commodity" rate and less than the general rate; the latter rate is published as being open to "intending settlers only," but in practice it is given to shippers indiscriminately, and does not appear to be unreasonable in itself. *Held*, (1) That there is neither propriety in, nor necessity for, retaining in the classification and tariff either the two rates, or the statement in connection with the commodity rate that it is open to "intending settlers only," as their retention can only serve to mislead the public and afford opportunity for the practice of favoritism and unjust discrimination as between shippers; (2) That the west-bound rate on "Emigrants' Movable" (including "household goods") from Louisville to Los Angeles should not be in excess of the amount of said commodity rate thereon.
7. While the circumstances and conditions in respect to the work done by the carrier and the revenue earned are dissimilar in the transportation of freights in carloads and less than carloads, and a lower rate on carloads than on less than carloads is, therefore, not in contravention of the statute, yet the difference between the two rates must be *reasonable*.
8. The agreement of the Trans-continental Association on file with the Commission is not on its face a "contract, or agreement or combination," for the "pooling of freights" or "division of earnings" between different and competing railroads, such as is declared unlawful by section 5 of the Act to Regulate Commerce.

Decided November 3, 1893.

QUESTION on rates of freight on carload and less than carload lots of "emigrants' moveables" and limitation or release of liability for damages. See Complaint, 8 Inters. Com. Rep. 256.

Mr. Blanton Duncan for complainant.

Messrs. Britton & Gray for Atchison, Topeka & Santa Fé R. Co. and affiliated companies.

Mr. James C. Martin for Southern Pacific Co.

Mr. Edward Baxter for Louisville & Nashville R. Co.

REPORT AND OPINION OF THE COMMISSION.

Clements, Commissioner :

These two cases were brought by the same complainant, Blanton Duncan, and as they raise similar, and to some extent identical, questions, may be considered together.

The case (No. 270) against the Atchison, Topeka & Santa Fé Railroad Company, the Atlantic & Pacific Railroad Company and the Southern California Railroad Company (which are known as the "Santa Fé System"), relates to a shipment by complainant over the roads of defendants in January, 1889, of a carload of "household effects" from Louisville, Ky., *via* St. Louis, Mo., to Los Angeles, Cal., and the subsequent shipment in September of that year of a "carload of household goods, containing a large portion of the same effects" back from Los Angeles over the same route to Louisville. It is alleged that the charge for the transportation of the carload from Louisville to Los Angeles was \$263.00, and from Los Angeles back, \$350.00, and that this was a "discrimination against complainant and the locality (whether Louisville or Los Angeles is not stated) and a violation of the 8d section of the Act to Regulate Commerce." It is also charged, that on the eastbound shipment the goods were in transit six or eight days longer than is usual for the passage of cars over that route and about eight days longer than the transit of the westbound carload, and were received by complainant at Louisville in a badly damaged condition—the damage being estimated at about \$1000.00.

In the case (No. 271) against the Southern Pacific Company and the Louisville & Nashville Railroad Company, complaint is made in reference to a shipment by complainant on January 12, 1889, of a carload of goods over

the roads of defendants from Louisville *via* New Orleans to Los Angeles. As to this shipment, it is alleged, that "the Louisville & Nashville Railroad Company, through its agent, made a contract with complainant in writing, to transport from Louisville to Los Angeles a carload of 'emigrant moveables,' not to exceed 20,000 lbs. in weight, for the sum of \$263, which was the rate for such carload for emigrants on the printed tariffs of the defendant companies" and "it was further agreed in said written contract, that complainant should ship in the same carload his furniture, mirrors, pictures and household effects generally, and some hams, lard, apples, butter, eggs, cheese, etc., as a part of his said emigrant moveables, without becoming subject to any further demand or claim, because they were of a different and lower classification, than household effects;" that "in pursuance of said contract the Louisville & Nashville Railroad Company received [and shipped the said effects which were received in Los Angeles on Feb. 1st by the Southern Pacific Company and on notice thereof the complainant gave to the Southern Pacific Transfer Company the \$263.00 in payment of the freight;" that thereupon, the furniture was delivered, but the Southern Pacific Company refused to deliver the provisions, etc., claiming that it was a mixed carload and demanding an additional sum of \$128.10 as freight on the provisions, etc., and on complainant's refusal to pay the additional freight held said provisions, etc., until after March 14, 1889; that complainant, about March 8, engaged a firm of lawyers to sue said railroad company for illegal conversion of the goods, and the agent of the company having heard of this requested complainant's lawyers to hold

up proceedings, and thereafter, on March 14, wrote complainant that the company would surrender the goods without further payment of freight; that complainant then accepted the goods, with notice to the company that all damage resulting from their detention would be claimed, and that "from rotting and other causes an immediate sale was necessary, with damage to a large amount, which the company refused to pay." The complainant charges that the demand by the Southern Pacific Company of the additional freight charge was a "discrimination against him in violation of the Act to Regulate Commerce." In an amendment to the complaint in this case, it is further alleged, that the Southern Pacific Company by its tariff in combination with other railroads discriminated in 1889 between west bound rates charged for household goods from Louisville to Los Angeles and rates on such goods from Los Angeles east bound to Louisville, the rate per carload west bound being \$263.00 and for the same classification and commodity over the same line east bound, being \$350.00 per car; and that this is violative of section 3 of the Act to Regulate Commerce.

In the complaints in both cases the following additional allegations and charges are made:

1. That by the tariffs of the defendant carriers the rate on "household goods" per 100 lbs. for less than the carload of 20,000 lbs. is \$3.95, both east and west bound, and the rate per carload of 20,000 lbs. is \$263.00 and that this is unreasonable, in that it compels shippers to pay for a carload of 20,000 lbs. even if the weight of the shipment is less than 10,000 lbs.; that said carriers further exact, as a condition of granting said rates, a release by the shipper of all claim for damages for loss in excess of the amount of \$5.00 per 100 lbs., and that this also is unreasonable and a violation of the Act to Regulate Commerce.

2. That the defendant carriers are "in combination with other common carriers under the name of the Trans-Continental Traffic Association, under the rules of which they committed the violations of the Act" recited by complainant; and that "said combination is violative of section 5 of the Act," forbidding the pooling of freights and division of earnings of competing railroads, in that "it is a combination on the part of the carriers to pool and divide earnings effectually, by upholding the prices of freights among the different and competing railroads."

The defendants in their answers deny all the alleged violations of law on their part and set up various matters of fact, which, so far as deemed relevant and established by the proof, will be stated and discussed in our findings of fact and conclusions.

The complainant submitted a motion in case No. 270, which is stated at the outset to be a
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motion "*to strike out the answer of the defendants as irrelevant, flippant and frivolous; as containing scandalous and libelous matter, and as in disrespect of this court*" (commission), specifying certain portions of the answer as subject to those objections. The motion concludes with a prayer "that the defendants be ordered to *reform their pleading*." The motion taken as a whole we consider to be in legal effect a motion to have the answer *reformed* by striking therefrom the alleged objectionable matter. Parts of the matter referred to (and which we deem it unnecessary to set forth), while doubtless provoked by the evident warmth exhibited by the complainant in his petition, were not in our opinion justified or proper to be inserted in the answer in this case. The offensive averments made the basis of the motion are, however, surplusage; and the answer without reference to them puts in issue all the material allegations of the complaint; the parties have appeared (the determination of the motion as preliminary not having been insisted upon) have introduced their evidence, argued the case upon its merits and submitted it for our adjudication thereon, and an order at this time requiring the defendants to reform their answer by expunging therefrom the objectionable matter would only result in further delay. The matter referred to will be treated as stricken out and will not be considered in our determination of the questions presented. While under the circumstances we deem it inadvisable to issue a formal order granting the complainant's motion, it is proper to say, that the use of offensive personalities and statements in pleadings, when not essential to a full presentation of the pleader's case, should be carefully avoided and that in this case it meets with our disapproval.

In case No. 270 there is a motion, also, on the part of one of the defendants, the Atchison, Topeka & Santa Fé R. Co., to strike from the file the deposition of the complainant, Blanton Duncan, taken at Louisville, Nov. 22, 1890, on the ground as stated in the motion, that "reasonable notice of the taking thereof was not given respondent, as required by U. S. Rev. Stat. § 863 and Rule XII. of this Commission." The Rule XII. referred to is that contained in the "Rules of Practice" adopted by this Commission, June, 1889, which were in force at the time the deposition in question was taken. It provides that "when a case is at issue on petition and answer, each party may proceed at once to take depositions of witnesses in the manner provided by sections 863 and 864 of the Revised Statutes." Section 863 requires "reasonable notice" to be given in writing "to the opposite party or his attorney of record, as either may be nearest." The notice given by complainant was by registered letter addressed to "Robert Dunlap, Atty. A.

T. & S. F. R. R., Topeka, Kansas," advising him that the complainant and other witnesses would be examined before a notary public in Louisville on Nov. 22, 1890, at 10 A. M. Dunlap was not the attorney of record of the defendant and if he had been, we do not think the notice was "reasonable," as it was received by him at Topeka, a distance of 622 miles from Louisville, only two days prior to the time named for taking the testimony. But, it will be observed, Rule XII. invoked by the defendants, only applies "when a case is at issue on petition and answer." By Rule IV. it is required that "a carrier complained against must answer the complaint made within 20 days from date of notice thereof." The defendants' attorneys, Messrs. Britton & Gray, acknowledged service of a copy of the complaint, Sept. 6, 1890, but filed no answer until Dec. 20, 1890, nearly three months after the expiration of the time prescribed by the rule for filing answers and about a month after the deposition in question had been taken. When the deposition was taken the cause was not at "issue on petition and answer," and the defendants were then and had been in default nearly two months, not having answered within the prescribed time. In cases of such default the following provisions of Rule XI. apply: "The petitioner or complainant must in all cases prove the existence of the facts alleged to constitute a violation of the Act, unless the carrier complained of shall admit the same, or shall fail to answer the complaint. . . . In cases of failure to answer, the Commission will take such proof of the charge as may be deemed reasonable and proper, and may make such order therein as the circumstances of the case may require." At the hearing the complainant offered himself for cross-examination on the matters contained in the deposition and the counsel for defendant availed himself of this offer, reserving the right to insist upon the motion. It will be seen that under the views which we take of the law applicable to the questions presented in this case, the facts testified to in the deposition and not elsewhere proven can not prejudice the defendant in this proceeding. It is, therefore, unnecessary to decide whether under the circumstances above detailed the motion should or should not be granted.

Facts and Conclusions.

Where injury or damage is sustained by a party "in consequence of any violation" by a common carrier of the provisions of the Act to Regulate Commerce, it is made the duty of this Commission to issue "a notice to said common carrier to cease and desist from such violation or to make reparation for the injury so found to be done, or both." The injury to goods of complainant on their reshipment to

Louisville in September, 1889, set up in case No. 270 against the companies forming the "Santa Fé System," does not appear to have been in consequence of a violation of any of the provisions of the Act. He testifies that the goods were received by him "in a badly smashed condition, the repairs on part of which cost him over \$600.00," and that the transit was seven days longer than on the original shipment of the goods west. The damage to the goods shipped January 12, 1889, to Los Angeles, mentioned in case No. 271, against the Louisville & Nashville and Southern Pacific Companies, appears to have resulted from "rotting and other causes" of the perishable part of the shipment during its detention by the Southern Pacific Company after its arrival at destination. The detention was because of the failure and refusal of the complainant to pay as freight on the goods so detained, a sum in addition to the amount specified in the bill of lading and in a contract made by complainant with the initial carrier, the Louisville & Nashville Company, for the entire shipment, embracing household furniture as well as the detained articles. The demand of this additional sum is charged by the complainant to have been a "discrimination against him in violation of the Act to Regulate Commerce." As will be seen from our discussion of the matter *infra*, this charge cannot, in our opinion, be sustained. Therefore, in this case, also, the damage complained of cannot be made the basis of an order of reparation as being "in consequence of any violation of the Act." The remedy of a party for injury to goods shipped resulting from delay in transit, detention, loss, breakage, rotting or other deterioration or damage not attributable to a violation of any provision of the Act, is by proper action in the courts. *Loud v. South Carolina R. Co.* 4 Inters. Com. Rep. 205, 5 L. C. C. Rep. 529. The complainant, it is proper to say, does not ask for orders of reparation from this Commission, and has instituted suits in court for the recovery of his alleged damage in both cases.

We will now consider the contention of complainant (to which we have just adverted), that the demand by the Southern Pacific Company of the additional freight charge on what we have denominated the perishable part of the shipment "was a discrimination against him in violation of the Act to Regulate Commerce." The Louisville & Nashville R. R. Company by its agent contracted with the complainant to ship a carload, not to exceed 20,000 lbs. in weight, of household furniture and goods as "emigrants' movables" from Louisville *via* New Orleans to Los Angeles, over its own road and that of the Southern Pacific Company, for \$263.00, with permission to embrace in said carload apples, bacon, lard,

etc. The rate designated as a commodity rate on "emigrants' movables" from St. Louis and New Orleans (Mississippi river points) to Los Angeles under the west bound tariff of the Trans-Continental Association was \$215.00 per carload of 20,000 lbs. The rate of \$263.00 which the Louisville & Nashville R. R. Co. agreed to charge complainant was a combination of the local rate from Louisville to St. Louis with the \$215.00 rate from the latter point on. This rate was the lowest possible on any combination of rates by any route from Louisville to Los Angeles, the combination on New Orleans (*via* which the goods were shipped) being \$288.00, or \$25.00 more. The Southern Pacific Company, after making out an original bill for \$288.00 based on the combination on New Orleans, reduced it to \$263.00, which the complainant paid. The furniture and household goods were delivered, but the apples, bacon, lard, etc., were detained as not being "emigrants' movables," and a separate bill of \$122.10 was made out therefor, which the complainant refused to pay. Thereupon a correspondence was had between the Southern Pacific and the Louisville & Nashville which resulted in an order from the Louisville & Nashville Company directing the Southern Pacific to charge up the \$122.10 against the Louisville & Nashville Company. The Southern Pacific Company then delivered the goods to complainant (except the apples, which had been sold as perishable and accounted for) in, as he alleges, a damaged condition resulting from the detention. The rate of \$263.00 given complainant by the Louisville & Nashville Company was the west bound rate on "emigrants' movables," and it appears that the articles detained by the Southern Pacific Company did not belong to that class of goods as defined in the current western classification. The charge for those goods of \$122.10 appears to have been in accordance with the regular published tariff, and the Louisville & Nashville Company recognized this by having that amount charged to it in its settlement with the Southern Pacific. From these facts it does not appear that the Southern Pacific Company discriminated against the complainant in making the additional charge, but only demanded (as the law required) the regular published tariff rates on such shipments, and which were, or should have been, charged all shippers alike. If this rate was in itself reasonable (as to which there is no evidence *pro* or *con*) its exaction was no violation of the Act to Regulate Commerce. On the contrary, the Louisville & Nashville Company would seem to have violated the Act both by a discrimination in favor of complainant in charging him less than the established tariff rates charged shippers in general and by a deviation from those rates. The complainant would, also, have been

chargeable with a violation of law if he "knowingly and willfully" obtained the transportation of his goods "at a less than the regular rates then established and in force on the line of transportation." (Sec. 10, Act to Regulate Commerce). It is proper to say in this connection that, while the demand of the full legal rate and detention of the goods for its enforcement by a carrier cannot be held to be a violation of any provision of the Act to Regulate Commerce, the question of the lawfulness of such detention, where the shipper is an innocent party to the contract and not *in pari delicto* with the contracting carrier, will arise in a suit at law for the recovery of the goods and damages for their detention and is one for the determination of the courts and not within the cognizance of this Commission.

Demand by the terminal or delivering carrier, in cases of through shipments over lines composed of two or more roads, of a greater amount of freight charges than is specified by the initial carrier in the bill of lading or contract of shipment, appears to be of common occurrence and is a matter of almost constant complaint to this Commission. It seems to be the rule on the part of carriers in such cases to detain the goods, if payment be not made. The consignee is thus left the option of paying the extra charge, no matter how unlawful or unreasonable, or of being deprived for an indefinite period of the goods, which he often urgently needs in his business or for other purposes. If payment be made and the amount paid prove to be an "overcharge," the consignee is then compelled to seek re-payment from the carrier and this is generally found to be a matter of great difficulty, involving much correspondence and many references, back and forth, from one railroad official or department to another, lasting ordinarily for months and sometimes for years. The trouble and delay incident to such claims are so great and vexatious as to preclude the consignee from attempting to obtain satisfaction where, as is generally the case, small amounts are in question. While for the most part the sum in each case may be small, the instances are so numerous, that in the aggregate they involve a large and material amount. The shipment is made on the faith of the rate named by the initial carrier and in cases of merchandise shipments the extra charge always lowers the margin of profit on the goods and doubtless frequently causes the transaction to result in actual loss. The practice (as it may be termed from its frequency) of "overcharging" is a wide spread evil, which calls for a remedy. Where the demand by the delivering carrier is for an amount other than the regular published rate filed with this Commission, it is made unlawful by sec. 6 of the Act to Regulate Commerce,

and, if done "willfully," is declared in sec. 10 to be a misdemeanor punishable "upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed by a fine of not to exceed \$5000.00." The time, expense and trouble which are required in prosecutions under this clause of the Statute and the difficulty in making proof of the criminal intent, are so great in comparison with the amount which may be involved in any one overcharge as to render such prosecution as a general rule impracticable. Moreover, it is not to be believed, that overcharges are resorted to by railway companies "willfully" and systematically as a means of evading the law. The remedy, in our opinion, lies in the hands of the carriers and consists largely in adopting measures to prevent mistakes in the rate named to the shipper.

It is difficult to understand why mistakes in through rates should be of such frequent occurrence and why, by the exercise of ordinary diligence, they may not be avoided. If the tariffs, classifications and rules of the railway companies or associations are so uncertain or complex and confusing, that even a railroad agent, whose special duty it is to know them accurately, cannot advise shippers with certainty what the rates are, then either a simpler, more certain and less perplexing system should be adopted, or else agents of a higher order of intelligence should be employed. If the agents of the roads cannot readily understand the tariffs and classifications, how can a shipper be expected to do so? A system of tariffs and classifications unintelligible to shippers defeats the end and object of the provisions of the interstate commerce law and rules of this Commission thereunder requiring the posting and publication of rates for the information of the public.

If the contract for shipment be for a greater than the authorized rate, it is manifestly not only a violation of law by the carrier, but also an imposition upon the shipper, who, it is to be assumed, would not knowingly agree to pay such rate. In a case of that kind there is no ground, legal or equitable, for the enforcement of the contract. Where the rate specified in the contract is less than the established legal rate, and the shipper "knowingly and willfully" obtains the transportation of his property at this illegal rate, he can of course acquire no rights under the contract; but, where the shipper has not, or is not chargeable with, this guilty knowledge and intent, a different rule has been laid down in the case of the *Mobile & O. R. Co. v. Dismukes*, decided by the Supreme Court of Ala., Dec. 27, 1891 (4 Inters. Com. Rep. 200). The shipment involved in that case was from Cairo, Ill. via Mobile, Ala. over the through line formed by

the roads of the Mobile & Ohio and Mobile & Birmingham R. R. Companies, to Sunny South, a station on the latter road. The value of the goods was about \$40.00 and the freight charge named in the bill of lading delivered to the shipper was \$5.44. The charge under the tariff of rates filed with this Commission, it is stated in the opinion, would have been \$29.30. On the arrival of the goods at Sunny South, the consignee, Dismukes, tendered \$5.44, the amount specified in the bill of lading, and demanded delivery. This demand was denied, the agent of the Company claiming the established rate of \$29.30. The consignee brought suit before a justice of the peace for the value of the goods and recovered judgment. On appeal by the company, the judgment was sustained in the circuit court and finally affirmed by the supreme court of the state. The illegality of the contract appears to have been relied on as a defense by the company. The following is an extract from the opinion of the supreme court in the case:

"The Mobile & Ohio Company agreed and bound itself to carry this consignment to Sunny South, Ala., and there deliver it to Dismukes, for a certain compensation. That company has no right, under the law and its tariff of rates adopted, approved, and promulgated as by law provided, to enter into any such contract; and so far as the company is beneficially concerned in it, so far as the contract might otherwise be relied on by the carrier against the consignee, it is void, as being in the teeth of the law of Congress, as the same has been put into practical operation, upon the carrying business of the company. But it by no means follows that the consignee has no rights under it, or, indeed any less or other right than would have been his had the rate set down in the bill of lading been the approved rate for the transportation. It nowhere appears that either the consignor or consignee knew that the stipulated rate was different from the approved rate. It is not in the contemplation of the Interstate Commerce Law that persons dealing with common carriers should be held to a knowledge of what their published schedules of rates contain. These schedules are not part of the law which all men are held to know. . . . It is only when the shipper knowingly contracts for a rate differing from that therein prescribed that his act is denounced as unlawful and punished as a crime. The motive of this legislation, moreover, is the protection of persons dealing with common carriers. Its primary purpose is to prevent a resort on the part of carriers to the undue advantages which accrue to them from the circumstances of their relations to persons having need for their services. . . . To allow the carrier to draw the shipper, entirely ignorant of the schedule of rates ap-

proved by the commission, into a contract of affreightment, upon which the goods are delivered and carried, at a stipulated rate which the shipper can afford to pay,—as in this instance, about 12½ per cent of the value of the property,—and then refuse to deliver the shipment to the consignee, except upon payment of a rate which he cannot afford to pay,—in this instance, 75 per cent of the value,—and upon which the property would not have been shipped at all, would be to put a construction on the law of Congress which its terms do not require or justify, and which would defeat the purposes which actuated its enactment. True it is that the contract here is one which the Mobile & Ohio Company had no right to make. True it is that its execution on their part involved a crime. But the act of the shipper in entering into it is not, in the absence of knowledge on his part of the schedule rate, tainted with criminality, or violative of any provision of the interstate commerce acts. He is not *in pari delicto* with the contracting carrier; and he is entitled to the protection of that principle of law which enforces such a contract in behalf of the innocent party to it,—a principle which we conceive to be logically sound, and thoroughly settled upon authority. See *Tracy v. Talmadge*, 14 N. Y. 162, and numerous later cases, which are cited and discussed in a note to that case as reported in 67 Am. Dec. 153.”

(See also authorities cited in foot note, 4 Inters. Com. Rep. 200, 201.)

In cases of through shipments at through rates over lines operated by several carriers, each successive carrier knows that the transportation over its road is under a contract with, or at a rate named by, the initial carrier, and it would seem that a system may be adopted (if it does not already exist) by which each carrier, before forwarding the shipment, may know what that rate is, and that the payment of overcharges as a condition precedent to the delivery of the goods might be avoided. What we have said in this connection is intended as suggestion and for the purpose of invoking the serious consideration and prompt action of carriers in reference to a matter of general and almost constant complaint.

As appears from our statement of the allegations of the complaints, it is claimed in substance in both the cases that the charge by defendants of \$350.00 for the transportation over their respective lines of a carload of “household goods” from Los Angeles east to Louisville, while only \$268.00 is charged on a carload of goods of the same kind and classification from Louisville over said lines west to Los Angeles, is in violation of section 8 of the Act to Regulate Commerce, which forbids the giving of undue or unreasonable preferences or advantages as between persons, particular descriptions of traffic and localities. In case 4 INTER S.

No. 270 against the “Santa Fé” line, this complaint is confined to complainant’s shipment of household goods from Louisville to Los Angeles in January, 1889, and their shipment back in September of that year, and in case No. 271 against the Louisville & Nashville and Southern Pacific Companies, it relates to shipments in 1889 of “household goods” in general. Under the Western Classification (which is applied to this traffic) “household goods” and what are termed “Emigrants’ movables” (which embrace “household goods” and other articles hereinafter named) in carloads are classed ‘B’ and the class rate on them from Louisville to Los Angeles and from Los Angeles to Louisville is the same both ways, \$350.00. On complainant’s shipments from Los Angeles to Louisville, he was charged this rate, it being the only east bound rate between those points applicable to his shipments. On shipments west, however, from Louisville to Los Angeles, there is also what is called a “commodity” rate on “emigrants’ movables” and this rate, as heretofore shown, amounted to \$268.00 per carload. The complainant’s goods were shipped west under this rate on “emigrants’ movables.” The difference between the two rates is \$87.00, and the goods shipped by complainant west were of the same kind and would come under the same classification as those shipped by him east.

“Emigrants’ Movables” are defined in the Western Classification as the “property of *intending settlers only*,” and the terms apply (according to that classification from which we quote) to “Household goods; second hand farm machinery and vehicles; livestock, not exceeding ten (10) head; trees and shubbery; lumber and shingles (not to exceed in the aggregate the equivalent of 2500 ft. of lumber); fence posts (not to exceed 250 in number); or a portable house; and property *included in the outfit of intending settlers*, but does not include doors, sash, blinds, provisions, grains (unless intended for seed or for feeding animals while in transit) general merchandise, nor any articles intended for sale or speculation.” The testimony is that the commodity rate on “Emigrants’ Movables” west bound was adopted for the purpose of assisting and stimulating *emigration* westward to the Pacific coast and territories and thus increasing the business of defendants. While this rate was, doubtless, primarily made for the use of “intending settlers” or emigrants only, in practice (according to the evidence) it is given to shippers indiscriminately, without inquiry as to whether or not they are emigrants and without reference to the intent with which the shipment is to be made. The complainant was allowed this rate, although, as he testifies, he was not an emigrant or “intending settler.” It is, therefore, practically a rate open to shippers in gen-

eral. There are, then, two rates open to shippers generally on "Emigrants' Movables" west-bound—the class rate of \$350.00 per carload and this commodity rate of \$268.00 per carload. There is in the tariff in connection with both rates a limitation as to valuation in case of loss or damage—as to the former \$5.00 per 100 lbs. and as to the latter, \$1000.00 per car. The carload being 20,000 lbs., \$1000.00 per car would be at the rate of \$5.00 per 100 lbs., on a full carload. There being no apparent substantial advantage in taking the class rate of \$350.00, it seems evident that the commodity rate of \$268.00 will (if made known to them) be the only rate used by shippers and that practically there will be but one rate on "emigrants' movables" west bound.

Commodity rates on "emigrants' movables," lower than the class rates, appear to have been in force on these west bound shipments from as far back as our records extend, 1887—how much farther we are not advised—to the present time, with the exception of the period from January 16 to October 23, 1888, and Mr. Smurr, General Freight Agent of the Southern Pacific Company's Pacific System, states that the "result desired to be brought about by these special rates" was "the maximum movement of emigrants' moveables and emigrants' things to the Pacific coast states and territories" and "that under said modified rates, the west bound movement is, as compared with east bound, as two to one—in other words, double the east-bound movement." From this it may be inferred that in his opinion these rates have accomplished, to some extent at least, the desired result and have been beneficial to the roads. The rate of \$268.00 is about 26 per cent of the valuation of \$1000 per car stipulated for by the roads in case of loss or damage, and, on the basis of the distance from Louisville to Los Angeles *via* St. Louis (about 2397 miles over the Louisville, Evansville and St. Louis road and the Atchison, Topeka & Santa Fé System,) it yields a rate of over a cent per ton per mile. It is also in evidence that "the class of goods that go west under the term 'Emigrants' Movables' on the average are of materially lower value than are those shipped from the Pacific Coast and the insurance risk is consequently less."

In view of the foregoing facts, which tend to show that the commodity rate of \$268.00 is not unreasonable in itself and is satisfactory to the roads, and also in view, particularly, of the practice of giving this rate to shippers indiscriminately (which is testified to by the officials of defendants) we can see no necessity for, or propriety in, retaining in the tariff and classification the class rate of \$350.00 west-bound or the statement that the commodity rate is for "intending settlers only." It can only serve to mislead those who consult the

tariff and classification and afford opportunity for the practice of favoritism or unjust discrimination as between shippers.

Unless within the authorized exceptions to the general rule of the statute, discriminations in charges upon like shipments of the same commodities based solely upon the purpose or "business motive" of the shipper, are unlawful whether affected directly, or indirectly by methods of classification.

The rate designated as a "commodity" rate has been in force a large number of years; it amounts to about 26 per cent of the limit of valuation of a carload in case of loss or damage; it yields a rate per ton per mile of *over a cent* for the long distance of 2397 miles; and the action of the roads in practically opening it to shippers in general would seem to indicate their approval of it as a reasonable general rate. Our conclusion is that there should be but one rate (which must be open to all and so published) on the classes of goods designated as "Emigrants' Movables" (which include "Household Goods") from Louisville westward to Los Angeles, and that that rate should not be in excess of the commodity rate of \$215.00 per carload from Mississippi river points, which added to the rate from Louisville to St. Louis amounts to the \$268.00 rate, which was given the complainant on his shipments west.

The complainant was not discriminated against in being allowed on his shipments west to Los Angeles the lowest available rate and there was no discrimination against him on his shipments east to Louisville, as he was charged the general rate exacted of all shippers. His complaint in reference to the disparity between the rates charged him on his east and west-bound shipments, respectively, is not properly one of unjust discrimination under the third section of the Act to Regulate Commerce, but rather calls in question the reasonableness of the higher rate. The claim is in substance, that the rate of \$350 eastward is unreasonable in view of the fact that the rate over the same line and between the same points westward is only \$268. This fact alone is relied upon to support the charge. The two rates have no necessary connection or relation, and the fact that a rate over a road or line in one direction is materially higher than the rate on the same class of traffic over the same road or line and between the same points in the opposite direction does not, as in case of hauls over the same line in the same direction, establish *prima facie* the unreasonableness of the higher rate. This would appear to be especially true where the hauls are of as great length as those now under consideration. It is moreover in evidence, as remarked above, that the "west bound movement of the traffic termed 'Emigrants' Movables' is double the east bound movement," and the goods shipped west

as "Emigrants' Movables" are "materially lower in value" than those shipped east. It may be conceded that the much greater volume of the traffic moved west than east is to some extent attributable to the lower rate west, but the tide of emigration is naturally from a comparatively old and thickly populated country like the east to a new and sparsely settled country like the west. No evidence as to the unreasonableness of this rate in itself has been offered.

In connection with the commodity rate on "emigrants' movables," as before remarked, it is specified in the tariff that "the valuation shall not exceed \$1000 per car," and the class rate on "household goods" (embraced in "emigrants' movables") is given upon condition of release by the shipper "to a valuation of \$5 per 100 lbs., in case of loss or damage." If the release be not made to these valuations, a higher rate is charged. The complainant contends that this is unreasonable and a violation of the Act to Regulate Commerce. The defendants in the case against the "Santa Fé" line in reply say that one purpose of this provision for limitation of their liability in case of loss or damage was the "protection of the carrier against overvaluation of property lost or injured, in cases where the carrier has not and cannot obtain knowledge or information as to the real value of the property and is placed at the mercy of shippers" in this respect. According to the weight of authority, a common carrier can make no contract protecting itself against liability for its own or its servants' negligence, but may, by special contract with the shipper, *reasonably* restrict its common law liability in *other respects*. Accordingly it is held that "a carrier may state a *reasonable* limit to the sum for which he shall be held accountable in case of loss, but cannot where this sum is understood to be an undervaluation of the goods thereby evade his full accountability as an ordinary bailee." *Schouler, Bailments & Carriers*, § 457; *South & North Ala. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Chitty*, Cont. 692; *Hart v. Pennsylvania R. Co.* 112 U. S. 381, 28 L. ed. 717; 2 Redf. Railways, 108, note a. In *Hart v. Pennsylvania R. Co.* cited above, it is held that such a contract will be upheld "as a proper and lawful mode of securing a *due proportion* between the amount for which the carrier is responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations," and in *South & North Ala. R. Co. v. Henlein*, that if the limit of liability fixed in the contract "be greatly disproportionate to the real value" of the goods shipped and "*the amount of freight received*, it would be unjust and unreasonable," but "if the limit was intended to adjust the measure of liability to the *reduced rate of freight charged* and to protect the carrier against exaggerated

or fanciful valuations," it will be sustained "as the measure of the carrier's liability." As stated at the outset of this opinion the remedy of a shipper for loss or damage is by appropriate action in the courts. In such action, the validity of a contract limiting the carrier's liability must be determined by the application of the law to the *facts in each case*. A contract unreasonable in view of the value of the shipment and the rate charged for its transportation would not be upheld, and the shipper would not be stopped by such contract from claiming and recovering his actual damage. The question presented for our consideration, however, relates, not to the validity of the limitation as to value, but to the reasonableness of the rate charged in view of that limitation. While the value of the service of transportation and the extent of the carrier's risk are measured by, among other things, the value of the property transported, and this is an important factor in rate making, it is to be noted that as shipments of goods of the same kind or class vary greatly in value, for the same weight, some being many times more valuable than others, a uniform rate per hundred weight for any commodity or class of traffic cannot bear the same proportion to the value of each shipment of such goods. The carrier can only be expected in establishing uniform class or commodity rates to take into account the estimated average value of shipments of the class or commodity to which the rates are applied. There is no proof whatever showing or tending to show that the limitation of value complained of is below the average value of shipments of "household goods," or that the rates in question are unreasonable in view of that valuation. Moreover, while the value of the property transported is an important element in rate making, there are others, such as the cost of service, net revenue of the carriers from the traffic involved, character of the goods as being perishable and liable to breakage, and other matters. We do not feel warranted to declare the rates under consideration unlawful on the mere fact of the release as to value required by the defendants.

The charge in both complaints as to the disparity between the carload and less than carload rates is confined to those rates as applied to "household goods" shipped from Louisville to Los Angeles. The less than carload rate is compared with the carload rate of \$263.00, which, as we have seen, is the commodity rate on "emigrants' movables" west bound. No less than carload rate is specified in the classification and tariff in connection with either the class rate of \$350.00 on "Emigrants' Movables" or the west bound commodity rate thereon of \$263.00. The less than carload rate is stated only on "household goods" and it is a class rate. It was in January, 1889, \$8.95 per 100 lbs., and the carload rate was

\$350.00, on the minimum carload of 20,000 lbs., or \$1.75 per hundred pounds. Under these rates the less than carload rate was about 125 per cent higher per 100 lbs. than the carload rate, and at the former rate the charge on 9000 lbs. would amount to \$355.00, a little more than the carload rate of \$350.00 on 20,000 lbs. These rates appear to have been maintained until April 11, 1893, when there was established per hundred pounds on shipments of "household goods" from Louisville *via* St. Louis to Los Angeles a carload rate of \$1.82 and a less than carload rate of \$3.60, and on such shipments *via* Memphis, a carload rate of \$1.73, and a less than carload rate of \$3.55. Under the latter rates, which are the lowest combination, the aggregate carload rate on a carload of 20,000 lbs., is \$346 and at the less than carload rate a weight of 9750 lbs., would be charged as much as such carload. In applying the carload and less than carload rates, the rule has been and is that, if a less weight than 20,000 lbs. yields at the less than carload rate a sum smaller than the aggregate carload rate, the shipper is given the benefit of the lower figure, but if the amount which would be so realized be larger than the aggregate carload rate, then the shipper is given the carload rate. Where also more than a carload of 20,000 lbs. is shipped, the carload rate is given on the excess although it may not amount to a full carload. Under these rules and the present rates *via* Memphis, shipments of from 9750 lbs. to 20,000 lbs. take the aggregate carload rate of \$346.00. On 9750 lbs. the carload rate amounts to about \$3.54 per 100 lbs., and on shipments over that weight up to 20,000 lbs. it grows continually less per 100 lbs. until, when 20,000 lbs. is reached, it is \$1.73. The shipper whose "household goods" weigh 9750 lbs. is charged \$346.00, and another shipper by the same train between the same points,

whose goods of the same kind weigh 20,000 lbs., pays the same amount.

The three leading classifications now practically governing the freight traffic of the United States are the "Official," which is applied east of the Mississippi river and Chicago, and north of the Ohio and Potomac rivers to the Atlantic Seaboard; the "Southern," which is applied south of the Potomac and Ohio rivers and east of the Mississippi river, and the "Western," which is applied west of the Mississippi and Chicago. Under these classifications household goods in carloads and less than carloads are classed as follows:

Classification.	Class.		Number of classes the less than car load is higher than the carload.
	C. L.	L. C. L.	
Official	2	1	One.
Southern	6	4	Two.
Western	B	1	Six.

It appears from the above that under the Western Classification, which is applied from Mississippi river points to the traffic now under consideration, household goods in less than carloads are placed six classes higher than when shipped in carloads, while under the Official and Southern Classifications there is a difference of only one and two classes. The rates stated above as now in force on carloads and less than carloads of household goods from Louisville to Los Angeles are governed by the Official Classification from Louisville to St. Louis, and by the Southern Classification from Louisville to Memphis, and by the Western Classification from those cities on to Los Angeles, and they illustrate the difference in the proportions between carloads and less than carloads resulting from the differences in classifications, as will be seen from the following tables giving the rates to St. Louis and Memphis under the Official and Southern Classifications, and thence on under the Western:

Louisville to Los Angeles via St. Louis.

	Classification.	C. L.		L. C. L.		Percentage of excess of less than carload over carload rates.
		Class.	Rate.	Class.	Rate.	
Louisville to St. Louis.	Official.	2	34	1	40	About 17%.
St. Louis to Los Angeles.	Western.	B	148	1	320	About 116%.
Through rate.			182		360	

Louisville to Los Angeles via Memphis.

	Classification.	C. L.		L. C. L.		Percentage of excess of less than carload over carload rates.
		Class.	Rate.	Class.	Rate.	
Louisville to Memphis.	Southern.	6	25	4	35	40%.
Memphis to Los Angeles.	Western.	B	148	1	320	About 116%.
Through rate.			178		355	

While there may be reasons for higher rates in the territory subject to the Western than in that subject to other classifications, it is not apparent why the disparity between the carload and less than carload rates on "household goods" should be so much greater.

We have been considering above the less than carload *class* rate as compared with the carload *class* rate on "household goods." As there is no less than carload rate corresponding, or given in connection with the commodity rate of \$263.00 on "emigrants' movables" west-bound, it would seem to follow that when shipped in less than carloads they take the regular less than carload rate. If that be so, and the less than carload rate on "Emigrants' Movables" (which embrace other articles beside "household goods") be the same as on "household goods," the disparity between the two rates on "Emigrants' Movables" west-bound will be greater than that above shown in connection with the rates on "Household goods." The commodity rate of \$263.00 on a carload of 20,000 lbs. amounts to \$1.31½ cts. per 100 lbs., which is only about 37 per cent of the less than carload rate per 100 lbs. of \$3.55 on household goods. Under these rates, the shipper whose "emigrants' movables" weigh 7400 lbs. would be charged about the same amount as one whose goods of the same kind weigh 20,000 lbs. It is also to be noted that not only the weight but the value of shipments is to be considered in determining the reasonableness of rates, and the aggregate value of 20,000 lbs. of goods will, except in rare cases, be much greater than that of 7400 lbs. or 9750 lbs. of goods of the same class or kind.

In the case of *Thurber v. New York Cent. & H. R. R. Co.* 3 Inters. Com. Rep. 742, 3 I. C. C. Rep. 473, it was held that the transportation of freight at a lower rate in carloads than in less than carloads is not in contravention of the Act to Regulate Commerce and that the circumstances and conditions of the transport-

tation in respect to the work done by the carrier and the revenue earned are dissimilar and may justify a *reasonable* difference in such rates. The differences between the rates for carloads and less than carloads on the grocery articles in question in that case were under the facts established by the testimony declared to be unreasonable. That testimony was voluminous and related, among other things, to the average cost of handling and loading the freight in carloads and less than carloads, respectively, and of its transportation, unloading and delivery; to the relative earnings from carloads and less than carloads; to the relative number and tonnage of carloads and less than carloads; to the movement of empty cars over the lines of the carriers complained against, and to the cost of many of the articles in question to the seaboard jobbers and the profit arising from the business. In the present cases there is no proof except as to the difference between the carload and less than carload rates. It is questionable whether the difference in cost of service and other conditions incident to the two modes of shipment is so great as to justify a rate on less than carloads more than twice as high as that on carloads. "Household goods," it is specified in the Western Classification, are not to be shipped "for sale or speculation," but even if this be carried out in practice, an unreasonable disparity between the carload and less than the carload rates on those goods in favor of the former would be none the less an unjust discrimination against the shipper under the latter. It is manifest, if they be shipped as articles of merchandise, that the small dealer would be absolutely precluded by the existing disparity in rates between small and large shipments from engaging in the business, and the field would be left to the exclusive occupancy of the large dealer. The importance of maintaining a reasonable relation between carload and less than carload rates on the same commodity is seen from the fact that any material difference be-

tween them in favor of the larger shipments must result in altogether debarring small dealers from participation in the trade. It may conduce to the convenience and interest of the carrier that shipments of certain kinds of traffic be made in carload lots, but as is said by the Commission in the Second Annual Report, "carriers in making rates cannot arrange them from an exclusive regard to their own interests, but must respect the interests of those who may have occasion to employ their services, and subordinate their own interests to the *rules of relative equality and justice which the Act prescribes.*"

An examination, however, of the entire Western Classification and tariff of rates thereunder discloses the fact, that the difference between the carload and less than carload rates on many other articles (most of them articles of merchandise) is as great or greater than that between those rates on "household goods;" and not only the defendants in the cases under consideration but many other carriers not before us as parties defendant are interested in all these rates. In view of these facts, and especially the further fact above adverted to that no proof has been made on which a definite conclusion can be reached as to what difference between the rates in question will be reasonable, we deem it advisable to leave this matter open for future consideration and determination, when all the parties in interest may be heard and the whole subject thoroughly investigated.

There remains to be considered the charge made in both cases, that the defendants, as members of the Trans-Continental Traffic Association, are in a "combination with other carriers" under the rules of that association "to pool and divide earnings effectively by upholding the prices of freights among different and competing railroads." The complainant contends that this alleged "combination is violative of sec. 5 of the Act to Regulate Commerce." That section of the statute makes unlawful "the pooling of freights of different and competing railroads," or the division "between them of the aggregate or net proceeds of the earnings of said railroads or any part thereof." As we understand the above allegation of the complainant, it is not intended to charge that there is an *actual* pooling or division of earnings between the defendants or other members of the Trans-Continental Association, but that the same result is accomplished "by upholding the prices of freights among different and competing railroads" as would be brought about by such pooling and division.

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In the agreement of the Trans-Continental Association on file with the Commission, its object is stated to be "to promote harmony of action between the carriers parties to it, to the end that reasonable rates of charge for their respective services may be jointly made and maintained." By Sections 1 and 2 of Article V. of the agreement, it is provided "that the General Freight and Passenger Agents of the parties thereto shall constitute Rate Committees," which shall "make all rates and divisions and rules pertaining thereto," and that those "rates, divisions, rules and regulations shall be promulgated by the Chairman for the guidance of the parties in interest and no deviation shall be allowed therefrom except" in certain specified cases. The "division" referred to, we understand to be that of through rates between the members of a through line. There is no provision in the agreement for an actual "pooling of freights" or "division of earnings" between the parties to the agreement. What was the practice under the agreement while in operation was not made to appear, but the witness examined on the subject testified, that "no such condition existed as pooling rates or allotments." It has not been shown by the agreement itself or other evidence that the object of the Association as stated in the agreement and the measures provided therein for fixing and maintaining rates constitute it a "contract, agreement or combination" in violation of section 5 of the Act to Regulate Commerce, or that those measures, if carried out in good faith for the purpose named, indirectly lead to the same result as the actual "pooling of freights" and "division of earnings" forbidden by the statute. In this connection it is proper to state, that on Dec. 31, 1892, notice was issued by the Chairman of the Trans-Continental Association that the Association had ceased operations except in the winding up of past business, and its existence appears to have then terminated.

It is directed that an order, issue requiring the defendants to forthwith alter or amend their classification and tariff in conformity with our conclusion herein, so that there shall *not* be two west bound rates on "household goods" and "Emigrants' Movables" including "Household Goods," and that one rate, *open to all shippers and so published*, be put in force on "household goods" and "Emigrants' Movables" including "Household Goods," from Louisville westward to Los Angeles, and that said rate be not in excess of the present commodity rate on "Emigrants' Movables" of \$263.00 per carload.

THOS. V. CATOR

v.

THE SOUTHERN PACIFIC COMPANY and THE UNION PACIFIC RAILWAY COMPANY.

1. Under the statute the defendants had a legal right to withhold or put into effect an open excursion rate to Omaha, and such right was not affected by the fact that open excursion rates, lower than regular rates of fare, had been in force over their connecting roads during the month previous. Comparison of the rates charged to complainant and others in July for transportation from

San Francisco to Omaha and return with reduced excursion rates charged for the transportation of persons from San Francisco to Chicago and Minneapolis in June of the same year, does not of itself present a discrimination or preference which the Act to Regulate Commerce empowers this Commission to correct.

Complaint filed October 3, 1892.—Answer filed October 22 and October 24, 1892.—Agreed statement of facts filed May 10, 1893.—Briefs filed May 10, 1893 and October 20, 1893.—Decided November 10, 1893.

DISCRIMINATION in special excursion rates.

Mr. Thomas V. Cator, for complainant in person.

Mr. James C. Martin, for Southern Pacific Co.; John M. Thurston, for Union Pac. R. Co.

REPORT AND OPINION OF THE COMMISSION.

McDill, Commissioner:

The complainant alleges that he is an attorney at law, residing and having his place of business at the city of San Francisco, California; that the defendants are common carriers subject to the Act to Regulate Commerce; that said defendants have been guilty of unjust discrimination and have given undue and unreasonable preference in this, to wit: That in June, 1892, the Republican and Democratic parties held national nominating conventions at Minneapolis and Chicago, respectively, each being composed of delegates from the several states and territories; that to each of these conventions delegates from California were carried over the roads of the defendants at greatly reduced rates; that thereafter in July, 1892, the People's party held a national nominating convention at Omaha, which was also composed of delegates from the several states and territories, and that the delegates from California thereto, thirty-six in number, including this complainant, applied to defendants for the same reduced rates as had been given to the delegates from California to the first above mentioned conventions, but such application was refused, and they were compelled to pay the usual and full rates to Omaha.

The defendant, the Southern Pacific Company, admits that special excursion rates were in force from California points to Chicago and Minneapolis in June, 1892, and that said re-

duced rates were not in effect at the time the national convention of the People's party was held at Omaha. This defendant further says that the special excursion rates made in the month of June to Minneapolis and Chicago were not limited to delegates, but were open to the public at large; that they were put in force strictly according to the provisions of the Act to Regulate Commerce; that under said Act it would not have been lawful or proper to give complainant or the 36 delegates to the Omaha convention special reduced rates which were not open to the general public; that the said special excursion rates from San Francisco to Minneapolis ranged, according to the route selected by the person desiring the transportation, from \$67.90 to \$82.90, and that tickets were issued at said rates, good only for continuous passage going on trains to arrive at Minneapolis on June 5th and 6th, 1892, and limited on return to 80 days from date of sale; that the said special excursion rates from San Francisco to Chicago ranged according to the route selected by the person desiring transportation, from \$70 to \$85, and that tickets were issued at said rates, good only for a continuous passage going on trains to arrive at Chicago on June 19th and 20th, 1892, and limited on return to 80 days from date of sale; that nothing in the Act to Regulate Commerce prevents carriers from making and issuing excursion rates and tickets as they may deem advisable, pro-

vided such rates and tickets are open to the public at large. The defendant, the Union Pacific Railway Company, filed a similar answer. It admits that the rates charged to complainant and others in July were about double the special excursion rates charged from San Francisco to Minneapolis and Chicago in June; but says that the said special excursion rates to Minneapolis and Chicago were made upon a cash guarantee that not less than 150 tickets should be purchased at the reduced rate, whereas no guarantee for a greater number than 86 passengers was offered by the applicants for reduced rates to Omaha.

Agreed facts.

Counsel for the respective parties have agreed upon the facts in this case. The stipulation reads as follows:

It is hereby stipulated that the following shall constitute the agreed facts in this case in lieu of other evidence, to wit:

A state convention of the People's party was held at Stockton, California, June 1, 1892, at which 86 delegates were elected to attend the national convention of the People's party to be held at Omaha, Nebraska, on July 2, 1892. James J. Morrison was secretary of the state convention; Jesse Poundstone was secretary of the delegates elected to the national convention. It was desired to secure reduced rates for the delegates and such other persons from California as might desire to attend the national convention, and the matter of securing such rates was taken up by Mr. Poundstone and Mr. Morrison. The following correspondence on the subject was subsequently had by letters, copies of which are hereunto attached, viz:

1. Letter from Mr. Jesse Poundstone to Mr. A. N. Towne, General Manager of the Southern Pacific Company, dated June 4, 1892.

2. Letter from Mr. A. N. Towne, to Mr. Jesse Poundstone, dated June 6, 1892.

3. Letter from Mr. Jesse Poundstone to Mr. James J. Morrison, dated June 4, 1892.

4. Letter from Mr. James J. Morrison to Mr. Jesse Poundstone, dated June 6, 1892.

5. Letter from Mr. James J. Morrison to Mr. T. H. Goodman, General Passenger Agent of the Southern Pacific Company, dated June 6, 1892.

6. Letter from Mr. T. H. Goodman to Mr. Jesse Poundstone, dated June 7, 1892.

7. Letter from Mr. Poundstone to Mr. R. Gray, General Traffic Manager, Southern Pacific Company, dated June 7, 1892.

8. Letter from Mr. T. H. Goodman to Mr. J. J. Morrison, dated June 8, 1892.

9. Letter from Mr. T. H. Goodman to Mr. Jesse Poundstone, dated June 9, 1892.

10. Letter from Mr. Jesse Poundstone to Mr. T. H. Goodman, dated June 10, 1892.

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11. Letter from Mr. T. H. Goodman to Mr. Jesse Poundstone, dated June 11, 1892.

12. Letter from Mr. E. A. Holbrook, General Traffic Agent of the C. & N. W. Ry. Co., to Mr. Jesse Poundstone, dated June 7, 1892.

13. Letter from Mr. W. D. Hitchcock, General Agent, Union Pacific Railway Company, to Mr. Jesse Poundstone, dated June 11, 1892.

14. Letter from E. P. Vining, Chairman, T. C. A., to Mr. Jesse Poundstone, dated June 14, 1892.

There were no other negotiations or requests for reduced rates in addition to the letters above referred to. If the annexed letters amount to a sufficient request for reduced rates, such request was made. The officers of the railroad companies, defendant in the case, did not consider that there was such a number of passengers likely to attend the national convention as would justify making reduced rates for the occasion. The defendants did grant a reduced rate to the delegates and all persons attending the Republican and Democratic national conventions mentioned in the pleadings.

The substance of the letters referred to is that the Southern Pacific Company and the Union Pacific Railway Company were requested by Messrs. Morrison and Poundstone, representing the delegates from California to the Omaha Convention, to issue special rates from California points to Omaha upon the holding of the said People's party convention. In reply to such request, the General Agent of the U. P. Co. advised Mr. Poundstone to take the matter up with the Southern Pacific Railway Company, the initial carrier from San Francisco. The Southern Pacific Railway Company in reply to Messrs. Morrison and Poundstone stated that as the proposition related to interstate transportation it would be unnecessary to have the request for special rate taken up by all members of the Trans-continental Association for action thereon.

Conclusions.

This complaint, filed on behalf of a class of persons carried under defendants' published passenger rate in July, 1892, alleges unlawful preference and discrimination in favor of another class of persons transported under a lower rate in June of that year. This allegation is based upon the fact that both classes purchased transportation over defendants' connecting railways for a similar purpose, that of attending national political conventions, and that the class charged the higher rate was refused the reduced rate allowed to the other class.

Passenger tickets of any kind must be offered impartially to all who accept the conditions on which they are issued, and the rates at which they are sold must be published. *Larrison v.*

Chicago & G. T. R. Co. 1 Inters Com. Rep. 869, 1 I. C. C. Rep. 147; *Re Passenger Tariffs*, 2 Inters Com. Rep. 445, 2 I. C. C. Rep. 649. The lower rate above mentioned was a special excursion rate, and the higher charge was the ordinary and regular rate of fare in force over the defendants' roads. There is no showing that the special excursion rates mentioned were not open to the public generally and sold impartially to all who chose to accept the conditions under which they were issued, or that the special rates were not put into effect and discontinued in the manner prescribed by law; and it must be assumed in this report that the defendants did, as averred in their answers, comply with the statute in these particulars.

Section 22 of the Act to Regulate Commerce as amended provides: "That nothing in this Act shall prevent . . . the issuance of mileage, excursion, or commutation passenger tickets." To rule in this case that complainant and his associates were subjected to unjust discrimination or undue prejudice by the issuance of excursion tickets in June and the refusal to issue such tickets for a similar occasion in July, would be a notice to carriers that if they do issue excursion tickets for a given purpose, they lay themselves under obligation to issue them for a similar purpose whenever occasion offers or application is made. Congress intended by the provision in the 22nd section to leave the issuance of these tickets free from such restriction. The special excursion rates in June were not limited to convention delegates or to any portion of the public, and the fact that they had been in force did not make it compulsory upon the carriers to establish a similar reduced rate in July upon application of persons desiring to attend another convention. Under the statute, the defendants had a legal right to withhold or put into effect an open excursion rate to Omaha, and such right was not affected by the fact that open excursion rates had been in force over their connecting roads during the previous month. The complaint does not attack the legality of rates charged in July from San Francisco to Omaha and return, except by comparing them with the lower special and limited excursion rates in prior effect from San Francisco to Chicago and Minneapolis. This does not constitute a discrimination or preference which the Act to Regulate Commerce empowers this Commission to correct. The complaint must, therefore, be dismissed.

In what has been said we have endeavored to state the law governing this case. Nevertheless the question raised by the complaint is unique and merits more extended notice. As a matter of equity there seems to be considerable justice in the proposition, which results from the claim advanced by the complainant, that if a carrier establishes an excursion rate

on account of a particular occasion, it ought also to allow reduced rates when, soon afterwards, a similar event takes place, unless it appears that the first excursion rate was unprofitable. Take this case as an example. The national conventions of the Republican and Democratic parties were held in June, 1892, and the national convention of the People's party assembled in the following month. Each of these conventions was composed of a large number of delegates chosen from the several states and territories, and was also largely attended by party leaders and spectators. The defendants made low excursion rates on account of the conventions of the first named parties but declined to make a special rate for the People's convention, and this naturally resulted in a belief on the part of the Populists that they had been subjected to unjust discrimination and undue prejudice. The fact that the distinction was made between political parties also served to increase the bitterness of feeling. Special excursion rates are made by carriers with a view of increasing travel at particular times. The occasion may be a convention, a fair, a military or civic demonstration, a general election, a picnic, a prize fight, a journey to points of interest or resort, or through a section of country noted for its scenery. Whatever the reason which impels a carrier to put reduced rate tickets on sale for a limited period may be, so long as the tickets are open to all who desire to purchase them, the law does not question the propriety of making the reduced rates; on the contrary, the statute says in terms that this right of carriers shall be preserved. But in specially excepting excursion, mileage and commutation tickets from any operation of the law, which, without such exception, might prevent their being issued, Congress sought as a prime object to protect the public interest. The exceptive phrase in the twenty-second section does not, however, provide against discrimination by the issuance of excursion tickets for one occasion and refusal to issue them on account of a similar event. It was supposed that the right to issue them would in itself be a sufficient safeguard against discrimination of this kind, and as a general rule this is true. This case is the first that has been instituted before the Commission wherein wrong is alleged to result from the issuance of special excursion tickets at one time and refusal to issue them at another. The general similarity of the three conventions, the large attendance at each of them, the absence of any proper desire on the part of the carriers to limit attendance at the Omaha convention, and their known and proper interest in stimulating business over their lines, make the reason for denial of the reduced rates in July somewhat obscure. The facts show that a guarantee of the sale of at

least 150 tickets was given for the June conventions, and that complainant and his associates furnished no guarantee that more than 36 passengers would travel under a reduced rate to Omaha in July. Ordinarily, it is important that carriers should have some definite idea of the number of persons likely to travel in case the excursion rate is established, but when there is to be a recurrence of great gatherings carriers frequently and safely rely upon the fact that travel to such assemblies has been considerable, and are guided in making reduced excursion rates by former experience. The refusal of defendants to issue reduced rate excursion tickets to the public on account of the Omaha convention may therefore have been a mistake which in their own interest these carriers will not repeat in the future. The fact remains, however, that as the law stands it gives the Commission no authority to order a carrier to cease and desist from discriminating between bodies of persons traveling at different times for a similar object by establishing a special excursion rate for one occasion and refusing to make any reduction whatever for the other. Whether the law

should be amended in this respect is a question for Congress to consider.

While we are satisfied that there is no authority under the law for an order from the Commission, yet we feel compelled to express our belief that the importance of national conventions for the nomination of candidates for President and Vice President of the United States, the fact that they are called but once in four years, and although held at different places yet generally occur about the same time in the year, all point to the conclusion that a proper observance of the spirit of the law to regulate commerce, which seeks equality and condemns undue preferences and prejudices, and unjust and invidious discriminations, would grant excursion rates to each national convention for such purposes.

As these conventions are only held at stated periods, and usually about four years apart, such equal action upon the part of carriers of passengers would not likely result in any serious embarrassment or loss of revenues, and therefore would seem to us to be subject in equity and justice to the rule above outlined.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF FLORIDA.

FLORIDA FRUIT EXCHANGE

v.

SAVANNAH, FLORIDA & WESTERN R. CO. ET AL.

1. The increase of rates for the transportation of oranges from Florida points to northeastern cities over the line of the Savannah, Florida & Western Railway and its connections, which was made November 23, 1890, and amounted to $3\frac{3}{4}\%$ upon rates previously in effect, is unjust, unreasonable, excessive, and in violation of the Interstate Commerce Act; and it is not justified by the increased facilities which have been afforded by the carriers for handling and preserving the fruit.
2. The reasonableness of a carrier's rate on fruit is not necessarily to be determined by the question of the profit or loss which the producer receives upon his product.
3. The division among themselves which a number of connecting carriers make of a through rate should not affect the question of the reasonableness or unreasonableness of the rate as an entirety.
4. Decree enjoining violation of an order of the Interstate Commerce Commission passed October 29, 1891, which prohibited the exaction of a rate for the transportation of oranges from Florida to northeastern cities which should exceed the rates in force prior to November 23, 1890, by more than 5 cents per box,—allowing complainant a counsel fee of \$5000,—and directing defendant to pay costs of the suit, including the Master's charges of \$870.50.

December 1, 1892.

SUIT to enforce an order of the Interstate Commerce Commission passed October 29, 1891.
8 Inters. Com. Rep. 688. *Decree in favor of complainant.*
The facts sufficiently appear in the Master's Report.

Report of **Joseph H. Durkee**, *Special Master* (filed September 16, 1892):

This case arises on petition of complainant
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asking this court to enforce by its order, decree, injunction, or other proper process, mandatory or otherwise, the decisions and orders

made by the Interstate Commerce Commission on the 20th day of October, A. D. 1891, upon the complaint of the Railroad Commission of Florida against the Savannah, Florida & Western Railway Company, and the Ocean Steamship Company of Savannah, and other named in said proceedings, in so far as said orders and decisions relate to the Savannah, Florida & Western Railway Company and The Ocean Steamship Company of Savannah.

The petitioner, the Florida Fruit Exchange, alleges that it is a corporation duly incorporated under the laws of the state of Florida, with its principal office at Jacksonville, in the northern district of Florida, and that the defendant, the Savannah, Florida & Western Railway Company, is a corporation by that name under the laws of the state of Florida and the state of Georgia, having business offices and agents at various places in said district; and that the defendant, the Ocean Steamship Company of Savannah, is incorporated under the laws of the state of Georgia, with a business office and agent in said northern district.

That the said defendants are common carriers and constitute a line under a common control or arrangement for continuous carriage or shipment over said lines, of freight, partly by railroad and partly by water, from Jacksonville, Callahan, Gainesville, Lake City, and Live Oak, and other places in the state of Florida, *via* said named places, to the city of New York, in the state of New York, the city of Philadelphia, in the state of Pennsylvania, the city of Boston in the state of Massachusetts, and by connecting lines to other eastern cities, and as such common carriers, are subject to the Act to Regulate Commerce and all statutes of the United States applicable in the premises and were so on and before the 30th day of December, A. D. 1890, and at all times since.

That Jacksonville, Callahan, Gainesville, Lake City, and Live Oak are base points in determining rates on shipments of oranges and lemons from points within the state of Florida to points without the limits of said state.

That during the season of 1885 and 1886, and for each season since, the defendant corporations established and maintained rates for the transportation of oranges and lemons from said base points in Florida to said points of destination, with but few changes until the season of 1889 and 1890, during which seasons said rates were to New York and Philadelphia by said lines, 30 cents per standard box, and to Boston, 35 cents, and proportionately to other eastern cities; that each of said defendants received, by agreement between them, a certain agreed proportion of said through rates, as set forth in Exhibit "A," filed with said petition.

That afterwards, to wit, in November, A. D. 1890, said defendants did agree together to advance and did, to wit, on the 28d day of November, A. D. 1890, actually advance said previously prevailing rates ten cents per standard box, and they have been, and are now, on all shipments from said base points to said points of destination charging, demanding, collecting, and receiving said advanced rates.

That afterwards, to wit, on the 30th day of December, A. D. 1890, the Railroad Commis-

sion of Florida filed a complaint with the Interstate Commerce Commission of the United States against the defendants herein, and others; alleging said advanced rates to be unlawful and in violation of the Act to Regulate Commerce and unjust, unreasonable and excessive and materially injurious to a large class of shippers.

That said complaint was answered by said defendants, and evidence taken thereon before said Commission and arguments submitted, and a decision rendered by said Commission on the 29th day of October, A. D. 1891.

That by said report, findings, decision and orders of the Interstate Commerce Commission it was ascertained, found, ordered, and adjudged that the said advance made in said rates on the 28d day of November, A. D. 1890, should not have exceeded 5 cents per box, and so far as it was in excess of that amount was unreasonable and contrary to law, and the said defendants were required to forthwith cease and desist from charging or collecting for the transportation of oranges and lemons any greater sum than an addition of 5 cents per box to the rates in force prior to the advance on November 28, 1890.

That said defendants have wholly failed and refused to observe, obey, or conform to said order of said Interstate Commerce Commission, and continue to charge and collect said excessive rates established by said advance of November 28, 1890, in the northern district of Florida.

The petitioner alleges that the Florida Fruit Exchange is engaged in the business of shipping and selling oranges and lemons, and is a large shipper of oranges, and also ships lemons from Jacksonville and Gainesville aforesaid by and over said line of defendants to said cities of New York, Philadelphia, and Boston on which the freight charges by defendants have to be paid, and is thereby interested in the observance by said defendants of said order of said Interstate Commerce Commission.

That since said order was made and said defendants have had notice of the same the petitioner has tendered to defendants to be carried over their line, from a base point in Florida, to wit: Jacksonville, to the cities of New York, Boston, and Philadelphia aforesaid, boxes of oranges of the usual or standard kind customarily used in the Florida trade, and has shipped over defendant's said line, and has offered to pay defendants for the transportation thereof of the rates fixed and ordered to be observed as aforesaid by said Interstate Commerce Commission, to wit, 35 cents to New York and Philadelphia, and 40 cents a box to Boston, and has demanded of them the said rates and the observance and performance of said order, and has made tender of payment to defendants in advance, of said lawful rates fixed by said order, but said defendants have refused to carry said oranges for the rates fixed by said order, but have exacted, charged, and collected, and continued to exact, charge, and collect of petitioner and its agents, the said rates established by defendants by said advance of November 28, 1890.

Petitioner alleges said rates to be unjust, unreasonable, excessive, contrary to law, and in disobedience of the said report, opinion, find-

ings, requirements, and orders of said Interstate Commerce Commission.

The petitioner prays that the said defendants and each of them, be restrained by the order, decree, injunction, or other proper process, mandatory or otherwise, of this honorable court from further violating, disobeying, or in any way refusing to observe, obey, conform to and perform said order of said Interstate Commerce Commission, and from refusing, failing, or neglecting to receive, transport, and deliver properly and promptly oranges and lemons of or from petitioner from said base points in Florida by and over said defendants' line to said points of destination, at rates of charges not in excess of those designated in said order of said Interstate Commerce Commission, to wit, an advance of 5 cents per standard Florida box on rates in effect next preceding November 23, 1890.

Petitioner further asks that the defendants be decreed to pay the costs and counsel fees herein and for such further relief as to the court may seem meet.

To this petition the Savannah, Florida & Western Railway answers and admits that it is a corporation under the laws of the state of Florida and a common carrier, and as such subject to the acts to regulate commerce; it admits that it has established and maintained rates as stated in the petition from the base points named, and that in November, 1890, said rates were to New York and Philadelphia by said line, 30 cents per standard box, and to Boston 25 cents, and that each of the defendants received by agreement between them the proportion of said rates as stated in Exhibit "A," filed with said petition.

It admits that on or about the 23d day of November, 1890, the defendants did advance the rates 10 cents per standard box, and that they have been and are now on all shipments from said base points to said points of destination, charging, demanding, collecting, and receiving said advanced rates.

It admits that the Railroad Commission of Florida filed its complaint with the Interstate Commerce Commission as alleged, but denies that the averments of said complaint, alleging said advanced rates to be unlawful and in violation of the Act to Regulate Commerce, are true.

It admits that proceedings were had before the Interstate Commerce Commission, but denies that the Interstate Commerce Commission, as organized and constituted by and under the Act to Regulate Commerce, as amended, rendered a decision and made orders on the complaint filed, while admitting that the so-called orders and decisions, appearing in Exhibit "A," to the petition, are true copies of their originals.

It admits that the defendants continued to charge the rates from said basing points on oranges and lemons put in effect November 23, 1890, but denies that said rates were excessive.

It admits that the petitioner is engaged in business as stated, and is a large shipper of oranges and lemons from and to the points named in the petition, and is interested in the rates charged thereon, and in any order which might be made by the Interstate Commerce

Commission as to said rates, and that the petitioner has tendered boxes of oranges as stated to be carried from and to the places named, and offered to pay for the transportation thereof, 35 cents per box to New York and Philadelphia, and 40 cents to Boston, and has demanded that such boxes of oranges be carried for said sums, and has made tender in advance of said sums.

It also admits that it has charged and collected and continues to charge and collect of petitioner the said rates established November 23, 1890, but expressly denies that said last mentioned are unjust, unreasonable, excessive, and contrary to law, while admitting that said rates are 5 cents per box higher than the amounts mentioned in the so-called order attached as Exhibit "A," to the petition in this case.

The answer further says that the complaint of the Railroad Commission of Florida against defendants was filed on the 30th day of December, 1890, and hearing had before the Interstate Commerce Commission at Jacksonville, Florida, on March 30 and 31, 1891, at which three members of said Commission were present, viz: Hon. Thomas M. Cooley, Hon. Martin A. Knapp, and Hon. Walter M. Bragg, and that before the 29th day of October, 1891, when a decision was rendered, Hon. Thomas M. Cooley had resigned as a member of said Commission, and the Hon. Walter M. Bragg had died, and that, therefore, the so-called order and decision of said Interstate Commerce Commission made on the 29th of October, 1891, is not the lawful order and decision of the Commission as created by the Act of Congress, and the amendments thereto, and that in refusing, neglecting, or failing to obey or perform said order it is not violating any order or requirement of said Commission made as a legally constituted Commission, or in a legal or authorized way, and that said order is not binding or of any force so far as this defendant is concerned, and asks that said petition may be dismissed.

It further recites that it filed its application for a rehearing before the said Interstate Commerce Commission on December 22, A. D. 1891, upon the grounds above stated, which was denied.

It avers that if the findings, decisions, and orders of the Interstate Commerce Commission were legal and valid they are but findings of fact and cannot be enforced except by the courts, and asks the court to hear and determine the cause anew upon proper pleadings and proofs, not only including the report of said Commission but all such other and further testimony as either party may introduce bearing upon the matters in controversy.

It avers that the rates in effect prior to November 23, 1890, did not afford a just and reasonable compensation for the services rendered, and that the rates put into effect on November 23, 1890, and which have been since charged, are just and reasonable, and denies every allegation in the petition which alleges that the rates now charged are unjust, unreasonable, or excessive.

Petition filed December 14, A. D. 1891.

Same date court directed defendants to file answers on December 21, A. D. 1891.

December 21, A. D. 1891, time extended to January 4, A. D. 1892.

Savannah, Florida & Western Railway filed answers March 8, A. D. 1892.

March 23, A. D. 1892, case referred to Special Master to take testimony and report with his findings.

Hearing begun March 26, A. D. 1892; closing testimony filed with Master, August 29, A. D. 1892.

Brief filed by petitioner September 1, 1892.

Brief filed by defendant August 31, 1892.

Charles M. Cooper, solicitor for petitioner, the Florida Fruit Exchange, and John E. Partridge, solicitor for defendant, the Savannah, Florida & Western Railway, were present at all hearings before the Special Master.

The admissions, made in the answer of the defendants to the allegations set forth in the petition, have brought down the questions to be considered here as to whether the increased rates put in effect on the 23d day of November, 1890, over the defendants' lines, upon standard boxes of oranges and lemons from Jacksonville, Callahan, Gainesville, Lake City and Live Oak, base points upon defendants' line of railroad, to the cities of New York, Philadelphia and Boston, and by connecting lines to other eastern cities, were unjust, unreasonable, excessive, and unlawful and in violation of the Act to Regulate Commerce, or were just and reasonable and not in violation of said Act.

The question raised by defendant as to the legality and validity of the proceedings had before the Interstate Commerce Commission, and the opinion, findings, decisions and orders thereon, as set forth in Exhibit "A" herein, is a matter of law which will be determined by the court.

The rates established and enforced upon oranges from Jacksonville, Florida, *via* Savannah, Florida & Western Railway and Ocean Steamship Company, to the cities of Baltimore, Philadelphia, New York and Boston, during different seasons from October 3, 1881, to the present time, are as follows, viz:

TABLE.

Rates on oranges from Jacksonville, Florida, to points named, *via* Savannah and steamer.

To Baltimore, Md.		Philadelphia, Pa.		New York, N. Y.		Boston, Mass.		Taking effect.
Bx.	Brl.	Bx.	Brl.	Bx.	Brl.	Bx.	Brl.	
50	1.00	50	1.00	50	1.00	50	1.00	Oct. 3, '81
50	1.00	50	1.00	50	1.00	50	1.00	Oct. 15, '83
50	1.00	50	1.00	50	1.00	50	1.00	Nov. 15, '83
50	.80	50	.80	50	.80	50	.80	Oct. 15, '84
50	.80	50	.80	50	.80	50	.80	Jan. 15, '85
50	.80	50	.80	50	.80	50	.80	Sep. 15, '85
50	.80	50	.80	50	.80	50	.80	Sep. 15, '86
50	.80	50	.80	50	.80	50	.80	Nov. 15, '86
50	.80	50	.80	50	.80	50	.80	Sep. 1, '87
50	.80	50	.80	50	.80	50	.80	Sep. 15, '87
50	.80	50	.80	50	.80	50	.80	Sep. 20, '88
50	.80	50	.80	50	.80	50	.80	Nov. 23, '90

The rates from the other base points in Florida, Gainesville, Callahan, Lake City, and Live Oak to the points above named are the same as from Jacksonville, and it is presumed they

have been since those places were fixed upon as base points.

The Savannah, Florida & Western Railway is a gathering or initial road to only a limited extent and the total rate to points of destination is made up of the rates before named, together with the local rate from place of original shipment to said base points, though bills of lading are given from initial points to points of destination.

Prior to November 23, 1890, the orange rate to New York was, by the Clyde Line, the Mallory Line, and the line composed of the S. F. & W. R. Co. and the Ocean Steamship Co., 30 cents per standard box of 80 pounds; by the Atlantic Coast Line, 37½ cents per standard box, and by the Atlantic Coast Despatch Line (all rail) 43 cents per standard box; that rate had been maintained by the defendants since November 18, 1886.

By agreement between the several lines interested this rate was increased in November, 1890, 10 cents per standard box, and said increased rate was put in effect on November 23, 1890, and continues to the present time; this is an increase in freight rates of 33¼ per cent from said base points to the cities of New York, Philadelphia and Baltimore.

It is the contention of the defendants that the rate of 30 cents per standard box, in effect up to November 23, 1890, from November 18, 1886, a period of four years, was not a remunerative rate, and was originally made as a war rate when the Clyde Line "decided to put on a steamer at Jacksonville, and put on the Charleston rates into Jacksonville," and that it was continued afterwards on account of the freeze in 1886, and the yellow fever in 1887 and 1888, which caused general depression in business in Florida, and it was not thought good policy to raise the rate then; the traffic men did not finally recommend the increased rate, but it was made by agreement between the presidents of the lines interested to increase revenue.

The facilities afforded by the defendants in transporting oranges to market are superior to those used in forwarding other freights.

A train known as No. 208 is run between Jacksonville and Savannah, daily, leaving Jacksonville at 3:25 P. M., and arriving in Savannah at 8:35 A. M., during the orange season, which is practically a "perishable" freight train; it is claimed that this train is run at a speed of about 18 miles an hour; if the time of departure and arriving is correctly given by the assistant master of transportation of the Savannah, Florida & Western Railway the speed would be but 12½ miles an hour between Jacksonville and Savannah, by that train, counting the distance as given at 172 miles. To this train extra care and attention is given in the kind of cars given, in prompt forwarding of freight, terminal arrangements and handling at junctional points; ventilated cars are almost universally used, except, occasionally, owing to overcrowding of freight, a tight box car may be used. Improvements are being made from time to time in these ventilated cars, and those more recently constructed have the most approved brakes and couplers, with side and end ventilation to the cars. Such cars can be and are used in transporting

other classes of freight, but are especially adapted to and built for carrying "perishables." Right of way is given to train 208 over all others. If passenger trains are delayed this train has the right of way over it. A better paid class of conductors is employed on this train than average freight trains. More fuel is used. Running at a greater rate of speed the wear to the track is greater because of the heavier pounding of the wheel upon the rails. The train is made up at Jacksonville, and there is an extra cost for rebilling. Fewer cars are carried on train 208 than on ordinary freight trains. Many of the returning cars come empty, and the cars are seldom loaded to their maximum capacity.

The Ocean Steamship Company reserves the best part of its steamers, and that most completely ventilated, for the orange freights, and has furnished at New York a pier largely devoted to this class of freight, protected in the winter by warm storage, without extra charge to the shipper. The rental value of this pier is from \$40,000 to \$45,000 per annum. It gives special attention to prompt forwarding and speedy transit, the steamers making extra speed to meet the requirements of the market. Recognizing the necessity of giving quick transportation to the markets for oranges, that company in building its last ship, the *Kansas City*, built it with special reference to speed, and it makes 16 knots an hour.

There has been a persistent and increasing demand from orange shippers upon transportation companies for prompt and speedy transit of oranges from the packing house to the commission merchant, and better methods of shipment with increased facilities for handling, storing and caring for the fruit at terminals have been demanded. In furnishing these the transportation companies have acted intelligently and with a view of securing business. The importance of rapid transit is set forth by one orange grower (Rev. Lyman Phelps) by the statement that he considers the difference between an eight day delivery and a five days delivery from place of shipment, Sanford, Florida, to northeastern cities, at 10 cents per box. He also states that lying over en route for three hours might do more damage to the fruit, from want of oxygen, than continuous movement for forty-eight hours. The Florida orange is considered more tender and delicate than the California or Mediterranean, with less tissue and fibre and more juice, and does not stand shipment as well, ordinarily, its tissues breaking down and fermentation beginning quicker, unless special and intelligent care is taken in cultivating and preparing the orange for the market. The Florida orange is a perishable fruit, but bears transportation fairly well if picked when dry, carefully handled in packing, and shipped in dry weather. It is not as perishable as the strawberry, tomato, ripe peaches, or the banana. Promptness in handling, speed in movement, without delay en route, are essential requisites upon the part of common carriers to ensure the best results from the orange to the shipper. To meet these requirements seems to be the aim and purpose of the defendants, by continually furnishing increased facility for handling, transporting, and storing this fruit.

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The orange industry is steadily and continuously increasing in volume and importance. It has become a fixed factor in the calculation of the defendants upon which to rely for sure, regular, and large freights.

It is estimated (Fairbanks, President Florida Fruit Exchange) that the number of orange growers in Florida is from 10,000 to 15,000, and that there are upwards of 70,000 acres of bearing groves, and from 20,000 to 30,000 acres not yet come into bearing. The value of bearing groves is considered to be \$300 per acre, or a total of \$21,000,000 for 70,000 acres of bearing groves. The non-bearing groves are estimated to be worth \$10,000,000 more. The orange crop in round numbers for the year 1884 and 1885 was 600,000 boxes, 1885 and 1886, 900,000 boxes, 1886 and 1887, 1,200,000 boxes, 1887 and 1888, 1,500,000 boxes, 1888 and 1889, 1,950,000 boxes, 1889 and 1890, 2,150,000 boxes, 1890 and 1891, 2,600,000 boxes, 1891 and 1892, 3,500,000 boxes. The net return to the grower is put down for 1888 and 1889 at \$1.72 per box; for 1889 and 1890, \$1.52; 1890 and 1891, \$1.54; 1891 and 1892, \$1.05. These figures represent the actual return to the orange grower at the point of shipment, and do not include the cost of production, packing and boxing. These items of cost are variously estimated. At a yield of 100 boxes to the acre it is stated that the expense of cultivation would be \$15 per acre, fertilizing \$15 per acre, boxing, picking, etc., 100 boxes at 40 cents per box, \$40; interest on value of grove \$300, \$24; total \$44. Net returns for 1891 and 1892, \$1.05 per box, leaving \$11 profit per acre after paying interest on investment. For the preceding years the profit would be greater per acre, taking the figures above quoted as the net return for oranges each year.

About one third of the orange crop goes to western points, and two thirds to eastern and northeastern points, upon which the increased rate of 10 cents per box, put in effect November 23, 1890, has been paid.

In the season of 1890 and 1891 there was shipped over the S. F. & W. Ry., via Savannah and steamships, including what went by Merchants & Union Line to Baltimore, to northeastern cities: from Jacksonville, 470,918 boxes; from Callahan, 82,254 boxes; and from Gainesville, 187,024 boxes; a total of 690,196 boxes. For the season 1891 and 1892, up to March 22, 1892, the shipments by same lines to northeastern cities were, from Jacksonville, 626,108 boxes; from Callahan, 160,922 boxes; from Gainesville, 292,782 boxes; a total of 1,079,782 boxes, or an increase over the former year of 389,566 boxes.

Taking the weight of the standard box of oranges at 80 pounds, the increase of tonnage from oranges over the S. F. & W. Ry., in the season of 1891 and 1892 in excess of that of 1890 and 1891 to northeastern cities amounts to 1558 cars loaded with 20,000 pounds each.

The orange crop is considered an uncertain one by orange growers, on account of the liability of severe frosts injuring or killing the trees. Such frosts have occurred six or seven times since 1866, each time doing much damage both to young and bearing trees. There have been but one or two severe cold spells,

notably in January, 1886, which were general and inflicted damage in all the orange growing portion of the state. At times many trees have been killed by the cold, and at times the growing branches would be killed back, taking a year or two of fresh growth to place the tree in a bearing condition again. The orange groves are also liable to much damage by insects, especially the red spider. In spite of these drawbacks the orange crop is increasing year by year, as new trees are being planted, young ones come into bearing, and old ones reach full bearing. This increase from the season of 1884 and 1885 to 1885 and 1886 amounted to 50 per cent; from 1885 and 1886 to 1886 and 1887, to 40 per cent; from 1886 and 1887 to 1887 and 1888, about 20 per cent; from 1887 and 1888 to 1888 and 1889, over 28 per cent; from 1888 and 1889, to 1889 and 1890 over 10 per cent; from 1889 and 1890 to 1890 and 1891, over 20 per cent, and from 1890 and 1891 to 1891 and 1892, nearly 35 per cent. There are no indications to show that the crop will grow less in the near future.

The amount of business for the defendants' line in handling the orange crop can be year by year quite accurately and safely estimated. It has been before shown that its line carried, in the season of 1891 and 1892, up to March 22, to Savannah for northeastern cities, an increase of one third more tonnage in oranges than during the season of 1890 and 1891. The orange rate of 40 cents per standard box *via* Savannah, Florida & Western Railway, and the Ocean Steamship Co., from Florida base points to the cities of New York, Philadelphia, and Boston, is divided, giving 18 cents to the S. F. & W. Ry., 18 cents to the Ocean Steamship Co., and 4 cents for the transfer at Savannah, one cent of which goes to the S. F. & W. Ry. Co. This road then received 19 cents per box for 172 miles carriage, Jacksonville to Savannah, and terminal service. Calculating the standard box of oranges at 80 pounds, twenty-five would make one ton. The compensation then is \$4.75 per ton, or a little more than 2 7-10 cents per ton per mile.

The division of the through rate over these lines was made originally when the route to Savannah, *via* S. F. & W. Ry., was by Live Oak and Dupont, and the distance was 259 miles. The distance from Savannah to New York *via* Ocean Steamship Co. line, was computed at about 750 miles. One rail mile was considered equivalent to three water miles in making up the rate. After the rate was established upon this basis the Short line from Way Cross to Jacksonville was built reducing the distance between Jacksonville and Savannah to 172 miles.

In recasting rates the Ocean Steamship still allowed the S. F. & W. Ry. Co. 50 per cent of the through rate, as before, for reasons sufficient to the contracting parties. If this basis of fixing rates between land and water transportation companies is the correct one, the all water route from Jacksonville to New York is equivalent to 800 rail miles.

The manager of the steamship line from Savannah, estimates that compress cotton occupies about twice as many cubic feet per ton as a ton of oranges, but while cotton may be carried anywhere, the best ventilated part of

the ship must be reserved for oranges. The same authority states that the revenue per ton to his line on oranges and cotton is about the same. The gross revenue from cotton is \$5 or \$6 per ton, out of which comes cost of compressing; for marine transportation, actual cost not stated. The gross revenue upon oranges is \$4.25 per ton. The cost of handling oranges in New York is put at 75 cents per ton, of cotton 20 cents per ton. Lumber is carried still cheaper at \$3.10 to \$3.20 per ton.

The rate on cotton from Callahan, Jacksonville, Lake City and Live Oak, Florida, *via* the S. F. & W. Ry., and Ocean Steamship to New York by traffic in effect Sept. 12, 1891, is only about 20 per cent higher than the 40 cent rate on oranges.

The Savannah, Florida & Western Railway "under its proportion of the old rate received 1.88 cents per ton per mile, and according to its report, the estimated cost of carrying a ton of freight per mile in general over its line, was, for the year ending June 30, 1890, .965 of a cent. Deducting the latter from the former there is left .915 of a cent as the excess of the rate per ton per mile under the old rate over the estimated cost of its general transportation. Making the same deduction from the rate per ton per mile 2.7 cents received under the advanced rate, there is left 1.745 cents as the excess of the present rate over the cost of transportation in general."

It is not necessary for the purpose of this inquiry to consider the cost of transporting freight per ton per mile, or the average receipts per ton per mile of the railroads making up the all rail route from Savannah to New York, as they are not parties herein.

The division of through rates between the Savannah, Florida & Western Railway and the Ocean Steamer Co., on oranges, grew up naturally. Prior to 1881, oranges from East Florida were carried on steamers out of the St. Johns river to Savannah and Charleston en route to New York. Most of them went by steamers from Charleston to New York, and the through rate was divided with the line from Charleston to Palatka, making 50 per cent each. The Ocean Steamship Co. received a part of these oranges, and divided the through rate in the same way. The orange business rapidly increasing, the Savannah, Florida & Western Railway, then the Atlantic & Gulf Railroad, wanted some of it, and consented to the same equal division of the through rate.

Its route was then *via* Live Oak and Dupont, 259 miles from Jacksonville to Savannah, and the division was a natural one, taking three water miles as the equivalent of one rail mile; when the Savannah, Florida & Western Railway built the short line from Jacksonville, *via* Way Cross, to Savannah, decreasing the distance between the two points to 172 miles, that company and the Ocean Steamship Co., in recasting rates, again agreed to make an equal division of the through rate.

By what percentages the through rate is divided between the defendants can be of no importance to the complainant, unless such an unequal division was made as to render the entire rate an unreasonable one.

The orange freight business has grown up and attained proportions giving it importance

in transportation circles in the last fifteen or twenty years. From insignificance fifteen years ago, the orange crop of 1891 and 1892 had reached 8,500,000 standard boxes. To convey this number to market would require 11,666 cars carrying 800 boxes each. Taking the estimate of cars making up a train on No. 208, as 32, it would take 364 solid trains to move last season's crop. It only establishes the credit of the transportation lines for business intelligence and sagacity that they have furnished as rapidly as possible improved facilities for handling, forwarding and storing such a large, sure and yearly increasing volume of freight. Experience taught both shipper and carrier that the orange must have ventilation in transit, to protect it from decay, and so ventilated cars were built and put upon the rails. It was found that better results were obtained by having air spaces in packing at the tops of the cars and space for ventilation at the side doors of the cars, and that oranges went forward in better condition if packed not to exceed 300 boxes in a car. Continuous and accelerated speed was found important, as thereby oxygen was furnished the orange in movement. Facilities for warm storage at terminals became necessary to protect the fruit from the cold weather in northern cities. These increased facilities have been added as experience showed their necessity, and were mainly in use before the advance complained of. They were made as an inducement to the producer as the natural competition existing for the carrying trade would lead him to ship by those lines offering best ventilation, continuous and rapid transit and improved terminal facilities for storing.

The former rates were in effect from November 18, 1886, to November 23, 1890. It is claimed that it was originally established as a war rate, and continued in subsequent seasons by the reason of the freeze of 1856, and the yellow fever of 1887 and 1888. This rate was not objected to during all this time as unremunerative, and when increased was not recommended by the traffic manager of the S. F. & W. Ry. Co. The increase is claimed to be justified on account of large expenditures for increased facilities for handling the crop. The increased expense consists of an addition to the cost of ventilated freight cars over the common box car, which is used also in the transportation of vegetables and ordinary merchandise, the extra expense for service and speed in running train No. 208, and the cost of furnishing warm storage in New York. These increased expenses would have been necessary had the rate remained to enable the transportation companies to handle rapidly and to the satisfaction of the shippers such heavy freights. The rate cannot be determined and fixed with a view necessarily of affording a balance of profit to the producer and shipper. The carrier will doubtless endeavor to establish rates so as to encourage and foster the cultivation of the orange. It is his interest to do so. It is manifestly improper, however, to so make rates as to at all times afford a profit to the shipper. An attempt to do this would cause rates to fluctuate with the markets, upon supply and demand.

The defendant company's through line from

base points in Florida to New York is made up of taking the average of distances from the base points, Jacksonville, Callahan, Gainesville, Lake City and Live Oak to Savannah of about 200 miles rail and about 750 miles water transportation. There is a competitive all water route from Jacksonville to New York, and a competitive route from Jacksonville, Gainesville, Lake City and Live Oak to New York *via* Fernandina, partly rail and partly water transportation. One of these lines, the Clyde, seems to have been instrumental in the reduction of the rates in 1886 to 80 cents. Upon the basis named by one witness (Sorrel) in fixing rates, this route to New York is equivalent to but little more than 300 miles of rail transportation. It is stated that oranges are delivered, on an average, as quickly by this route as by Ocean Steamship Company, or all rail. The strategic advantage occupied by this line should not operate to cause other lines to carry freights without proper compensation and profit. The actual cost of carrying oranges over the Savannah, Florida & Western Railway cannot be arrived at from any evidence furnished. It is shown that the average receipts per ton per mile in 1890, was 1.378 cents per mile, and the average cost of a ton per mile was .955 of a cent, a difference of .413 of a cent of the cost of transportation. Under the present rate on oranges this company receives about 2.7 cents per ton per mile, including terminal charges. If the cost of transporting a ton per mile remains the same as in 1890, this company receives 1.745 cents upon oranges over the average cost of transportation per ton per mile.

The orange crop does not supply a continuous freight throughout the year. Shipments begin in October, and continue steadily until April. For fully one half of the year no important movement of this crop is made. Many extra cars are required during the shipping season, and the terminal facilities in New York are not all required for other freight the remaining part of the year. An additional burden is thereby imposed upon orange freights.

The fact that claims are interposed by shippers and paid for loss, breakage and theft of oranges en route, is of no more significance than similar claims upon other classes of freights. It appears that oranges are shipped released and that no contract is made for delivery within a specified time at point of destination. Deterioration by delays in transportation are not considered. This loss falls upon the shipper.

The orange is a staple product in Florida, and its annual increase has been steady since it first assumed proportions of sufficient magnitude to engage the attention of transportation lines. The crop can be depended upon not to decrease in amount from year to year in the near future. It is handled easily and cheaply, packs closely, and is of sufficient weight to give fair tonnage to cars. Its transportation to market is a regular daily business during the season, and can be calculated upon with certainty. The volume of orange freights offered to defendants is increasing each season, and the cost to the carrier is decreasing.

The rate which was formerly in effect was continued for four years, and was not com-

plained of as unremunerative during that time.

The increase was much greater than required to compensate for increased facilities furnished by the carrier, admitting that these were made solely for the benefit of the shipper and not the intelligent and business like improvements which a first class railroad would supply as fast as found necessary to enable it to control a large and increasing proportion of these freights.

This increase was an advance of 83½ per cent upon the rates previously in effect to New York, Philadelphia and Baltimore, and was made without previous notice to a large class of shippers extending over a wide territory, whose interests were materially affected thereby. No such increase was made upon other products of similar volume and value. The decision and findings of the Interstate Commerce Commission have not been shown as erroneous by the proofs submitted before the master. If the court determines that said findings and decision were made by a legally constituted body, I recommend that the prayer of the petitioner be granted and the orders made by the Commission be enforced.

The evidence on file, as to the value of the services of the solicitor for complainants consisting of the sworn statements of two of the leading solicitors in the district, indicate a proper compensation to be from \$3000 to \$5000. The weight of evidence is in favor of the latter sum, and I recommend an allowance of \$5000 as compensation for the services of said solicitor in this cause.

Special Master's Fees & Expenses.

Taking testimony and report, with findings upon reference in above entitled case,	\$750.00
To cash paid stenographic notes and typewriting,	120.00
	\$870.00

Defendant's exceptions:

Exceptions taken by the defendant, Savannah, Florida & Western Railway Company, to the report of Joseph H. Durkee, Special Master in Chancery, to whom this case was referred to take the testimony and report same, with his findings, by an order made herein on the 23d day of March, A. D. 1892, the report bearing date the 16th day of September, 1892, and which was filed on the 17th day of September, 1892.

1st. For whereas there was but one question before the master, viz: whether the increased rates on oranges and lemons put in effect on the 23d day of November, A. D. 1890, over the line of the Savannah, Florida & Western Railway Company from Jacksonville, Callahan, Gainesville, Lake City and Live Oak, basing points, to New York, Philadelphia and Boston, and by connecting lines to other eastern cities, were unjust, unreasonable, excessive and unlawful and in violation of the Act to Regulate Commerce, who finds that said increase of rate was unjust, unreasonable and excessive, that said finding is erroneous, and petitioner cites and relies upon the entire testimony taken in this case to support same.

2d. For that said master finds, as a conclusion of fact on the testimony introduced in this

case, that all of the contentions of the defendant are established by the proof, viz: that the rate prior to the increased rate complained of in this suit, was not remunerative and that it was reduced originally as a war rate and retained afterwards on account of the freeze, the yellow fever epidemic, and the depression of business; that the facilities afforded by the defendant for transporting oranges and lemons are superior; that they run a special freight train for this purpose, called "A Perishable Freight Train;" that they give extra care and attention and terminal arrangements to handle these shipments at junctional points that are exceptional; that the cars are of superior character, having the most approved air brakes, couplers and ventilation; that they run at a greater speed; that there is extra expense for re-billing the freight; that many of the cars return empty, and that they go without being loaded to their maximum capacity; that the Florida orange is more perishable than other oranges grown in this country; that quick and continued transportation, by reason of the oxygen generated by motion, preserves the orange; that the expedition is worth at least 10 per cent over a movement that would be two or three days slower; and then he errs in finding in conclusion as a matter of fact, that the increased rate was unjust, unreasonable and excessive and unlawful and in violation of the Act to Regulate Commerce.

3d. For that the master, while finding that the orange is perishable, but will bear transportation "if packed when dry and carefully handled in packing," errs in the general conclusion which holds the transportation companies responsible for their being "packed when dry and carefully handled in packing" by saying that the rate is unreasonable, and to this extent basing it upon fruit that will bear transportation.

4th. For that the master erred in finding that the rate was unreasonable in its increase, because his own finding of fact shows that the grower receives \$11 per acre after deducting interest upon his investment, thereby demonstrating by his own finding that the increased rate was not unreasonable.

5th. For that the master erred in finding that the crop could be accurately counted upon for freightage during a stipulated period of the year, and defendant refers to the testimony of Geo. R. Fairbanks, Mr. Bishop and Rev. Lyman Phelps, and the master's own finding of fact, that the orange is liable to freezes and destruction by insects, in support thereof.

6th. For that the master while finding that the division of the through rate should not affect the reasonableness or unreasonableness of the rate as an entirety, is erroneously influenced by the division that is made of said rate between the carriers by basing in part his opinion upon the difference in miles allowed for sea voyage as against transportation by rail.

7th. For that the master, in basing his conclusion as to the reasonableness of the rate upon his computation that the defendant, the Savannah, Florida and Western Railway Company, receives 2.7 cents per ton per mile for hauling oranges against a much smaller percentage per ton on dead freights, erred by

reason of the fact that the increased tonnage that can be carried in a car of dead freight over perishable freight is not considered, and the fact that the perishable cannot wait, but must move, while the dead freight is a waiting freight.

8th. For that the master erred in part basing his finding that the rate was unreasonable on the estimated cost of .965 cents per ton per mile, by reason of the fact that the profit that a carrier may make on a perishable as against a dead freight cannot properly be a factor as to the reasonableness of the rate, and because there is no evidence to show what the cost per ton of carriage was at the time of this hearing.

9th. For that the master erred in refusing to take into consideration the claim for damages made on shipments of fruit as against similar losses upon dead freights.

10th. For that the master erred in finding that the increased rate was greater than the facilities furnished required.

11th. For that the master erred in basing his findings largely upon the fact that the increased rate was 83 1-3%, and was a larger increase than had been made at any one time upon any other character of shipment, instead of basing his findings upon the testimony, and defendant cites all of the testimony in this case to show the reasonableness of the rate and the unreasonableness of the master's findings.

12th. For that the master erred in placing the value of services of complainant's solicitor at five thousand dollars (\$5000), and defendant cites the testimony of Horatio Bisbee and A. W. Cockrell, and proffert of the record in this case in support of said ground.

13th. For that the bill of costs charged by the master in this case are excessive and onerous and unreasonable. And defendant cites the number of sittings had, as shown in the record, and the fact that the testimony was taken stenographically and charged for, independently, in support of this ground.

John E. Hartridge,
Sol. for S. F. & W. Ry.

DECREE.

Swayne, J., delivered the opinion of the court:

The above entitled cause having been heard and considered on the petition of said com-

plainant, the answers of said defendants, the evidence therein, the report of the master therein, and the exceptions of said defendants to said report, and the arguments of counsel for the respective parties complainant and defendant, it is considered, ordered, adjudged, and decreed that the said exceptions of complainants to said master's report be and the same are hereby overruled, and that the said report of the master filed herein be and the same is hereby sustained and confirmed. And, further, that said defendants, The Savannah, Florida & Western Railway Company and the Ocean Steamship Company of Savannah, and each of them and their and each of their agents, servants and employees and every of them, be and are hereby enjoined and restrained from further violating, disobeying, or in any way refusing to observe, obey, conform to and perform, the requirements of the order of the Interstate Commerce Commission of the United States, made, to wit: on the 29th day of October, 1891, requiring said defendants and each of them to forthwith cease and desist from charging or collecting for the transportation of oranges and lemons any greater sum than an addition of 5 cents per box to the rates in force prior to the advance on November 23, 1890; and from refusing, failing or neglecting to receive, transport and deliver properly and promptly, oranges and lemons, or either, of or from said complainant, The Florida Fruit Exchange, from the base points in Florida, to wit: Jacksonville, Callahan, Gainesville, Lake City and Live Oak, and any one of them, by and over said defendants' line or lines of transportation, railroad, or railroads, steamship or steamships, to New York city in the state of New York, and other eastern cities, or any of them, the points of destination of any such shipment or shipments, at and for rates of charges therefor not in excess of those designated as the maximum allowed by said order of said Commission, to wit: an advance of 5 cents per standard Florida box on the rates in effect next preceding November 23, 1890.

And further that said defendants pay to complainant the costs of this suit, including the master's charges as reported by him, and pay to complainant or its solicitor of record the fee of the complainant's solicitor and counsel, Charles M. Cooper, of five thousand dollars, which is hereby allowed herein.

UNITED STATES CIRCUIT COURT OF APPEALS. (Second Circuit.)

INTERSTATE COMMERCE COMMISSION

v.

TEXAS & PACIFIC RAILWAY, *Appt.*

1. A charge of \$3.70 per hundred pounds upon domestic traffic from New Orleans to San Francisco when only 80 cents per hundred between the two points is charged under substantial equality of conditions upon similar goods coming to the port of New Orleans from Liverpool is not justified by the fact that there is competition with

water routes in carrying between Liverpool and San Francisco, since the gross inequality shows that the carrier is either injuring itself by carrying without profit or is receiving an unwarranted return from the domestic traffic for the service rendered.

2. Disobedience of an order of the Interstate

Commerce Commission prohibiting the carriage of traffic from foreign ports upon any other than the published inland tariff rates for similar freight from the port of entry to the point of destination, not permitted by the United States circuit court on the ground of the existence of competing water routes; but the general question whether rates for the inland carriage of foreign and domestic traffic must be the same, without regard to any circumstances which may exist in the foreign country, is not decided.

3. A carrier is not free to make dissimilarities to any extent it may choose in the freight rates on foreign and domestic traffic from the fact of the existence of some dissimilarity of conditions.
4. Where a carrier has an office in one state,

which is that of the executive officers, and where the stockholders' and directors' meetings are held, and the stock certificate books and the records of stockholders and directors meetings are kept, while the administrative offices of the carrier are in another state, the former is its principal office within the meaning of section 16 of the Interstate Commerce Act relating to place of bringing suits to enforce orders of the Commission.

5. All the carriers which united in making a joint rate are not necessary parties in a suit for an injunction against one of them founded on an alleged disobedience of an order of the Interstate Commerce Commission which commanded its abandonment.

Decided October 17, 1893.

APPEAL by defendant from a decree of the the Circuit Court of the United States for the Southern District of New York in favor of complainants in a suit brought to enjoin defendant from further disobedience of an order of the Interstate Commerce Commission, requiring it to desist from making certain excessive charges for the transportation of freight.

Affirmed.

The facts are stated in the opinion.

Messrs. Winslow S. Pierce and David D. Duncan for the appellant.

Messrs. John D. Kernan and Edward Mitchell, U. S. Dist. Atty., for the appellee.

Shipman, Ch. J.:

On March 28, 1889, the Interstate Commerce Commission made, not upon contention of parties, a general order, which, among other things, provided as follows: "Imported traffic transported to any place in the United States from a port of entry, or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights." This order was quite generally obeyed by those railroad companies and their connecting lines, which carried imported goods westward from the Northern Atlantic seaboard. At least six railroad companies ceased, after said order, their previous practice of discrimination in favor of imported traffic.

On June 19, 1889, the Commission filed its decision in regard to export rates in the case of *New York Produce Exchange v. New York Cent. & H. R. R. Co.* and eighteen other railroad corporations, 2 Inters. Com. Rep. 533. The opinion shows that the trunk lines, so called, had, "under resolutions of their association, made through export rates of which the inland proportion accepted by them was, at the port of New York, often ten cents or more per hundred pounds less on like traffic than the published tariff rates charged at the same time to the same port." It was held "that the discrepancy between the proportion of the through rate accepted and the established tariffs for seaboard consignments for the same inland carriage, is not shown to have been justified by any circumstances tending to show that it was just or

proper, and that it must therefore be deemed an unjust and unlawful discrimination as against the transportation terminating at that port," and that "the only practicable mode yet devised for making through export rates, as appears by past experience, is to add to the established inland rates from the interior to the seaboard the current ocean rates."

This decision was confined to export rates at the port of New York, but as thus made, was of almost national importance. It is believed that the railroad companies which were parties to the litigation complied with the order of the Commission.

In this state the general railroad policy which has been established by the Commission in regard to rates which discriminated in favor of either import or export traffic against inland traffic, the New York Board of Trade and Transportation filed, before the Interstate Commerce Commission on November 29, 1889, a complaint against the Pennsylvania Railroad Company and its connecting western railroad companies, charging in substance that these corporations were, in violation of the Act to Regulate Commerce, guilty of unjust discrimination in that, for the transportation of property to Chicago and other western points, which was delivered to them at New York or Philadelphia, by vessels or steamship lines from foreign ports, under through bills of lading, they were charging rates fifty per cent lower for the like and contemporaneous service rendered to property delivered at New York or Philadelphia, which did not arrive from foreign ports. Subsequently, the San Francisco

Chamber of Commerce became a party complainant and divers other railroad companies, among them the Texas & Pacific and the Southern Pacific Railroad Companies, were made parties defendant, until twenty-eight companies were defendants. This complaint was apparently brought to compel universal obedience to the order of March, 1889. The Commission dismissed the complaint as to eighteen defendants and found that its averments were true as to ten defendants, among which were the Texas & Pacific and the Southern Pacific companies, and as to said defendants, ordered, on January 29, 1891, that each of them, on and after May 5, 1891, cease from carrying any article of import traffic shipped from any foreign port, through any port of entry of the United States or any port of entry in a foreign country adjacent to the United States, upon through bills of lading and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over their respective lines from such port of entry to such place of destination, which order was duly served upon the Texas Pacific Railroad Company.

On or about January 18th, 1892, the Commission brought its petition against said company before the Circuit Court for the Southern District of New York, alleging that it had willfully violated said order, by charging, collecting and receiving freight rates which had been declared to be illegal, and by way of specification, the petition alleged that the offending and also the regular inland rates were shown in a table annexed to the petition, marked "Exhibit 86." The findings of fact by the Commission upon the original complaint were made part of the petition. The prayer of the petition was for an injunction against further disobedience of the order.

The defendants' answer denied that its principal office was in the state of New York. It denied no other allegations of fact but denied that the order was a lawful order. It stated that the rates which were complained of were, so far as they were made for inland carriage, the joint rates over its railway and the Southern Pacific Railway and cover the carriage by the rails of the defendant from New Orleans to El Paso, Texas, and by the rails of the Southern Pacific road from El Paso to San Francisco.

The answer admitted that it charges, demands, collects and receives, and has, since the date of the order, charged, demanded, collected and received rates for the transportation of commodities from Liverpool and London, *via* New Orleans, and said two railways, to San Francisco and also from New Orleans, *via* the same route, to the same destination, substantially as stated in Exhibit 86.

Its reason for a discrimination in inland rates between foreign and domestic merchandise will be stated hereafter.

The answer further said that the order affected its rates from London, Liverpool and other European points to Missouri river points, but that these rates became so low that it had canceled its tariff and was charging on such business as it received, destined from Europe

to the Missouri river, the local rates from New Orleans.

The answer further stated that the order also affected its rates of transportation on articles from Europe to towns in Texas and Colorado.

No testimony was taken before the circuit court. The case was heard upon petition and answer and an injunction was directed against the defendant in accordance with the prayer of the petition. From this decree the defendant has appealed to this court.

Exhibit 86 shows a very marked discrimination in rates from New Orleans to San Francisco between those charged upon merchandise shipped by through bills of lading from Liverpool to San Francisco and those charged upon the same kind of goods delivered to the defendant at New Orleans from places in this country for transportation to San Francisco. For example, the through rates from Liverpool to San Francisco, per hundred pounds, on books, shoes, carpets, cashmeres, cutlery and woolen goods were \$1.07, of which the railroads received, for carriage from New Orleans to San Francisco, eighty cents. While upon the same classes of goods received from points in this country at New Orleans, the rates for carriage from New Orleans to San Francisco, per hundred pounds, were as follows: upon books and carpets \$2.88, upon shoes, cashmeres, cutlery and woolen goods \$8.70.

The finding of facts by the Commission shows that in 1889, the importations of the Texas & Pacific Railway were about five millions of pounds, of which about 2,500,000 pounds went to Missouri river points, about 2,000,000 pounds to the Pacific slope, California terminals and Oregon points and the remainder was distributed mostly in Colorado and Utah, while a little of it went to Texas. As the defendant is charged with a violation of the order only with respect to its rates to California terminals, it is necessary to state no other facts than those which related to that part of its business.

The through rates from Liverpool to San Francisco are controlled by the competition, at Liverpool and London, of steamships connecting with railroads across the Isthmus of Panama and in a small degree, with respect to cheap heavy goods, of sailing vessels around Cape Horn.

The defendant carries import traffic at the reduced rate to California terminals only. To intermediate points the regular inland rates are charged. This traffic is taken at the reduced rate, because, unless so taken, the defendant would, by reason of the competition, lose the business which it is expected will increase. The defendant places the dissimilarity of conditions between the transportation of imported and domestic goods solely upon this ocean competition. There is apparently no other reason why the inland rate should not be applied to all business, both domestic and foreign. No finding was made as to the profit upon the San Francisco business. There was a profit, when the case was heard before the Commission, upon the Missouri river business. It was found that the Southern Pa-

cific proportion of the through rate would not, in the absence of competition, be a full and fair return for the transportation service rendered. It gave the road something more than the actual cost of the movement of the freight.

The Commission contended that upon these facts the defendant had violated the second section of the Act to Regulate Commerce which prohibits unjust discrimination in the compensation charged for like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions and had also violated the third section which prohibits any undue or unreasonable preference or advantage to any particular description of traffic.

The defendant insisted that the dissimilar conditions growing out of the ocean competition freed its conduct from the prohibition of the statute.

The Commission in deciding the original case, held that this class of dissimilar conditions was not in the contemplation of the statute and was not to be regarded in the regulation of inland tariffs of rates. Its language was as follows:

"These circumstances and conditions are indeed widely different in many respects from the circumstances and conditions surrounding the carriage of domestic interstate traffic between the states of the American Union by rail carriers; but as the regulation provided for by the Act to Regulate Commerce does not undertake to regulate or govern them, they cannot be held to constitute reasons in themselves why imported freight brought to a port of entry of the United States or a port of entry of an adjacent foreign country destined to a place within the United States should be carried at a lower rate than domestic traffic from such ports of entry respectively to the places of destination in the United States over the same line and in the same direction. To hold otherwise would be for the Commission to create exceptions to the operation of the statute not found in the statute; and no other power but Congress can create such exceptions in the exercise of legislative authority."

It further said: "Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports; it also has all the benefit and advantage of the low rates made in the ocean carriage arising from the peculiar circumstances and conditions under which that is done; but when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States under the operation of the Act to Regulate Commerce must be under the inland tariff from such port of entry to such place of destination covering other like kind of traffic in the elements of bulk, weight, value, and of carriage, and no unjust preference must be given to it in carriage or facilities of carriage of that freight. In such case all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight

and operation, and in its carriage from a port of entry to the place of its destination in the United States, the mere fact that it is foreign merchandise thus brought from a foreign port is not a circumstance or condition under the operation of the Act to Regulate Commerce which entitles it to lower rates or any other preference in facilities and carriage over home merchandise or other traffic of a like kind carried by the inland carrier from the port of entry, to the place of destination in the United States from the same distance and over the same line."

Its conclusion was that foreign and home merchandise "under the operation of the statute, when handled and transferred by interstate carriers, engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, charges and treatment for similar services rendered."

This rule, having been founded upon a construction of the statute, is a very broad one; it is applicable to all the foreign circumstances and conditions which affect rates and the question whether it must be universally applied, without regard to any circumstances which may exist in a foreign country, and whether dissimilarities which have a foreign origin are to be excluded from consideration, under the operation of the statute, is an exceedingly important one whose ultimate decision may have a wider influence upon the interstate commerce of the country that we can foresee. This legal question was not discussed in the export rate case, which was treated "as one of practical policy."

We are not disposed to pass authoritatively upon this question, except in a case which demands it and in which the effect of this construction of the statute is naturally the subject of discussion.

This petition presents a question of narrow limits, which relates only to the validity of the order so far forth as it concerns the conduct of the defendant in its joint rates for transportation of imported traffic from New Orleans to San Francisco, and is whether these rates subject domestic traffic between the same points to an undue disadvantage.

The same conditions exist between New Orleans and San Francisco, with reference to each class of goods. There was no "difference in cost, expense, or the exceptional character of the service." The only reason which induces the defendant to take the import business is competition in Great Britain between water routes, which drives it to carry an imported case of cutlery for eighty cents per hundred pounds when it requires a hundred pounds of domestic cutlery to pay \$8.70 for the same carriage. Assuming that ocean competition can create a dissimilar condition, which is to be considered in determining whether discriminations against particular classes of traffic are unjust and is a fact to be taken into account in determining whether a particular traffic is subjected to an unreasonable disadvantage (*Phipps v. London & N. W. R. Co.* [1892] 2 Q. B. 229), does this condition justify the great disparity in rates in this case?

While it is true that under sections 2 and 4 of the statute substantially dissimilar conditions may justify dissimilarity in rates, it does

not follow that any dissimilar condition, of whatever kind it may be, justified any discrepancy in rates.

Gross inequality shows either that the road which makes the inequality is unjust to itself in carrying goods without profit "or else the larger rate gives an unwarranted return for the services rendered." *Board of Trade of Chattanooga v. East Tennessee, V. & G. R. Co. ante*, 213. In this case, it may fairly be presumed that the joint rates gave each road something more than the cost of movement, leaving repairs, interest upon floating debt and all fixed charges to be paid by the rates upon some other traffic. The rates were not entirely unremunerative, and if so, the much larger rates placed upon domestic traffic not only compelled it to bear an undue burden, but gave the company an unwarranted return.

Exhibit 86 cannot be examined, in the light of the admitted facts of equality of conditions from the port of New Orleans, without the conviction that unless the defendant is injuring itself by its rates upon imported goods, it is imposing an exceedingly high rate upon domestic goods. It is true that a person who pays only a fair price for a service cannot justly complain merely because another pays too little for the same service. *Garton v. Bristol & E. R. Co.* 1 Best & S. 112. But this general truth does not meet the conditions of this case, which are of such inequality, that the larger rates must be found to be excessive. It has been justly said by the Commission that rates should not only be reasonable, but be relatively reasonable, and thus not become unjust in their results. *Boards of Trade Union v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Rep. 608, 1 I. C. C. Rep. 215. It follows that the conduct of the defendant was in violation of sections 2 and 8 of the statute in question, and was properly attempted to be corrected by the order which was disobeyed.

But it will be urged that if it is assumed that ocean competition can create a dissimilar condition, it follows that it is a condition which may rightfully be regarded in establishing rates for import and domestic traffic and that the order of the Commission which directed equality should not be enforced because some inequality might be justifiable.

The accusation against the railroad companies in the original complaint before the Commission was not that they were charging too low rates upon import traffic, but that by their relatively excessive rates upon domestic traffic, they were unjustly discriminating against the latter. The underlying question which arises upon the petition to the circuit court is the same. The defendant's answer before the Commission averred that its "domestic rates are fair and reasonable in themselves." In its answer to the petition, it omits this averment, does not justify its rates upon domestic traffic, and does not state, if a reduction should be made, what excess of rates could properly be placed upon that kind of traffic, but defends the existing difference in rates solely upon the ground that if it charged higher rates upon the import traffic, it would lose that class of business.

The final question before the circuit court was: "Is the order of the Commission, a proper 4 INTER S.

one, and should obedience to it be insisted upon?" In order to decide that question, the answer presented two questions upon the subject of rates. 1st. Can ocean competition be regarded, in any event, as creating a dissimilar condition? 2d. If it can, is the difference in the existing rates justified by that condition? A third question might have been, but was not presented, viz: In the event that the first question is answered in the affirmative, and the second is answered in the negative, does the dissimilar condition justify any, and if so, what dissimilarity in rates? To answer this question the court should have been informed in regard to the reasonableness of existing rates upon domestic traffic.

This court is of opinion that assuming that the first question can be answered in the affirmative, the second must be answered in the negative and that an unfair inequality of rates is plainly manifest.

There is nothing in the record which enables the court to determine that the assumed dissimilar condition justified any substantial dissimilarity in rates, and it ought not to permit disobedience to an order until it can suggest a better one as a substitute.

The defendant's apparent position that inasmuch as substantially dissimilar conditions create dissimilarity in rates, the amount of dissimilarity in rates is not important, cannot be sustained. That some dissimilar conditions justify dissimilarity in rates is true. That remote dissimilarities of condition justify any dissimilarities which the carrier chooses to make, is not true. To set aside the order of the Commission and permit the present excessive inequality of rates, in the absence of any attempt to show the reasonableness of the inequality, would not accord with justice.

Two objections which have been taken by the defendant to the jurisdiction of the court remain to be considered.

Section 16 provides that in case of the disobedience of a common carrier, which is subject to the provisions of the Act, to a lawful order of the Commission, the latter can apply for an injunction, by petition to the circuit court sitting in equity in the judicial district in which the carrier has its principal office or in which the disobedience of such order has taken place.

This petition was brought in the southern district of New York upon the ground that the principal office of the defendant was in the city of New York, whereas it is said to be in Texas. The charter does not declare where the principal office of the company shall be. In fact, the stockholders' meetings and directors' meetings are held in New York, where also is the office of the President, First Vice President, Secretary and Treasurer of the Company and where the stock certificate books and records of the stockholders' and directors' meetings are kept. The New York office is thus the domicile of the corporation and the principal office, while the general or administrative offices of the heads of departments are in Texas.

It is also contended that inasmuch as the rates upon import traffic were joint rates with the Southern Pacific Railroad Company and as any order of the circuit court requiring the

defendant to desist from carrying business upon such joint rates would abrogate contracts and agreements to which said company is a party, it is a necessary party to the petition.

It is true that in proceedings before the Commission to test the legality of through rates, the Commission, which has the power to make other common carriers parties, irrespective of their places of residences, has insisted upon the necessity of bringing in all the corporations which make the rates, and has said: "They must be brought in, first, because they have a right to be heard, and, second, because an order made and purporting to control their action when they were not parties would be improper on its face and in legal sense ineffectual." *Allen v. Louisville, N. A. & C. R. Co.* 1 Inters. Com. Rep. 621, 1 I. C. C. Rep. 199. In the proceeding before this Commission, the Southern Pacific Company was a party.

The present proceeding is a petition to compel obedience to an order, made upon hearing, and presumably correctly made, which is

brought before a circuit court whose jurisdiction over parties is limited and controlled by statute.

The Circuit Court for the Southern District of New York has no jurisdiction over the Southern Pacific Railway Company whose principal office is not in that district. Neither would a circuit court in any one district in which the violation was committed, in Texas, or Louisiana or California, probably be able to obtain jurisdiction over both the railroad companies which make the rates. The proceeding before the circuit court should not be rendered impossible, in the event of its inability to obtain jurisdiction over all the disobeying companies which have united in making through rates, and inasmuch as the proceeding is to enforce an order already made, after hearing all the parties in interest, the presence of all the parties who have jointly disobeyed is not necessary or indispensable.

The decree of the circuit court is affirmed with costs.

GEORGIA SUPREME COURT.

L. F. HENNINGTON, *Plff. in Err.*, v. STATE OF GEORGIA.

(.....Ga.....)

*The provision of § 4578 of the code making it a misdemeanor to run a freight train upon any railroad in this state on the Sabbath day is a regulation of internal police, and not a regulation of commerce. It is not in conflict with the Consti-

tution of the United States, even as to freight trains passing through the state from and to adjacent states, and laden exclusively with goods and freight received on board before the trains entered this state, and consigned to points beyond its limits.

*Headnote by BLECKLEY, Ch. J.

June 8, 1892.

ERROR to the Superior Court for Dade county to review a judgment convicting defendant of violating the Sunday law. *Affirmed.*

Defendant was indicted under § 4578 of the Code of Georgia. It was admitted that he was master of transportation upon the Alabama Great Southern R. Co., which runs from Chattanooga, in the state of Tennessee, through Dade county, Georgia, in which Hennington was indicted, on through Alabama, to Meridian in the state of Mississippi; that the train was loaded at Chattanooga with freight destined for Meridian and points beyond; and that it never stopped in Dade county to take on or deliver freight but was engaged in carrying interstate freight.

Further facts appear in the opinion.

Messrs. W. U. & J. P. Jacoway and R. J. & J. McCamy, for plaintiff in error.
Mr. A. W. Fite, Sol. Gen., for the state.

Bleckley, Ch. J., delivered the opinion of the court:

If the sanction of time can ever be invoked to justify the exercise of governmental authority over a particular subject-matter, this can certainly be done in respect to setting aside one day in each week for rest and the cessation of all unnecessary labor. A law to this effect prevailed in the earliest times of which we have any authentic record, and the subject was

one of statutory regulation in Georgia during her colonial period, and has so continued throughout the whole term of her existence as a state. At no instance since her independence was declared has she been without such a law on her statute book. It is not only unlawful, but penal, for any person whatsoever to "pursue their business or work of their ordinary calling upon the Lord's day, works of necessity or charity only excepted." Code,

§ 4579. This prohibition upon Sunday labor was already in force when the code was adopted, and dates back to the year 1762. The penalty prescribed by the colonial statute has been changed, but in other respects that statute has been operative continuously since it was enacted. There can be no well-founded doubt of its being a police regulation, considering it merely as ordaining the cessation of ordinary labor and business during one day in every week; for the frequent and total suspension of the tolls, cares, and strain of mind or muscle, incident to pursuing an occupation or common employment, is beneficial to every individual, and incidentally to the community at large,—the general public. Leisure is no less essential than labor to the well-being of man. Short intervals of leisure at stated periods reduce wear and tear, promote health, favor cleanliness, encourage social intercourse, afford opportunity for introspection and retrospection, and tend in a high degree to expand the thoughts and sympathies of people, enlarge their information, and elevate their morals. They learn how to be, and come to realize that being is quite as important as doing. Without frequent leisure, the process of forming character could only be begun. It could never advance or be completed. People would be mere machines of labor or business,—nothing more. If a law which, in essential respects, betters for all the people the conditions, sanitary, social, and individual, under which their daily life is carried on, and which contributes to insure for each, even against his own will, his minimum allowance of leisure, cannot be rightly classed as a police regulation, it would be difficult to imagine any law that could. With respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not they did have, and it is probable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest. But neither of these considerations is destructive of the police nature and character of the statute. If good and sufficient police reasons underlie it, and substantial police purposes are involved in its provisions, these reasons and purposes constitute its civil and legal justification, whether they were or not the direct and immediate motives which induced its passage, and have for so long a time kept it in force. Courts are not concerned with the mere beliefs and sentiments of legislators, or with the motives which influence them in enacting laws which are within legislative competency. That which is properly made a civil duty by statute is none the less so because it is also a real or supposed religious obligation; nor is the statute vitiated, or in any wise weakened, by the chance, or even the certainty, that in passing it the legislative mind was swayed by the religious, rather than by the civil, aspect of the measure. Doubtless, it is a religious duty to pay debts, but no one supposes that this is any obstacle to its being enacted as a civil duty. With few exceptions, the same may be said of the whole catalogue of duties specified in the ten commandments. Those of them which

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are purely and exclusively religious in their nature cannot be or be made civil duties, but all the rest of them may be, in so far as they involve conduct as distinguished from mere operations of mind or states of the affections. Opinions may differ, and they really do differ, as to whether abstaining from labor on Sunday is a religious duty; but, whether it is or not, it is certain that the legislature of Georgia has prescribed it as a civil duty. The statute can fairly and rationally be treated as a legitimate police regulation, and, thus treated, it is a valid law. There is a wide difference between keeping a day holy as a religious observance and merely forbearing to labor on that day in one's ordinary vocation or business pursuit. Nor is the statute a regulation of commerce. It applies alike to all business, vocations, and occupations. It concerns the general police of the state and all interests, whether agricultural, mechanical, manufacturing, commercial, professional, or what not. It is universal, and rigidly impartial, making no discrimination whatever for or against commerce or anything else. It puts no obstacle in the way of trade or its operations which is not encountered by every other class of worldly business or employment. Nontrading days are nonbusiness days, generally, and nonworking days for all the people. Trade may go on when anything else can. It stops only when, and so long as, there is a complete suspension of worldly enterprise and activity. It is required to take no rest which is not appointed for everything else to take.

Having now classified the colonial act of 1762, as brought down to us in section 4579 of the code, it is easy to see that the later legislation, embraced in section 4578 of the code, belongs to identically the same class, and seeks only to enforce and render effective, as respects the running of freight trains on Sunday, the scheme of internal police which the former established as universal throughout the state for all industries and vocations. On the assumption that the running of such trains on Sunday, under ordinary circumstances, is not a work of necessity, the running of them on that day was already prohibited by virtue of the prior statute when the later one was passed. The new legislation silently assumes that the running of these trains on Sunday is not a work of necessity; and, in express terms, it renders the superintendent, or other officer having control of the running of trains, answerable penally for any running which may be done on that day. As the person having the right and power to prevent it, he is held responsible for its occurrence whenever it does occur, save when it is done by others in violation of his own orders and rules. The language of the statute, so far as now material, is as follows: "If any freight train shall be run on any railroad in this state on the Sabbath day (known as Sunday) the superintendent of transportation of such railroad company, or the officer having charge of the business of that department of the railroad, shall be liable for indictment for a misdemeanor in each county through which such train shall pass. . . . The defendant may justify himself by proof that such employes acted in direct violation of the

orders and rules of the defendant." Code, § 4578. The section of the code just cited embraces qualifying provisions added by Acts 1873, p. 63, and Acts 1874, p. 97. A still further qualification may be found in Acts 1882, 1883, p. 66. None of these qualifications are directly pertinent to the present inquiry. We hold confidently, and without doubt, that section 4578 is no more a regulation of commerce than is section 4579; that both are to be taken and construed together; and that the former is part and parcel of the police system generalized in the latter, but first drawn out in one of its details by the former, and applied to the specific work or business mentioned, in so far, and in so far only, as superintendents or train managers are concerned. In so far as employes engaged immediately in running freight trains on Sunday are concerned, section 4578 has no direct application. They are still left to be dealt with under the other section. It is almost superfluous to add that we deem it of no consequence that in the case now under consideration the freight train run on Sunday was merely passing through and over some of the territory of this state on its journey from the state of Tennessee into the state of Alabama, and was laden exclusively with goods and freight received on board before it entered this state, and consigned to points in Alabama or beyond. It is no valid objection to a police regulation that it may incidentally affect interstate commerce or persons engaged therein. Almost any broad and comprehensive police regulation may have such a consequence in a greater or less degree. Nothing can be legitimate police which would prohibit, unduly restrict, or unreasonably delay inter-

state commerce; but to call a weekly halt to all business of every kind throughout the length and breadth of the state is to treat interstate commerce as everything else is treated, and surely what is exacted by law to be done, and has been generally done in Georgia for more than one hundred years, is not, in itself, unreasonable. The right of every state to enact a similar law, and the possible chance that one state may select one day of the week for rest, another state another day, and so on, until a wide reach of interstate commerce would find itself unable to move at all, cannot fairly be urged in condemnation of the police system prevailing at present in Georgia. Every system is reasonable or not, according to conditions. When conditions change, it is time enough to change the system; and it may well be assumed that any necessary change will be made in due time. So far as appears, and so far as we are aware, no day of the week except Sunday is anywhere in the United States a day of enforced rest. We are not now practically concerned with what is possible if other days should, in some of the states, be preferred to Sunday. Whether, in that event, Georgia must change, or they must, or no day whatever be protected, need not be anticipated. It is enough that, under present conditions, interstate commerce is subjected to no unreasonable delay by the Sunday law now in force. We have examined the case of *State v. Baltimore & O. R. Co.* 24 W. Va. 788, and that of *Norfolk & W. R. Co. v. Com.* 18 L. R. A. 107, 88 Va. 95. We agree with the former, and disagree with the majority opinion in the latter. *Judgment affirmed.*

ARKANSAS SUPREME COURT.

ARKANSAS & LOUISIANA R. CO. v. SMITH.

1. The shipper can base no right of recovery upon the violation of a contract between connecting railways, as to the apportionment of an agreed rate of freight. If the carrier lays an additional charge on the shipper without sharing it with its connecting line, it would be no injury to him unless the same was unreasonable.
2. Misrepresentation by a carrier as to the rate charged, but without injury, affords no ground of redress in a suit for damages.

Decided May 17, 1890.

A PPEAL from Clark Circuit Court.

The complaint alleges that defendant is a common carrier operating a railroad from Hope in Hempstead county to Nashville in Howard county; that, during the season of 1886-'87, plaintiff shipped from Nashville to St. Louis, Mo., 988 bales of cotton over defendant's road and the connecting line, the St. Louis, Iron Mountain & Southern Railway Company; that appellant falsely represented the freight rate from Nashville to St. Louis, as established by it and the connecting line to be \$3.75 per bale, where in fact it was only \$3.50 and thereby unlawfully collected and extorted from plaintiff twenty-five cents per bale as freight on the cotton.

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The answer admitted the charge but denied the misrepresentation. The court charged the jury as follows: "If the jury believe from the evidence that the defendant company through its officers and agents, demanded and collected an excessive rate of freight on the cotton shipped by plaintiff over defendant's road and connecting lines, by falsely and fraudulently representing to plaintiff that the joint rate established by the defendant road and connecting lines from Nashville to St. Louis was \$3.75 per bale, when in truth and in fact the rate so established was only \$3.50 per bale, and that said representations were false and fraudulent,

and known to the defendant to be false and fraudulent, and that, by means of said false and fraudulent representations, plaintiff was induced to contract for the payment of, and did pay to the defendant company, an excessive rate of freight on the cotton so shipped. they may find for the plaintiff the difference between the rate established by the joint act of all the roads, and the rate collected, provided they further find that the rate collected was an excessive rate."

Verdict and judgment for plaintiff. Reversed.

Messrs. A. B. & R. B. Williams, Dan W. Jones and T. B. Martin, for appellant. Messrs. Feazel & Rodgers, for appellee.

Cockrill, Ch. J., delivered the opinion of the court:

Smith, the shipper, was not a party to the contract between the railways, in which they adjusted the through rate for the carriage of cotton: and he did not ship his cotton upon the expectation that it would be carried at the rate which the carriers had agreed should be apportioned between them for the service rendered. He can base no right of recovery, therefore, upon a violation of the contract. It was no concern of his how the carriers apportioned between themselves the amount charged for through freight. *Owen v. St. Louis & S. F. R. Co.* 83 Mo. 454. If one received a greater portion of the charge agreed upon for the carriage than its share, or laid an additional charge upon the shipper without sharing the profit with the connecting line, it would be no injury to the shipper,

unless the charge demanded of him was unreasonable for the service rendered by one or both contracting lines. In that event the suit would be for extortion in demanding unreasonable charges.

But the cause was not tried upon the theory of an unreasonable charge. The gist of the action, argues the appellee, was that the appellant extorted from him 25 cents a bale on all cotton shipped by him, by falsely representing that the rate agreed upon by it and its connecting line of railway was \$3.75 per bale on cotton to St. Louis, when in fact the joint rate was only \$3.50 per bale. But there is no proof tending to show injury by reason of the false representation. Misrepresentation without injury affords no ground of redress in a suit for damages. If the appellant by false representations had led the appellee to believe that the rate had been advanced over the line of the connecting railway, and thereby induced him to ship by its line and pay it more for transportation than the service would have cost him by some other route or means of transportation, he should recover the excess paid to the appellant, whether the charge was great enough to amount technically to extortion or not, because it would have been procured from him by fraud.

The cause was tried, however, upon the theory that the false representation and payment of the higher rate on the strength of it constituted extortion without further proof. That was error.

Reverse the judgment and remand the cause for a new trial.

MISSISSIPPI SUPREME COURT.

POSTAL TELEGRAPH CABLE CO., *Appt.*,

v.

WIRT ADAMS.

A privilege tax on telegraph companies, graduated according to the value of the property of the company measured by its mileage, and imposed

in lieu of all other taxes, although incidentally affecting interstate commerce, is not unconstitutional, as an interference with such commerce.

Decided December 4, 1898

A PPEAL by defendant from a judgment of the circuit court for Hinds county in favor of plaintiff in an action brought to compel the payment by defendant of a privilege tax. *Affirmed.*

The facts are stated in the opinion.

Messrs. Mordecai & Gadsden and Brame & Alexander for appellant. Messrs. Williamson & Potter for appellee.

Woods, J., delivered the opinion of the court:

This action was instituted by the revenue agent of the state for the recovery of a privilege tax alleged to be due by the appellant

for the years 1888 and 1889, under section 585, Code 1880, and the amendment thereto contained in section 1, chap. 3, Acts 1888. Under the statute thus amended, among other provisions, we find this language: "A tax

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on privileges is levied as follows, to wit: on each telegraph company operating 1000 miles or more which shall be in lieu of other state, county or municipal taxes, \$3000;

on each telegraph company operating less than 1000 miles of wire, for each mile of wire, \$1." The declaration alleges that the appellant operated, in the aggregate, during the years named, 391.28 miles of wire in the state of Mississippi, and was, therefore, under the statute, liable for a tax of \$391.28 for each year named. It will be thus seen at once that this is a tax imposed upon a telegraph company, in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, state, county, municipal. The reasonableness of the imposition appears in the record as shown by the second count of the declaration and its exhibits, whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single ad valorem tax. The pleas bring in question the validity of our statute, and aver its conflict with the interstate commerce clause of the Constitution of the United States. The record presents a Federal question, and we acknowledge ourselves bound to follow the decisions of the court of last resort of the United States, if that court shall be found to have adjudicated it. Our difficulty arises from our inability to say with confidence what the Supreme Court of the United States has finally determined in cases of like character. The reported opinions of that court are so irreconcilable in their variances and seeming conflicts, in our view, that it is with diffidence that the impartial student can affirm what will or will not follow in any given state of case. If the line of decision adopted in *Pensacola Telegr. Co. v. Western U. Telegr. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Telegr. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158; *Pickard v. Pullman Southern Car Co.* 117 U. S. 84, 29 L. ed. 785; *Robbins v. Shelby County Taxing Dist.* 1 Inters. Com. Rep. 45, 120 U. S. 489, 30 L. ed. 694; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311; and *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649—stood alone, the settlement of the controversy in the case at bar would be made without great difficulty, in accordance with the contention of the appellant. But the numerous other cases decided by the same great tribunal, in which was involved the same or like questions as are to be found in those just named, and in which contrary views seem to have been upheld, involves the controversy in much apparent, and, as we think, some real, difficulty. If we had for our guidance only the other lines of decisions, embracing *Philadelphia & R. R. Co. v. Pennsylvania* ("State Tax on Railway Gross Receipts") 82 U. S. 15 Wall. 284, 21 L. ed. 164; *Osborne v. Mobile*, 83 U. S. 16 Wall. 479, 21 L. ed. 470; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419; *Western U. Telegr. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790; *Maine v. Grand Trunk R. Co.* 3

Inters. Com. Rep. 807, 142 U. S. 217, 35 L. ed. 994; *Ficklen v. Shelby County Taxing Dist.* 4 Inters. Com. Rep. 79, 145 U. S. 1, 36 L. ed. 601; *St. Louis v. Western U. Telegr. Co.* 148 U. S. 92, 37 L. ed. 380—the right of the revenue agent of the state to maintain this suit successfully would seem to be well established in accordance with the views of counsel for appellee. If from generalization we descend to detail, the confusion that prevails in the decisions of the court whose lead we are bound to follow touching interstate commerce will be seen at once, and their confusion will deepen on protracted examination.

In the case of *Western U. Telegr. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, Mr. Chief Justice Waite, speaking for a unanimous court, said: "The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation, the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and business." This very language of the then chief justice is quoted with approbation in *Western U. Telegr. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, by Mr. Justice Miller, speaking for an undivided court. It is unqualifiedly declared in these two cases that the telegraph company—the agent of the government, and engaged in interstate commerce, as held repeatedly in the court whose decisions we are reviewing—"may undoubtedly be taxed in a proper way on account of its occupation and its business." But in *Leloup v. Mobile* (as well as in other cases) 127 U. S. 640, 32 L. ed. 311, Mr. Justice Bradley, speaking for the same united court, says: "Ordinarily, occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a state can tax a business occupation when it cannot tax the business itself."

In *Western U. Telegr. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, we decided that a state cannot lay a tax on the interstate business of a telegraph company, as it is interstate commerce. . . . In the present case, it is true, the tax is not laid on the occupation, or the business of sending such messages. It comes plainly within the principle of the decisions lately made by this court in *Robbins v. Shelby County Taxing Dist.* 1 Inters. Com. Rep. 45, 120 U. S. 489, 30 L. ed. 694, and *Philadelphia & S. M. S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200." And this rule seems to be adopted in one or two later cases. The conflict in the decisions on this point appears to be sharp and irreconcilable.

The case of *Osborne v. Mobile*, 83 U. S. 16 Wall. 479, 21 L. ed. 470, occupies a most unique position. In this case the court held that a privilege tax levied upon an express company having business intraterritorial as well as extraterritorial was not invalid or repugnant to the interstate commerce clause of the Federal Constitution. In *Pickard v. Pullman Southern Car Co.* 117 U. S. 84, 29

L. ed. 785, the case of *Osborne v. Mobile*, was re-examined, and the correctness of its determination reaffirmed; and in *Robbins v. Shelby County Taxing Dist.*, *supra*, Mr. Chief Justice Waite and Mr. Justice Field and Mr. Justice Gray in their dissenting opinion refer to it as unchallenged authority. It has been quoted by Mr. Justice Bradley, in a dissenting opinion, as authority. But the judge last named, in delivering the opinion of the court in another case,—the case of *Leloup v. Mobile*,—indulges the remark that the *Osborne* case would now be decided otherwise.

Again, in the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, it was held that the transportation of passengers and freight for hire by a steam ferry across the Delaware river from New Jersey to Philadelphia by a New Jersey corporation is interstate commerce, and not subject to taxation by the state of Pennsylvania; while in *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, the court holds that state has the power to impose a license fee upon ferry keepers living in the state for boats which they own and use in conveying from a landing in the state passengers and goods across a navigable river to a landing in another state. Once more, *Pickard v. Pullman Southern Car Co.* 117 U. S. 84, 29 L. ed. 785; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 811; and *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, in no doubtful terms deny to the states the right to impose a license tax on any agency employed even partially in interstate commerce; but, on the other hand, *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, and *Maine v. Grand Trunk R. Co.* 3 Inters. Com. Rep. 807, 142 U. S. 217, 35 L. ed. 994, unmistakably uphold a tax imposed upon a railway company engaged partially in interstate commerce, for the privilege of exercising its franchises. It is true the amount of these privilege taxes is arrived at by the ascertainment of the earnings of the railway company within the state, and by the ascertainment of the valuation of the property within the state, in the telegraph company case; but they are by the terms of the statutes of the two states imposing them, in the one case "an annual excise tax for the privilege of exercising its franchises in this state, which, with the tax provided for in section 1, shall be in lieu of all taxes upon such railroad, its property and stock," and, in the other, "a tax upon its corporate franchises at a valuation thereof equal to the aggregate value of the shares in its capital stock." In the case of *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, it is to be observed that the tax was not upon the franchises of a domestic corporation, but upon those of a foreign one,—the Western Union Telegraph Company, a New York corporation,—and one employed in interstate commerce, and employed as a governmental agency also. It is no answer to the contention that they were privilege taxes—taxes upon the exercise of franchises—to assert that they were really taxes levied upon the property of the corporation. They are distinctly declared to be taxes on corporate franchises,

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taxes for the privilege of exercising corporate franchises, and the mere fact that the state adopted one method or another of fixing the amount of the tax is of no real value in the discussion. The question involved is not that of amount or method of ascertaining amount, but the validity of the tax itself, in any amount, ascertained in any way.

Are we mistaken in declaring that the decisions of the Supreme Court of the United States are not concordant on this most perplexing subject? We support ourselves in our perplexity by quoting the language of Mr. Justice Miller in *Fargo v. Stevens*, 121 U. S. 230, 30 L. ed. 888. Speaking on this very subject, the learned judge said: "With reference to the utterances of this court, until within a very short time past, as to what constitutes commerce among the several states, and as to what enactments by the state legislature are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all of the judges of the court who have written opinions for it may not have meant precisely the same thing." It appears to us that it is just and altogether decorous now to say that repeated and careful study of the decisions between 121 and 148 U. S. will warrant us in again asserting that the language employed by the court in the more recent cases of this character has not been the same, and that the judges who have written the later opinions have not meant precisely the same thing. Unable, then, to say certainly what the judgment of the Supreme Court of the United States would be in the case in hand if presented to it, we feel at liberty to decide the controversy according to our own views of what is right on the facts disclosed,—views not unannounced in that tribunal whose final word is law. This is the case of a foreign corporation admitted to the use and enjoyment of its corporate franchises in our state upon terms of perfect equality with all others. It is freely permitted to engage in the vast and various employments connected with its business. It has the use and enjoyment of the country highways of the state and the streets of our villages, towns, and cities, for the planting of its poles and the construction of its lines; and it has the care and protection of our laws and government. In return the state claims the right to treat it as she treats similar corporations chartered by her own authority. She asserts her authority to tax the exercise of its franchises in her midst as she does all others, domestic as well as foreign corporations. The state may tax its property as she does all other property of person or corporation within her limits. She may tax the exercise of its franchises within her borders and under the sheltering protection of her laws and government, and no foreign corporation may arrogantly assume any superiority over her domestic corporations. The privilege tax, the tax on the business, the occupation, the tax on the exercise of franchises, may be incidentally burdensome to interstate commerce. It does affect the business somewhat and inevitably. But so does an ad valorem tax on the prop-

erty employed in such commerce. It subtracts that much from the sum total engaged in the traffic. So does the tax on gross receipts, as in the case of *Philadelphia & R. R. Co. v. Pennsylvania* ("State Tax on Railway Gross Receipts") 82 U. S. 15 Wall. 284, 21 L. ed. 164. So does the tax for the privilege of exercising its franchises by a railroad company in any state, ascertainable and determinable by the amount of its gross transportation receipts, scaled as required in *Maine v. Grand Trunk R. Co.* 3 Inters. Com. Rep. 807, 142 U. S. 217, 35 L. ed. 994. Every tax is a burden, and to the extent imposed is an interference with the pursuit of business upon which it is laid. If the business is partly interstate commerce, then that commerce is incidentally affected and interfered with by every tax of any nature whatever that may be levied on it. In the case at bar there is no direct burden upon interstate commerce. There is no further interference with it than will be found necessarily to result from the imposition of any burden of taxation in any shape. For the use and occupation of the public roads of this state, for protection of its laws and government in the exercise of its franchises, and as its reasonable and proper contribution for the support of the government whose care and shelter it enjoys, the state has imposed a privilege tax ascertainable and determinable by the number of miles of wire in this state, in lieu of all other taxes, and in an amount less than an ad valorem tax on its visible property would yield. The appellant is reasonably required to pay what is called a "privilege tax," but it is a tax in lieu of all ad valorem and other taxes, state, county, and municipal, on property in this state. The state has chosen to impose a smaller burden than she might have done, unquestionably, if the property of the appellant had been subjected to the same rate of taxation as all other property whose situs is within her borders. By the imposition of a certain tax per mile on the lines wholly within her limits the state secures from appellant that which appears certainly not to be a sum in excess of the amount which might have been imposed as an ad valorem tax. It seems to us that this position is supported by the opinions delivered and the results reached in *Osborne v. Mobile*, *Western U. Teleg. Co. v. Atty. Gen.*, *Maine v. Grand Trunk R. Co.*, *Ficklen v. Shelby County Taxing Dist.*, and *St. Louis v. Western U. Teleg. Co. supra*; not to mention others that collaterally yet powerfully tend in the same direction.

In the case at bar there is no taxation of messages, interstate and other. There is no exclusion or attempted exclusion by state law of a governmental agency, or a foreign corporation partially engaged in interstate commerce. There is no taxation which interferes

with, interrupts, or burdens interstate commerce. There is a moderate, reasonable tax, called a "privilege tax," but ascertainable and determinable by the amount, and necessarily by the value, of the appellant's property, lying wholly in this state imposed in lieu of all others; and this tax burdens and interferes with interstate commerce just as a tax on each telegraph pole does, as in the case of *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, or as a tax on corporate franchises whose value is ascertainable and determinable by value of the shares of capital stock proportioned to the length of the telegraph lines in the state, as in *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, or as an annual tax for the privilege of exercising corporate franchises whose amount is to be determined by the gross transportation receipts, measured by the intrastate mileage compared with the total length of the railway within and without the state, as in *Maine v. Grand Trunk R. Co.* 3 Inters. Com. Rep. 807, 142 U. S. 217, 35 L. ed. 994. We adopt the language of *Mr. Justice Miller* in delivering the opinion of the court in *Western U. Teleg. Co. v. Atty. Gen.*: "While the state could not interfere by any specific statute to prevent a corporation from placing its lines along their post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real and personal property as any other person would be. It never could have been intended by the Congress of the United States in conferring upon a corporation of one state the authority to enter the territory of another state, and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support." And to this enlightened and just observation we unite the equally enlightened and just observation of *Mr. Chief Justice Waite* in *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, quoted with approbation in the long subsequent case of *Western U. Teleg. Co. v. Atty. Gen. supra*. "The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and business."

Affirmed.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ALABAMA.

SAMUELS *et al.* v. LOUISVILLE & N. R. CO.

(See S. C. 31 Fed. Rep. 57.)

1. A common carrier has not the right to make a discrimination where the conditions are equal, between two steamboats in delivering freight to them, on the ground that the greater charge is not unreasonable.
2. The burden is on a carrier to justify the fact of discrimination when that is admitted and the service is stated to have been substantially the same, and rendered under substantially the same circumstances and conditions.
3. A charter provision of a railroad granting the power to take "tolls from all persons, property, merchandise, and other commodities transported on their road, provided only the net profits of the road shall never exceed 25 per cent per annum," does not give the company the right to discriminate between connecting steamboats in the matter of freights.

*Decided April Term, 1887.***D**EMURRER to complaint charging discrimination by a railroad between steamboat lines.*Mr. L. W. Day*, for plaintiffs.*Messrs. R. A. McClellan and C. C. Harris*, for defendant.**Bruce, J.**, delivered the opinion of the court:

The plaintiffs allege they were engaged as common carriers for hire by means of steamboats on the Tennessee river, between Decatur and intermediate points, to Bridgeport, in the year 1886; that at the same time, and between the same points on the Tennessee river, the steamboats Chattanooga and Wilder were also running on the river between the same points, as carriers, in competition with the plaintiffs; that the defendant, the Louisville & Nashville Railroad Company, a common carrier by rail, operating its roads south from Louisville, Kentucky, to points on the Tennessee river, discriminated against plaintiffs in the matter of freights delivered to them by plaintiffs for transportation to points of destination, and in favor of the steamboats Chattanooga and Wilder that the discrimination consisted in this: that, for substantially the same service in the carriage of the same class of freight under like circumstances and conditions, and to the same points of destination, the defendant railroad company charged and received from plaintiffs 50 cents more per hundred than it charged and received from the steamboats Chattanooga and Wilder. Plaintiffs say that, by reason of such discrimination and charges for freight against them, they were injured in their business as common carriers on the river, and were put to expense, trouble, and increased risk in carrying their freight long distances on the river, to obtain carriage for it to points of destination, for which alleged injury to them they bring this complaint and suit for damages. The demurrer admits the discrimination in the rates, as stated; and the question at once suggests itself whether a common carrier, under the circumstances stated, has the right to have and maintain two prices, or different prices to different parties, for substantially the same service rendered under like conditions.

The question here is not whether a common carrier must necessarily have one and the

same prices for all, or whether a discrimination in a single case can be made the ground of an action; but here were two lines of steamboats on the Tennessee river, plying between the same points carrying freight for hire, and bearing the same relation to the defendant railroad company, both seeking its service to carry their freight to the same points of destination; and the question is, has the defendant the right to discriminate against one, and in favor of the other, not in a single or isolated case, when different circumstances and conditions might be at once suggested, but systematically, in a course of dealing with the plaintiffs in the transportation of their freight?

The idea that lies at the very base of the law of common carriers is that they are public servants, and serve all alike. The general proposition needs no citation of authority, and, as applied to railroad companies, the doctrine is thus stated by McCrary, *J.*, in the case of *Southern Exp. Co. v. Memphis etc. R. Co.*, 13 Cent. L. J. 68, 8 Fed. Rep. 802.

"(1) A railroad company is a quasi public corporation, and bound by the law regulating the powers and duties of common carriers of persons and property; (2) it is the duty of such a company as a public servant, to receive and carry goods for all persons alike, without injurious discrimination as to rates or terms."

Other cases might be cited to the same purport. In *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 311, Baxter, *J.*, says:

"The defendant is a common carrier by rail. Its road, although owned by a corporation, was nevertheless constructed for public uses, and is, in a qualified sense, a public highway. Hence every body constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities which it is capable of affording. Its ownership by the corporation is in trust, as well for the public as for the shareholders,

but its first and primary obligation is to the public."

In the light of these authorities, where can this defendant railroad company and public servant base its right to make the discrimination claimed by this demurrer? If a discrimination of 50 cents per hundred can be thus made and sustained, under such circumstances, then any discrimination, however great and oppressive, can be made; and practically the defendant can say who may and who may not serve the public, as common carriers on the Tennessee river one of the great water ways of commerce in the United States.

It is true there is a line of decisions to the effect that railroad companies may make different rates to different persons; and the cases show upon what grounds discrimination in rates may be and are sustained, and upon what grounds they have been held to be vicious, and are condemned by the courts. But it is not necessary here to go into any examination of the cases on this line of decision until advised by plea or otherwise upon what ground, and under what circumstances and conditions, the defendant made the discrimination here complained of. He admits the fact of discrimination; and when the service is stated to have been substantially the same, and rendered under substantially the same circumstances and conditions, the burden is on him to justify it.

The demurrer, however, goes to the point that the mere fact that the defendant charged a higher price to the plaintiffs than to the line of rival steamboats is no ground of complaint, unless it is alleged that the price charged the plaintiffs was unreasonable. In other words, the proposition seems to be that the defendant had the right to make the discrimination up to the point that the charge became unreasonable, and that charging a less price to the rival line of boats is no ground of complaint, unless the larger price is an unreasonable one. It is said that to charge one too little for a service is not to charge another too much for the same service; that the smaller charge does not make the greater charge more than the service is really worth, for that the service may have been worth every penny asked and received for it. Concede that, then it follows that the defendant company was serving the steamboats Wilder and Chattanooga for a less hire and compensation than the service was really worth; and the practical result to these plaintiffs, as carriers on the river, is the same, whether the defendant charged them 50 cents per hundred too much, or charged their rivals 50 cents per hundred too little. In either case, the defendant railroad company makes the discrimination, and the plaintiffs lose and are deprived by the defendant of their equal right and opportunity for business as common carriers on the river. And the question recurs, what right, or upon what ground, can this public servant, owing an equal duty to the entire public, say to one, "I will serve you for less than I will serve your neighbor?" The proposition insisted upon is that a common carrier is bound to carry for a reasonable remuneration, but is not bound to carry for

the same price for all; and the case of *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623, 26 Am. Rep. 781, is cited, where the supreme court of that state says: "The rule is not that all shall be charged equally but reasonably, because the law is for the reasonable charge and not the equal charge;" and other authorities are cited on the same line.

It would add nothing to the complaint, in its statement of fact, if the word "reasonable" had been used. The word "unlawful" is used; but the use of qualifying words such as these is unimportant. The ultimate test of what is a reasonable or unreasonable charge, a lawful or unlawful charge, in a given case, is a mixed question of law and fact, to be reached by the verdict of a jury, under proper instructions by the court, or perhaps, by the action of what is called sometimes a railroad commission, under statutes, state or national, on that subject.

This is not a case for the recovery of extortionate and unreasonable charges, exacted by the defendant railroad company, where the question as to what is a fair and just charge for a given service might properly arise, and be determined by some accepted rate of charges, or some usage or custom which has acquired the force of law. Nor is it the question as to what is the intrinsic value of the service, in the ascertainment of which there are many elements to be considered, such as the amount of the capital employed, and the difficulty and the expense attendant upon the service rendered, including compensation for services of officers having the administrative capacity required for such service. But, so to speak, on this side of that ultimate question is the question of the legal right of the defendant to make the discrimination here complained of.

When it is said that to charge one too little is not to charge another too much for a given service, we are ready to give assent. Because individuals may serve for hire, or may, without compensation, donate their services, it does not follow that common carriers by rail may do the same thing. The company owns the property, and the capital employed in the construction and operation of its road, but it must not be forgotten that in such operation of its railroad it is also in the enjoyment of a public franchise; and in the control of the property it has not the same measure of power that persons have and exercise over property that is affected by no public use, and operated without the exercise of any public franchise. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

There may be, and there is, difficulty in the determination, in given cases, of the line of public and private right, as to this species of property, as is illustrated in the enactment and administration of the recent Act of Congress known as the "Interstate Commerce Law." But the question in this case is to be determined upon the principles of the common law, and in the light of those principles as applied to railroad companies. In a case like the one at bar, can there be a reasonable charge which is not at the same time substantially an equal charge? And is not a charge unreasonable when it is unequal,

and in breach of the obligation and duty of the common carrier to the public?

There is a suggestion in the argument that this is a claim for damages founded upon the refusal of the defendant railroad company to prorate with the plaintiffs, upon through freight, upon the same terms that it did with the rival line of boats; and the case of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 28 L. ed. 991, is cited upon this point, and in support of the general proposition insisted upon by the defendant in his demurrer to this complaint. That is not the case made by the complaint, and the Supreme Court of the United States, in the opinion in that case, in so far as it touches the issues involved in this case, is against the views of the demurrant, as is seen from page 684 of the opinion, where the court says:

"The bill does not seek to reduce the local rates, but only to get this company put into the same position as the Denver & Rio Grande, on a division of through rates. This cannot be done until it is shown that the relative situations of the two companies with the Atchison, Topeka & Santa Fé, both as to the kind of service and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must be reasonable for the other."

Applying this to the case at bar, the implication is certainly very strong that the relative situation of the two rival lines of boats on the river being the same as to the defendant company, both as to the kind of service and the conditions under which it is to be performed, no charge is reasonable for one party that is not also reasonable for the other; and the idea of different prices to dif-

ferent parties, for substantially the same service, performed under like conditions, finds no favor in the authority cited.

Another proposition of the defendant is that there is a charter provision, to the benefit of which the defendant is entitled, by which the legislature granted the power to take "tolls from all persons, property, merchandise, and other commodities, transported on their road, provided only the net profits of the road shall never exceed twenty-five per cent per annum." And within this limitation, which it is said has never been passed, the company was vested with absolute discretion, bounded only by the common law, over the rates of compensation it should have for services rendered. This proposition answers itself, because it admits the bound and limit of the common law; and we have shown that the gravamen of this action is in the alleged violation by this defendant of the obligation and duty under the common law, as applied to common carriers, by rail.

The suggestion of a charter right which gives the defendant an option to discriminate at will, provided only the net profits of the road do not exceed a certain limit, scarcely merits serious consideration.

Upon the question of the remote, indefinite, and speculative character of the damages claimed, the complaint is within the rule on that subject. As to the loss of business, it may be that the proof may show that it is incapable of measure by a pecuniary standard; but the reading of the complaint shows that an objection to the whole complaint, on the ground stated, ought not to be maintained.

The result of these views is that the demurrer is overruled.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF ARKANSAS.

BAIRD v. ST. LOUIS, IRON MOUNTAIN & S. R. CO.

(See S. C. 41 Fed. Rep. 592.)

- *1. The act of the general assembly of the state of Arkansas approved February 27, 1885, prohibiting the collecting of freight in excess of that specified in the bill of lading, was not intended to give validity to stipulations in bills of lading which are the result of fraud or mistake.
2. The material part of a bill of lading on the subject of the freight rate is that which fixes the rate per 100 pounds. Weighing the freight is purely a mechanical process, and may be done at the point of shipment, or at the point of de-

*Headnotes by the court.

livery. Where the weight of the merchandise is uniformly the same, the carrier or the consignee may ask to have the weight verified up to the moment of delivery, and it is the weight disclosed by the scales, and not the weight marked on the bill of lading, that controls.

3. The shipment of merchandise from one state to another is interstate commerce, and any requirement of a state in respect of such commerce in conflict with the requirements of the Interstate Commerce Act is of no validity.

Decided March 18, 1890.

Statement by the court:

This is an action of replevin tried before the court on the following agreed statement of facts: "(1) That the Louisville New

Orleans & Texas Railway Company is a railway corporation of Louisiana doing interstate business, and has a line of railway running from New Orleans, La., to Huntington, Miss.

(2) That the St. Louis, Iron Mountain & Southern Railway Company is a railway corporation of Arkansas doing interstate business, and has a railway running from Arkansas City, Ark., to Little Rock. (8) That Huntington, Miss., is on the east bank of the Mississippi river, and Arkansas City, just opposite, is on the west bank; the two terminal points being connected by a steam railway transfer boat belonging to the St. Louis, Iron Mountain & Southern Railway Company. (4) That on August 28, 1889, the Iven & Son Machinery Company, consignors at New Orleans, La., delivered to the Louisville, New Orleans & Texas Railway Company 6 steam cotton presses for transportation from that point to the plaintiff at Little Rock, Ark. (5) That the consignors made out the bill of lading, and inserted therein the weight of said 6 cotton presses at 20,000 pounds. Exhibit "A." attached. (6) That, without questioning this weight, or weighing the goods, the Louisville, New Orleans & Texas Railway Company executed and delivered the bill of lading, as made out by the consignors, to them. (7) That after said machinery was aboard of its cars the said Louisville, New Orleans & Texas Railway Company weighed the same, and found that, instead of 6 presses weighing 20,000 pounds, they actually and in fact weighed 25,550 pounds. (8) That the charges on said machinery were \$35, and the rate for the through shipment from New Orleans to Little Rock was 45 cents per 100 pounds. (9) That after weighing the said machinery the Louisville, New Orleans & Texas Railway Company shipped the same over its line to Little Rock via Huntington, Miss., under a billing which showed the true weight, to wit, 25,550 pounds, and not the weight as inserted in the bill of lading by the consignors. Exhibit "B." (10) That on its arrival at Huntington, Miss., the said machinery was turned over to the defendant, the St. Louis, Iron Mountain & Southern Railway Company, under said way bill, which covered the weight as 25,550 pounds. (11) That defendant then transported said machinery to Little Rock, Ark., over its own road, and, on its arrival, presented its bill for charges and freight at the rate of 45 cents per 100 pounds upon 25,550 pounds, making the entire freight bill amount to \$149.98. (12) That plaintiff, Thomas W. Baird, refused to pay said freight bill and charges, but presented his bill of lading, and offered to pay the charges and freight as shown thereon, according to the weight of 20,000 pounds, at 45 cents per 100 pounds, which equaled the sum of \$125, and demanded that, under the statutes of Arkansas, the defendant should protect said bill of lading. (13) That defendant again weighed said machinery, and found that the same weighed over 25,550 pounds, and so informed plaintiff, and demanded that he should pay the freight according to the true weight. This Thomas W. Baird refused to do, whereupon the defendant refused to protect or honor said bill of lading, upon the ground that the weights of the said machinery had been falsely billed by the consignors at 5550 pounds less than

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its actual weight; that to deliver the same was in violation of the Interstate Commerce Act, and made the defendant and its agents personally liable to fine and imprisonment for doing so. (14) That thereupon, plaintiff refused to pay according to the true weights, brought this suit, replevied the goods, and now has them in his possession. (15) That the value of said goods is \$2500."

A statute of the state of Arkansas provides: "Section 1. Be it enacted by the general assembly of the state of Arkansas, that it shall be unlawful for any railroad company in this state, its officers, agents, or employes, to charge and collect, or to endeavor to charge and collect, from the owner, agent, or consignee, of any freight, goods, wares, or merchandise, of any kind or character whatever, a greater sum for transporting said freight, goods, wares and merchandise, than is specified in the bill of lading. Section 2. That any railroad company, its officers, agents or employes, having possession of any goods, wares and merchandise, of any kind or character whatever, shall deliver the same to the owner, his agent or consignee, upon payment of the freight charges as shown by the bill of lading. Section 3. That any railroad company, its officers, agents or employes, that shall refuse to deliver to the owner, agent, or consignee, any freight, goods, wares, and merchandise of any kind or character whatever, upon the payment, or tender of payment, of the freight charges due as shown by the bill of lading, the said railroad company shall be liable in damages to the owner of said freight, goods, wares or merchandise to an amount equal to the amount of the freight charges for every day said freight, goods, wares, and merchandise is held after payment, or tender of payment, of the charges due as shown by the bill of lading, to be recovered in any court of competent jurisdiction." Act. Feb. 27, 1885.

Mr. J. M. Rose, for plaintiff.

Messrs. Dodge & Johnson, for defendant.

Caldwell, J., delivered the opinion of the court:

The bill of lading was filled up by the consignors, and signed by the railroad company, on the faith that the consignors had stated truly the weight of the machinery. Either fraudulently or by mistake, the consignors stated the weight of the machinery to be 5550 pounds less than it was. The contention of the plaintiff is that by a statute of this state he is entitled to profit by this fraud or mistake: that, under the statute, a bill of lading, procured by fraud or mistake is as binding and obligatory as one honestly procured. Of course, the statute is not susceptible of such a construction. The statute was passed to prevent fraud, not to promote it; to punish fraud, not to sanction it. If the bill of lading, by the fraud or mistake of the railroad company had stated the weight of the machinery to be twice as great as it was, the attitude of the plaintiff would not be what it now is; and yet, if frauds and mistakes in bills of lading are to stand as

absolute verity, the rule ought to be mutual, and bind the consignee as well as the carrier. This case, probably, furnishes the first example of a party coming into a court of justice and boldly claiming a benefit from a confessed fraud or mistake. The through rate of freight is stated in the bill of lading to be 45 cents per 100 pounds. That is the material part of the bill of lading on the subject of the freight to be paid for transporting the machinery. In the language of the statute, that is the "sum for transporting said freight . . . specified in the bill of lading." About that there was a contract. There was no contract about the weight of the freight. The weight of the freight is settled by the scales, and not by the contract. Bills of lading are frequently issued before the weight of the freight is known. It is not necessary to the issuance of a bill of lading that it should be known. The freight rate is fixed when the rate per 100 pounds is agreed on. Weighing the freight is purely a mechanical process. It may be done at the point of shipment, or at the point of delivery, or both. One hundred pounds in New Orleans is 100 pounds in Little Rock; neither more nor less. Where, as in this case, the weight of the merchandise is uniformly the same, the car-

rier or the consignee may ask to have the weight verified up to the moment of delivery. It is the weight disclosed by the scales, and not the weight marked on the bill of lading, that controls. The machinery weighed 25,550 pounds, and no agreement of the parties could add to or diminish this weight, nor could it be varied, by fraud or mistake.

But, if the act of the legislature would admit of the construction contended for by the plaintiff, it would avail him nothing. The shipment of this freight from New Orleans to Little Rock was interstate commerce, and the Act of Congress is controlling. It is not necessary to quote that Act. It is sufficient to say that if the defendant had delivered, and the plaintiff received, this freight, with knowledge of the facts as they are set out in the agreed statement of facts, the agent of the defendant making the delivery, the plaintiff, and the consignors, if they had knowledge of the facts, would have been guilty of a flagrant violation of the Interstate Commerce Act, and rendered themselves liable to a criminal prosecution.

Let judgment be entered for the defendant for a return of the property or its value, and for costs.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF FLORIDA.

CUTTING v. FLORIDA R. & NAV. CO.

Re Petition of MALLORY.

(See S. C. 30 Fed. Rep. 663.)

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| <p>1. All charges made for any service in the transportation of any passengers or property, or for receiving, delivering, storing, or handling property, must under the Interstate Commerce Act be reasonable and just; and no discrimination can be made in rates, charges, or facilities.</p> | <p>2. Instructions to a receiver of defendant under the Interstate Commerce Act, upon petition and answer in respect to discrimination.</p> |
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Decided April 12, 1887.

Mr. Horatio Bisbee for petitioners.

Messrs. John A. Henderson and Hartridge & Young for receiver.

Settle, J., delivered the opinion of the court:

This petition was filed on the 21st day of March, 1887, which was before the Interstate Commerce Act went into effect. The answer of the receiver, H. R. Duval, was filed on the 4th day of April, 1887, in which he submits that he has reformed his tariff of rates, and intends to comply in all respects with the provisions of the Interstate Commerce Act.

In view of this answer, I deem it unnecessary and inexpedient at this time to do more than to give to the receiver of the Florida Rail-

way & Navigation Company some general instructions in respect to such of his business with the parties to this petition as falls under the head of interstate commerce. (1) All charges made for any service in the transportation of passengers or property, or for receiving, delivering, storing or handling property must be reasonable and just. (2) He will not discriminate in his rates, charges and facilities for or against the Clyde line or the Mallory line, but will give to both equal rates and facilities for trade and travel, for equal service from all points.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF IOWA.

STATE OF IOWA v. CHICAGO, M. & ST. P. R. CO.

(See S. C. 33 Fed. Rep. 301.)

1. To give the Federal court jurisdiction on the ground that the matter in dispute arose under the Constitution, laws, or treaties of the United States, it must clearly and unmistakably appear from the record that such Federal question must necessarily be decided before the merits of the case can be disposed of.
2. The Federal court will remand a cause removed to it on the ground that the matter in dispute arose under the Constitution, laws, or treaties of the United States, where the only showing to that effect in the record is that a Federal question may arise if the evidence proves certain facts.
3. The provision of section 3 of the Act of Congress of Feb. 4, 1887, that common carriers shall afford equal facilities for the interchange of traffic between their lines, but need not give the use of their tracks and terminal facilities to other carriers, does not affect a contract made by a railroad upon being given permission to use the streets of a city for its tracks, that it will pass the cars of other railway companies over its tracks when necessary to reach their customers' warehouses, and that it will not exceed a certain rate in its charges for switching.
4. The imposition by a state of a condition, upon giving permission to lay railroad tracks in the streets of a city, that such tracks shall be public and open to the use of citizens; and a regulation by the state of the switching rates to be charged by such railroad in the city,—do not clearly show an unconstitutional interference with or regulation of commerce between the states, although cars engaged in interstate traffic may be switched over such tracks.

Decided Dec. 5, 1887.

MOTION to remand a suit in equity removed from the District Court of Dubuque County, Iowa.

Messrs. A. J. Baker, Atty. Gen., and Fouke & Lyon for complainant.
Messrs. J. W. Carey and W. J. Knight for defendant.

Shiras, J., delivered the opinion of the court:

From the record in this cause it appears that until within a recent period the defendant company owned or controlled all the lines of railway entering the city of Dubuque, and that through the construction of side tracks over and along the public streets and alleys, and by obtaining control of certain tracks built, under an ordinance of the city of Dubuque, by the Lumberman and Manufacturer's Railway Company, the named companies practically controlled the access by railway cars to a large part of the manufactories and warehouses of the city.

Within the past year or two, the Minnesota & Northwestern and Chicago, Burlington & Northern railway companies have built their lines to or through the city, and the question becomes a practical one, whether these companies could have their cars switched over the tracks owned by the defendant company, so as to reach the manufactories or warehouses of persons desiring to patronize them.

The defendant company established a rate to be charged for switching such cars, to which exception was taken, and the result was that the state board of railway commissioners was appealed to; and the board, after considering the subject, rendered an opinion in which it was held that "the sidings of the companies in Dubuque are public highways,

and that the companies are required by law to haul over them the cars of all transportation companies or persons at reasonable rates," and the rate to be charged for such service was fixed by the board. Thereupon, under the provisions of Acts of the 20th General Assembly, Iowa, chap. 133, a proceeding in equity was brought by the state of Iowa against the railway company, in the district court of Dubuque county, Iowa, for the purpose of enforcing the decision of the board, from which court the proceeding has been transferred to this court, and it is now sought to have the cause remanded on the ground of want of jurisdiction.

The motion to remand presents the question whether it is a removable case, and as the state is a party, and jurisdiction in a Federal court cannot be had by reason of diverse citizenship, it follows that to sustain the jurisdiction it must appear that the case is of a civil nature, wherein the matter in dispute exceeds \$2000 in value, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, the Supreme Court has jurisdiction to review the decision of the highest tribunal of a state, on the ground that it involved the construction of the Constitution, laws, or treaties of the United States, the Supreme Court uniformly held that it must clearly appear from the record that the question arising under the

Federal Constitution, laws or treaties, was in fact passed upon necessarily involved in the conclusion reached.

In *Crowell v. Randell*, 35 U. S. 10 Pet. 368, 9 L. ed. 458, it was said that it was "not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case." In *Proprietors of Passaic & H. River Bridges v. Hoboken Land & Imp. Co.*, 68 U. S. 1 Wall. 116, 17 L. ed. 571, the rule is stated to be that "the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." In *Brown v. Colorado*, 106 U. S. 95, 27 L. ed. 192, it is said: "Certainly, if the judgments of the courts of the states are to be reviewed here for decisions upon such questions, it should be only when it appears unmistakably that the court either knew or ought to have known that such a question was involved in the decision to be made." It certainly will not be claimed that the rule is any less strict, when the question is as to the jurisdiction of the circuit court.

When it is sought to deprive a state court of the right to hear and determine a cause properly and rightfully brought therein by removing the same into the Federal court, on the ground that the controversy involves in its determination a question arising under the Constitution, laws, or treaties of the United States, it must be made to appear, clearly and unmistakably from the record, that the cause or controversy necessarily, in its determination, involves the consideration and determination of such Federal question. It is not sufficient for it to appear that such Federal question may possibly arise. Jurisdiction to wrest the case, if I may use that term from the state court, cannot exist unless a Federal question is certainly involved. If the record simply shows that possibly, during the trial, some Federal question may be presented, that will not confer the jurisdiction, and entitle the defendant to the right of removal. If it were otherwise, and upon the showing that a Federal question might arise, the case could be brought into the circuit court of the United States; the jurisdiction would then exist, not of the Federal question, but of the case; and yet, upon the trial, the decision might be rested upon questions of fact or law not arising under the Federal Constitution or laws, and thus the same court would have been deprived of its jurisdiction wrongfully.

The jurisdiction of this court either by original process, or by removal, in the class of cases under consideration, depends solely upon the fact that the controversy between the parties requires, for its final determination, the construction of some provision of the Constitution, laws, or treaties of the United States and the application thereof to the facts of the particular case, in such sense that the ruling thus made will materially affect the conclusion reached upon the controversy between the adversary parties to the litigation.

Unless from the record it clearly appears that the Federal question must be met and decided, before the issue or issues in the particular cause be finally disposed of, it cannot be said that the matter in dispute arises under the Constitution or laws of the United States, within the meaning of the statute. In such case, no removal can be had, and the cause must be heard and decided in the state court. If during the trial, in fact a Federal question does arise, and is decided adversely to the party claiming the protection of the Federal Constitution or laws, the party aggrieved can, by proper proceedings, carry the question from the court of final resort in the state to the Supreme Court of the United States.

It was suggested on the argument, that as the defendant set forth on the record that it claimed a defense to the proceeding arising under the laws of the United States, this necessarily raised a Federal question, because the court would be required to consider the facts thus averred, in order to determine whether they presented a Federal question, and that this involved taking jurisdiction of the cause. Whenever the jurisdiction of the court is challenged in a given cause, it becomes its duty to examine into and decide the question. It is not bound to retain jurisdiction simply because a party asserts that the same exists. On the contrary, it becomes the duty of the court, as already said, to hear and determine the issue of jurisdiction thus raised; and if in a given case the jurisdiction is based upon the allegation that it presents a question arising under the Constitution or laws of the United States, then it becomes the duty of the court to examine the record, and to ascertain whether, in fact, the controversy requires for its determination the decision of the title, right, privilege, or immunity claimed to arise under the Federal Constitution or laws, and also whether the title, right, privilege, or immunity relied upon actually arises under such Constitution or laws.

If the right to hear and determine a plea to the jurisdiction exists, and this is not questioned, then it must be conceded that the court must have the right to consider and determine all the questions of law and fact that inhere in the jurisdictional question, for in no other way can the court properly discharge the duty imposed upon it. In *Starn v. New York*, 115 U. S. 248, 29 L. ed. 888, it is said "The character of a case is determined by the questions involved. If from the questions it appear that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise not."

What then are the questions arising in the present controversy? The proceeding itself is one instituted by the state of Iowa under the provisions of an act of the state legislature passed for the purpose of providing a legal method for enforcing the conclusions

or orders of the state board of railroad commissioners. The particular order was one made by the commissioners which in effect holds that certain side and spur tracks, laid down over the streets and the alleys of the city of Dubuque are, under the laws of the state of Iowa and the ordinances of the city of Dubuque, public highways, and not the private property of the defendant company, and that, for the reasons set forth in the commissioners' opinion the defendant company was under legal obligation to pass, over such side and spur tracks, the cars of other companies, when such passage became necessary in order to enable the other companies to reach the factories or warehouses of their customers; and the commissioners also fixed the rates to be charged for the work to be done by the company when thus engaged in performing this switching.

It is clearly apparent, from this brief statement, that the complainant does not base the right asserted and sought to be enforced against the company upon any part of the constitution or laws of the United States; but on the contrary, to establish the right, if any such exists, dependence must be had upon the state laws and the ordinances of the city of Dubuque, coupled perhaps with principles of general jurisprudence, not depending for their existence or authority upon the Federal Constitution or laws.

The Federal question, if any exists, must be sought, then, in the defense or defenses interposed by the defendant, and substantially it is claimed that the action of the commissioners is a violation of the Federal Constitution in that it is a regulation of interstate commerce.

Can it be fairly said that if the state of Iowa, by direct legislative action, or through the power conferred upon the city of Dubuque, has provided that certain railroad tracks laid down in and over the public streets of the city of Dubuque, shall be and remain public highways, open to the use of every railway coming into Dubuque, that it was thereby regulating interstate commerce, and exercising a power prohibited by the Federal Constitution? When the state of Iowa, and the city of Dubuque, under its authority, gave permission to the defendant company to lay down tracks along certain streets, or to use those already laid down, upon condition that such tracks should be public and open to the use of the citizens of Dubuque, how did it regulate interstate commerce, or place any burden, hindrance, or restriction thereon?

But it is said that the state, through the agency of its commissioners, is seeking to fix the rate to be charged for the switching required to be done by the defendant, and that thereby interstate commerce is affected and regulated, because the cars thus switched may be filled with merchandise or other property brought from other states into Iowa, or intended to be carried from Iowa into other states. It will be noted that the operations of the defendant company, when engaged as a common carrier of persons or property either wholly in Iowa, or between Iowa and other states, are not in any manner affected

or regulated, either as to the mode of carriage, or to the price to be paid, by the order of the commissioners. The argument is that the property conveyed by the other railway companies may form part of the commerce between the states, and that in this way fixing the rate to be charged by the defendant company will affect the rate for the entire transportation.

The duty imposed upon the defendant company is that of passing the cars of the other connecting companies over the side and spur tracks in question, all of which are included within the limits of the city of Dubuque, and within the boundaries of the state of Iowa. Certainly it cannot be said that upon the face of it it clearly appears that by imposing this duty upon the defendant company, and providing the reasonable compensation to be paid therefor, the state is interfering with or regulating commerce between the states.

All that is sought to be done is to fix the rate to be charged by the defendant company for certain work which it has assumed to do, not by reason of its character as a common carrier, but as a consideration which the company agreed to do and perform for the privilege of laying down the side tracks in question. The facts averred in the record do not certainly show that the question of interstate commerce is necessarily involved in the case. If, in fact, such a question should arise and be decided, the defendant's rights in this particular will be fully protected by the right of appeal to the Supreme Court of the United States.

It is also urged that the action of the commissioners sought to be enforced in this proceeding is in contravention of the last clause of section 8 of the Act of Congress approved February 4, 1887, and known as the "Interstate Commerce Act." In the named section of the Act, it is provided that any common carrier subject to the provisions of the Act must afford equal facilities for the interchange of traffic between their respective lines, and for the forwarding, receiving, and delivering of passengers and property to and from their several lines, and those connecting therewith; and then comes the clause relied on, as follows:

"But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The meaning of this clause is clear. It simply declares that the preceding provision of the section shall not be deemed to give the right to one carrier to use the tracks or terminal facilities of another carrier in the like business. It has reference to the effect of the Act of Congress and nothing else. If the defendant company, by a contract with the city of Dubuque, has bound itself to allow other companies to use part of its tracks or terminal facilities, this clause of the Act of Congress does not affect such a contract or the enforcement thereof. So, also, if the state of Iowa has provided by proper statute that different companies may have a joint or common use of certain terminal facilities, the rights of the several companies to such joint use are

not affected by the provisions of the Interstate Commerce Act, but the same must be measured and determined by the statutes of the state.

So far as it certainly appears from the record in this cause the questions necessarily involved in the controversy between the parties grow out of the provisions of the statutes of the state, of the ordinances of the city of Dubuque, and of the contract alleged to exist on part of the company in regard to the use of the side tracks in question, including the power of the railroad commissioners to fix the rates to be paid the defendant for switching the cars of the other connecting companies over the side tracks in question.

It does not certainly appear that in decid-

ing the issues, it will be necessary to construe or apply any provision of the Federal Constitution or laws. The utmost that can be fairly said is that in the trial of the case, if certain conditions of fact are made to appear by the evidence, a Federal question or questions may arise. If so, and if the protection or defense claimed by defendant under Federal law is adjudged against the contention of the company, it has secured to it the right of appeal to the Supreme Court of the United States.

As the record now stands, it does not appear that a Federal question is necessarily involved, and hence the record fails to show jurisdiction in this court, and the cause must be remanded to the state court.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF LOUISIANA.

MISSOURI PAC. R. CO. *v.* TEXAS & P. R. CO. [No. 1.]

(See S. C. 80 Fed. Rep. 2.)

1. As a general proposition, where a railroad company is not restricted or inhibited by its charter or the law of the land, it is not unlawful for it to make an arrangement of rates for special purposes, on a sufficient consideration and for the legitimate increase of its business.
2. It is illegal for a railroad company to enter a "pool" whereby a parallel railroad has preference over it in rates, where its charter, granted by Congress, forbids discrimination against any connecting or intersecting road, and a state land grant to the railroad forbids it to enter into any combination with any parallel road in the state that will allow the latter to control rates on it.
3. A Federal court will not refuse to abrogate an illegal pooling contract of a railroad in the hands of its receiver upon the prayer of the representatives of other lines connected with it because the receiver is willing to enter into such combination with such objecting lines, and they may also be willing.

Decided Jan. 14, 1887.

INTERVENING petition charging discrimination by a receiver of a railroad.

Mr. Frank G. Stubbs, for petitioner.

Mr. W. W. Howe, for respondent.

Pardee, J., delivered the opinion of the court:

In the matter of the intervening petition of the Vicksburg, Shreveport & Pacific Railroad Company, and of Frank S. Bond, receiver of the Vicksburg & Meridian Railroad Company, the petitioners allege that they are operating a connecting railway line of the Texas & Pacific Railway lines, and the gist of their complaint, as a basis of relief, is that the receivers of the Texas & Pacific Railway Company, appointed by this court in the above entitled suit, to operate and manage the lines of the said company, have been and are discriminating against the lines operated by petitioners, "by requiring and receiving from them a much higher rate for

the carriage of all classes of freight, both east and west bound, over said lines of which they are and have been receivers, than said receivers have required or received of other railroad companies and transportation lines, particularly the said Missouri Pacific Railway Company, and the said The St. Louis, Iron Mountain & Southern Railroad Company, for similar service and similar carriage of like freight." The receivers answer at length as follows:

ANSWER.

First. Respondents submit to this honorable court that none of the matters in the said intervening petition mentioned and complained of are matters in respect of which

the petitioners therein are entitled to relief in this proceeding, and in a court of equity; and they ask to have the same benefit of defense thereto as if they had demurred to said petition.

Second. These respondents admit the adoption and existence of the various statutes and constitutional provisions set forth in the said intervening petition, but for greater certainty as to the specific language of said organic and statutory laws, they pray leave to refer to the same, as the same have been from time to time duly promulgated. But they specially deny that the provisions quoted from the constitution and statutes of the state of Texas have any application to the issue now existing between these respondents and the petitioners in the said intervening petition, or can take away any right conferred by the acts of Congress with reference to the Texas & Pacific Railway Company. They do not admit the allegations of said petitioners with respect to the spirit and intent of the acts of Congress and various other statutes and constitutional provisions quoted in said petition, but so far as the same may apply to this controversy, they pray the court to interpret the same.

Third. Respondents admit that the Texas & Pacific Railway operates its lines to Shreveport where it connects with petitioners' lines, and that the Vicksburg, Shreveport & Pacific Railroad was opened for general traffic about August, 1884. They admit that the same person is president of the Missouri, Kansas & Texas Railway Company and of the Texas & Pacific Railway Company, but they submit that this fact has no relevancy to the issues in this proceeding, since the Texas & Pacific Railway is being managed by respondents under the orders of the court. They aver that since their appointment as receivers the transportation department of the Texas & Pacific Railway has been distinct from that of any Missouri Pacific line; and since July, 1886, the freight traffic department has been under the sole charge of your respondent's general freight agent.

Fourth. They respectfully submit that it is unnecessary and would be irrelevant to inquire in such a proceeding as this into the details of the freight business of the Texas & Pacific Railway Company prior to the appointment of respondents as receivers. They admit their appointment and qualification but they specially deny that in managing the lines of railway under their charge, they have as charged in said intervening petition, at all times or at any time, in violation of law and their duty, discriminated against said petitioners as set forth in said petition, and that they are still so discriminating and will so continue unless prevented by this honorable court. They admit that certain correspondence was had, set forth as Exhibits - A, "B," "C" and "D" of said petition; but submit that said letters must be considered in connection with the other facts of this case. They do not admit the correctness of the memorandum "E," annexed as an exhibit of said petition, and they submit that its date, in June, 1884, shows that it has no relevancy to the issues herein, but if it should

be decreed relevant by the court, they leave the petitioners to make such proof of its correctness as they may be advised.

Fifth. They aver that in March, 1886, they made with the lines represented by petitioners, through respective traffic agents, such traffic arrangements as would enable petitioner's said lines to complete on equal terms with all other lines for freight business to points on the Texas & Pacific Railway. Said arrangement was amended or modified from time to time, and finally on the 28th of September, 1886, was put in the form of the memorandum hereto annexed as Exhibit "RA" of this answer. This was still further modified October 2, 1886, by the latter made part hereof as Exhibit "RB." They aver that the arrangements set forth in said Exhibits "RA" and "RB" were acceptable to the traffic agents of petitioner's lines, and has been and is now in operation without prejudice however to the hearing and decision of the issues in this matter. They aver that through rates from Cincinnati and from other points tributary to petitioner's lines, to points on the Texas & Pacific Railway, are the same by petitioner's lines as by any other line and nothing done by respondents has ever operated to divert traffic from petitioner's lines, or to discriminate against them. They specially deny that they have ever charged petitioners to or from Shreveport for freight any more than they charge for freight over their (respondent's) own line, and they show that since March, 1886, such charges as a rule have been less than those made on their (respondent's) own line, and less than justified by the letter of the law.

Sixth. Respondents aver that from the time they took possession of the Texas & Pacific Railway until September 1, 1886, the division of revenue on business interchanged between the roads of the Missouri Pacific system, intersecting the Texas & Pacific Railway, including the St. Louis, Iron Mountain & Southern and the Missouri, Kansas & Texas railroads was made on the basis of what was known as the "Gault-Tucker award" made by two expert traffic managers, viz: John C. Gault, now general manager of the petitioner's lines and Joseph F. Tucker, then traffic manager of the Illinois Central system and now assistant general manager of the Chicago, Milwaukee & St. Paul Railway. On the first of September, 1886, a new agreement for division of revenue on business interchanged between the said roads of the Missouri Pacific system and the Texas & Pacific Railway was duly made and executed which has been in operation and duly acted upon by the parties thereto since said 1st of September, 1886. A copy of the same is made part hereof as Exhibit "RC" of this answer.

The petition and order to answer in this proceeding were served on the receivers through Lionel A. Sheldon, one of your respondents on the 9th of September, 1886. They show that at the time of such service, and since they have as above been acting in the premises under such agreement of September 1, 1886.

Seventh. Your respondents aver that the Missouri Pacific roads intersect the Texas &

Pacific Railway at eight different points, while the Vicksburg, Shreveport & Pacific intersects the same at but one point. The effect is that the Missouri Pacific roads could, in the absence of this agreement of September 1, deliver freight at these eight points without any payments to the Texas & Pacific Railway, and could also deliver freight for local points on the Eastern division of the Texas & Pacific Railway at better revenue to the Missouri Pacific roads than derived under said agreement. In other words, the Missouri Pacific roads pay more in many instances under said agreement than they would in its absence; whereas at Shreveport, petitioner's roads pay nothing in this way but are in sharp local competition. As to the Rio Grande division, its principal business is the transportation of cattle and the principal markets are St. Louis and Chicago. As to this business, petitioners' roads can offer respondents nothing, while the division of revenue therefrom allowed by the Missouri Pacific roads under said agreement is a liberal one. This fact is important in considering the propriety of the agreement of September 1, 1886. They further show that the effect of the said agreement of September 1, 1886, is to give the Texas & Pacific Railway a large business in lumber from the pinneries of Louisiana and Texas and in salt from the mines of Iberia, for the northwest, which it could not do to advantage in the absence of the division of rates established by said agreement.

They show that the same is true of the business in cotton to Mexico and wheat to mills on its lines. They further show that in consequence of the position of the Missouri Pacific lines on both sides of the Texas & Pacific road, the said agreement preserves to the latter a large amount of business which might be diverted by transportation over the Missouri Pacific Railway lines now existing, or easily built. Said agreement also secures to the Texas & Pacific a quantity of business controlled by the Missouri Pacific system, destined to points competitive between the Texas & Pacific and other lines which also directly intersect Missouri Pacific lines. They further show that the amount of business contributed by the Missouri Pacific lines to the Texas & Pacific lines is immensely greater than that to and from the lines of petitioners. From January 1, 1886, to September 3, 1886, the Missouri Pacific system contributed in all, 615,475,809 pounds of freight, the revenue to the Texas & Pacific being \$963,515.01 and from petitioners' lines during the same period there were contributed but 18,448,785 pounds, the revenue to the Texas & Pacific being only \$42,904.31. And respondent's annex as part hereof the statements by W. W. Finley, their general freight agent, which they believe to be correct, of the advantages of the property under their charge of the said agreement of September 1, 1886; said statements being marked "RD" and "RE." And respondents therefore show that the petitioners' lines are not able to furnish any such amount of business or advantageous interchange of traffic as the Missouri Pacific lines.

The amount of business properly going
4 INTER 8.

from respondent's lines to those of petitioners at Shreveport is small, and the business coming to respondent's lines at that point from petitioners has always been tributary to a large extent through other channels. As to the demand for "solid billing" made in the said intervening petition, respondents show that they have expressed to petitioners a willingness to make an arrangement for such solid billing, and are still willing to do so.

Eighth. Your respondents show that they have not in the premises violated any provision of the charter of the Texas & Pacific Railway Company, nor any other provision of law governing their action. They submit that all provisions of the charter and of other laws which may apply, must receive the interpretation which long established usage and the custom of the commercial world have given them. This custom has always taken into consideration the difference between transactions at wholesale and at retail, and the difference between dealing with large shippers and with small ones. They aver that special arrangements with large shippers under proper circumstances, do not amount to inequality, but promote reasonable equality. They submit that in the execution of their duties for the benefit of the property under their charge, they have but exercised a legal discretion in the premises in making such arrangements with the Missouri Pacific roads, and with the lines of petitioners as will, without unjust discrimination, confer the fullest benefit on the trust they represent. They submit that the arrangement made as aforesaid with petitioners gives them lower rates than they are entitled to under the letter of the law. The arrangement made as aforesaid with the Missouri Pacific system of September 1, 1886, does not operate an unjust discrimination or inequality but a reasonable equality, considering the facts above set forth. They submit that any other interpretation of the statutes in question would defeat their object and result in that unreasonable equality which is the most noxious inequality. They aver that whenever the petitioners in this proceeding are ready to tender them the same amount of business and the same advantages of interchange, under the same conditions as the Missouri Pacific system, they believe they will be ready to make with them an arrangement similar to that made with said Missouri Pacific system on said first of September.

SUPPLEMENTAL ANSWER.

In addition to the details given in their original answer hereto, filed November 10, 1886, and reiterating said answer, they aver that respondents have no connection with the important markets of St. Louis and Chicago except over lines of the Missouri Pacific system; that in the important article of coal of which they consume about \$100,000 worth annually, the same is furnished them over Missouri Pacific lines at \$1.25 per ton cheaper, freight included, than by petitioner's lines; that from Texarkana to Longview, a distance of about 100 miles, all the traffic of the Missouri Pacific system in question herein passes

over the Texas & Pacific Railway to the great advantage of the latter; and that from Whitesboro to Fort Worth, a distance of 71 miles, the track is owned by the Texas & Pacific Railway Company, and the agreement with the Missouri Pacific system which took effect September 1, 1886 (dated August —, 1886) and marked herein Exhibit "RC" contains provisions advantageous to the Texas & Pacific Railway for sharing the business of that portion of the latter's line, which the petitioners never have offered, and cannot offer.

The matter is submitted on petition and answer, and although the argument has extended over a wide territory, I feel compelled to restrict my examination of the case to the facts as admitted by the pleadings, the answer being taken as true.

It will be noticed that the answer, while in terms denying all discrimination against petitioners, goes fully into a statement of the previous and present relations, dependency, connections and joint business of the Texas & Pacific Railway, with the Missouri Pacific Railway system, and makes part of the answer the existing traffic contract with the Missouri Pacific Railway Company, and its leased and operated lines, entered into after the petition was filed, but before it was served upon the receivers. That contract covers division of rates, division of traffic and earnings and joint track operation and expenses, and amounts to what is known in railway parlance as a general pooling and traffic arrangement. Section 8 of article 2, division of traffic and earnings of said contract, provides as follows:

"In consideration of the above divisions and the further agreement mutually made between the respective companies to work as heretofore, in so far as they legally can, to the end of sending all the traffic they control over the lines of the system of the other, to or from points reached by the respective systems, in preference to the roads of other companies not parties to this agreement, and a further agreement on the part of each that they will not give other connecting lines equal rates and facilities as herein contained for each, without such connecting lines shall pay an equal consideration therefor, and a further agreement that the business between local stations on the lines of the parties hereto shall be routed in the same general manner as prior to the receivership of the Texas & Pacific Railway, except as hereafter changed by mutual agreement, or by the construction or control of either party hereto of new roads forming shorter routes, the parties hereto agree to divide as hereinafter provided," etc.

It is contended by the petitioners that this contract of itself, but particularly in the light of the above quoted provision, shows a preference in rates, business and facilities to do business on the part of the receivers of the Texas & Pacific in favor of the Missouri Pacific system and against all other connecting lines. This contention seems to be well founded. A preference in rates and business in favor of one connecting line is a discrimination against other connecting lines.

This contention is sought to be met with the propositions that the contract is not un-

lawful—that it operates to the benefit of the trust property; that the present traffic arrangement with petitioner's lines is a fair one, and acceptable to the traffic agents of said lines, and thereunder the charges are less than justified by the letter of the law being less than local charges on the Texas & Pacific lines, and that respondents are ready and willing to make the same arrangement with petitioner's lines, provided the latter will furnish them the same amount of business under the same conditions and advantages of interchange.

That the contract is not unlawful does not so plainly appear. As a general proposition where a railroad company is not restricted or inhibited by its charter or the law of the land, it may be conceded that it is not unlawful for it to make an arrangement for special purposes, on a sufficient consideration, and for the legitimate increase of its business (*Nicholson v. Great Western R. Co.* 4 C. B. N. S. 386) or that carrier may prorate through freight with one, and not with another (*Eclipse Tow Boat Co. v. Pontchartrain R. Co.* 24 La. Ann. 1) or that so far as the common law is concerned the question is whether the rate to the complaining party is reasonable. *Johnson v. Pensacola & P. R. Co.* 16 Fla. 664, 26 Am. Rep. 731; *Fitchburg R. Co. v. Gage*, 12 Gray, 393. Although the authority of all these cases is shaken by the case of *Scotfield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846, and the authorities there cited.

The fact is that the Texas & Pacific Railway Company is hampered by its charter, as well as by the laws of Texas, in regard to discrimination for or against connecting lines. Section 15 of the original charter to the Texas Pacific Railroad Company (16 Stat. at L. 578) is as follows:

"That all railroads constructed or that may be hereafter constructed, to intersect said Texas & Pacific Railroad shall have a right to connect with that line; that no discrimination as regards charges for freight or passengers or in any other matter shall be made by said Texas Pacific Railroad Company against any of the said connecting roads, but that the same charges per mile as to passengers and per ton per mile as to freight, passing from said Texas Pacific Railroad over any of said connecting roads, or passing from any of said connecting roads over any part of said Texas Pacific Railroad shall be made by said company as they make for freight and passengers over their own road; provided, also, that said connecting roads shall reciprocate said right of connection and equality of charges with said Texas Pacific Railroad; and provided, further, that the rates charged for carrying passengers and freight per mile shall not exceed the prices that may be fixed by Congress for carrying passengers and freight on the Union Pacific and Central Pacific railroads."

By Act of Congress approved May 2, 1872 (17 Stat. at L. 59) among other provisions, the name, style and title of the Texas Pacific Railroad Company was changed to that of the Texas & Pacific Railway Company, and this provision was made, to wit:

"That all roads terminating at Shreveport shall have the right to make the same running connections, and shall be entitled to the same privileges for the transaction of business in connection with the Texas & Pacific Railway as are granted to roads intersecting therewith.

Congress by the Act of 1871 granted some 15,000,000 acres of the public land to aid in the construction of the Texas Pacific Railroad. On the second of May, 1873, the legislature of the state of Texas passed "An act to adjust and define the rights of the Texas & Pacific Railroad Company within the state of Texas," etc. Under this act, the line of the road was distinctly defined, and certain grants and donations of land (nearly 5,000,000 acres) were made by the state to aid in its construction; these grants and donations being made subject to the conditions named in the last paragraph of section 9 of said act, to wit: "that said Texas & Pacific Railway Company shall be subject to such general laws as may be enacted by the legislature applicable to other railroads constructed within the state." And in section 10, to wit: that "all railroads in this state constructed or that may be hereafter constructed, to intersect said Texas Pacific road, shall have a right to connect with that line; that no discrimination in regard to charges for freight or passengers, or in any other matter shall be made by said Texas Pacific Railroad Company against any of the said connecting roads but that the charges per mile as to passengers and freight passing from the said Texas Pacific Railway over any of the said connecting roads, or passing from any of the said connecting roads over any part of the Texas Pacific Railroad shall be governed and controlled by the laws of this state now or hereafter to be enacted. . . . And said railroad company shall not have the right or power to consolidate with, or sell or rent or lease the same to, any other railroad in this state, or to purchase or lease, nor enter into any combination in the nature of a partnership with, any railroad in this state running parallel with the said Texas & Pacific Railroad, or in the same general direction, that would in any way or manner give the said company the power or right to control the rates of freight and passage on said railroad so purchased or leased, and should the provisions of this section be violated by said company, it shall work a forfeiture of the rights and privileges herein granted." Section 11 of the act requires that "the board of directors shall within fifteen days from the date of approval of this act (May 2, 1873) signify to the governor, by telegraph or otherwise, the acceptance or rejection of the terms and conditions of this act; and within thirty days from the date of approval of this act, shall file a formal acceptance or rejection of the same with the secretary of state of the state of Texas." It appears that such formal acceptance was duly filed. The constitution of the state of Texas, article 10, reads as follows:

"Sec. 1. Any railroad corporation or association organized under the law for the purpose shall have the right to construct and

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operate a railroad between any points within this state and to connect at the state line with railroads of other states. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination, under such regulations as shall be prescribed by law.

"Sec. 2. Railroads heretofore constructed or that may hereafter be constructed, in this state, are hereby declared public highways, and railroad companies common carriers. The legislature shall pass laws to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state."

"Sec. 5. No railroad or other corporation, or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchises of, or in any way control, any railroad corporation owning or having under its control, a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line."

It is contended in this case that the laws of Texas can have no force, because the connection between petitioner's lines and respondent's lines is not in Texas but in Louisiana; but this view loses sight of the fact that the contract under consideration is made with railway lines in Texas with reference entirely to business interchanged in Texas. It would seem, too, that under the circumstances the regulations of the laws of Texas with regard to the matters here involved, should be binding on the Texas & Pacific Railway Company in morals, if not in law. Of course the provisions of the charter and the supplemental charter are binding on the company, and on the respondents who are operating the railway lines under the franchises and rights granted the company.

Under these provisions of section 15 of the charter, and of the laws of Texas, accepted by the Texas & Pacific Railway Company for a consideration, it is by no means clear that the discrimination stipulated in the contract or agreement with the Missouri Pacific system is lawful. Both the charter and Texas grant provide that, "no discrimination, as regards charges for freight or passengers, or in any other matter, shall be made by said Texas & Pacific Railway Company against any of the connecting or intersecting roads. In the Texas grant as well as in the Texas law is the further provision that said railway company shall not enter into any combination in the nature of a partnership with any railroad in the state running parallel with the said Texas & Pacific, or in the same general direction that would in any way or manner give the said company the power to control the rates of freight and passage on said railroad." That the contract gives the Missouri Pacific lines advantages not granted to other connecting and intersecting lines is apparent from the extract given. That the Missouri Pacific lines are to a considerable

extent in competition with the Texas & Pacific lines appears from the reasons given by respondents for entering into the contract. That the Missouri Pacific system has more than 200 miles of railway in Texas parallel to the lines of the Texas & Pacific lines appears by the record.

If the contract with the Missouri Pacific system be unlawful, as not in consonance with the acts of Congress and the laws of Texas, then the consideration that it operates to the benefit of the trust property can have no weight. Neither is it material that the present arrangements with petitioners' lines are fair and satisfactory to petitioner's agents.

The proposition that the respondents are ready and willing to make the same arrangements with petitioner's lines, provided the latter will tender them the same amount of business under the same conditions is plausible only to the eye. The general tone of the answers of respondents seems to justify a discrimination in favor of connecting lines on the basis of the amount of business furnished, as for instance within a given period the Missouri Pacific system furnished the Texas & Pacific over 615,000,000 pounds of freight, while during the same period the petitioner's lines only furnished about 18,000,000 pounds.

Generally I consider that the case of *Seo-feld v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846, is the best exposition and furnishes the true rule on this subject; but for the Texas & Pacific Railway the matter is settled by its charter, section 15, *supra*, "but that the same charges per mile as to passengers and per ton per mile as to freight . . . shall be made by said company as they make for freight and passengers over their own road." And in this connection, it may be proper to say that a proper construction of said section 15 does not permit that connecting roads should be charged less or more per ton per mile as to freight or less or more per mile as to passengers than the rates charged on or over the Texas & Pacific lines, but the same. In other words, section 15 is in the interest of and for the protection of shippers local to the Texas & Pacific Railway, as well as in the interest of and for the protection of connecting lines. If respondents are, as they seem to say, charging the petitioner's lines less per ton per mile than the charges made on respondent's lines to other shippers under the same conditions as to distance and shipping points then respondents are discriminating (and probably against shippers who are forced to use their lines) which ought not to be permitted under any circumstances, and particularly on a railroad to the construction of which the general government and the state of Texas contributed so large a portion of the public lands.

For the relief of petitioners an order will be entered directing the receivers to give them the same rates and the same privileges for doing business in all respects as are given to other connecting or intersecting lines, substantially as prayed for in their petition.

In one of the exhibits attached to the petition I notice the statement made by the

general freight agent of the respondents "that the question of through rates into Texas is not absolutely controlled by the Missouri Pacific Railway, or the Texas & Pacific Railway, but by the Texas Traffic Association, of which the Texas and St. Louis, the H. & T. C. the Southern Pacific, and the G. C. & S. F. railways are also members" and again the "basis fixed by the Texas Traffic Association for the division of rates from Louisville and Cincinnati to common points in Texas like Dallas and Fort Worth, *via* New Orleans and all lines is as follows:" Whether these statements imply any power in the Texas Traffic Association to make discriminating rates for or against the Texas & Pacific Railway, or against any railway connecting or intersecting with the Texas & Pacific Railway, as to shipments *via* the Texas & Pacific, does not appear. If any such power is vested in the Texas Traffic Association, then the connection of the receivers of the Texas & Pacific Railway Company with that association is as obnoxious as the hereinbefore referred to contract with the Missouri Pacific Railway system. As these matters have been brought to the attention of the court, and considering that the receivers are operating the lines of the Texas & Pacific Railway under the orders and protection of the court to the end that the duties and obligations devolving upon the Texas & Pacific Railway Company as a public carrier under its charter may be performed, and that the public may not suffer detriment by the non-user of its franchises, as well as to preserve the property of the company for its creditors, and considering that it is the duty of the receivers to adhere to and comply with the charters, and grants to the company by which their franchises and privileges were obtained, and considering further that the aforesaid contract between the said receivers, and the Missouri Pacific Railway Company is in violation of the laws of Texas, and not authorized by the charter of the Texas & Pacific Railway Company, and that the Texas Traffic Association may be likewise obnoxious, . . . an order of the court's own motion will be entered in this cause, directing the receivers to abrogate and annul the said contract with the Missouri Pacific Railway system so far as it contemplates discrimination against intersecting or connecting lines and so far as it constitutes or stipulates any combination in the nature of a partnership with the Missouri Pacific Railway system in Texas; and advising the said receivers to withdraw from all connection with the Texas Traffic Association, unless they are able to report that under the rules of said association, they are not required to discriminate in any manner for or against any connecting or intersecting line of railway, or for or against any shipper or the public.

This opinion and the orders herein directed, are not to be construed as any reflections upon the receivers. They received the property of the Texas & Pacific Railway Company, which is a railway system by itself, in a dilapidated condition, with all the complications and entanglements rising from the fact that for years it formed an integral

part of the Missouri Pacific Railway system, and their management so far has been so wise and judicious that they retain the full confidence of the court, and merit the warmest approval from all financially interested in the prosperity of the railway.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF LOUISIANA.

MISSOURI PAC. R. CO. v. TEXAS & P. R. CO. (No. 2).

RE DAVIS.

(See S. C. 31 Fed. Rep. 864.)

A shipper is not bound by his order for a specified number of cars on a specified day in the absence of an acceptance of the order so as to bind both parties.

Decided May 28, 1887.

REPORT of Master on petition of I. T. Davis for damages.

*Messrs. Sexton & Smith and L. H. Kennard, Jr., for petitioner.
Mr. W. W. Howe, for receivers.*

Pardee, J., delivered the opinion of the court:

This matter has been heard on exceptions to the master's report recommending a dismissal of the claim. The master's report fairly and fully sets forth the facts as shown by the evidence, and his legal conclusions on the facts are supported at every step by the authority of adjudged cases. As the case seems to me, the claimant has failed to establish the basis of his claim for damages, to wit, a contract with the receivers to furnish him a specified number of cattle cars on a specified day. It may be taken as granted that the receiver's station agent had authority, from the general scope of his agency, to bind the receivers in a contract to furnish cars, but it does not appear that he made any contract to that effect. A shipper's order calling for a specific number of cars for a specified day will not, unaccepted by the carriers, constitute a contract binding

on either. A contract of the kind referred to will bind the carrier to furnish the cars, and the shipper to furnish the goods to load the cars.

Under the evidence it is apparent that the claimant did not intend to bind himself to furnish any certain number of cattle for shipment. In fact, he did not know, at the time of the alleged first contract, how many cattle he would have to ship, or when he would be ready to ship them; and, when he sent his order for cars, he ordered 75, when he had cattle for only 43; and at the time of the second alleged contract he again makes application for 75 cars for himself and Beal, but fixes no particular day for shipment and when he brings the cattle in has enough only for about 40 cars.

It is therefore ordered that the exceptions to the master's report be overruled; that the said report be in all respects confirmed; and that the said intervention be dismissed.

MISSOURI PAC. R. CO. v. TEXAS & P. R. CO.

[No. 3.]

(See S. C. 46 Fed. Rep. 862.)

1. Advice and instructions to receivers on application to the court, where *ex parte* are probably binding only upon the receivers; but where there are parties in interest, and they have their day in court, the advice may be decisive.
2. Competition may constitute a circumstance or condition of dissimilarity which will prevent the operation of the long and short haul clause of the Interstate Commerce Act, § 4.

Decided June 21, 1887.

PETITION of Receivers for advice in relation to the construction of the 4th section of the Interstate Commerce Act.

Mr. W. W. Howe for receivers.

Pardee, J., delivered the opinion of the court:

The petition of the receivers of May 23, the evidence and report of the special master, and the arguments have been carefully considered. The nature of the matters presented precludes anything beyond *ex parte* consideration. The receivers of the Texas & Pacific Railway, operating its lines of railway under the general direction of the court, can have general advice and instructions, and, in particular cases, particular advice and instructions on application to the court. The value of such advice depends: If there are parties in interest, and they have their day in court, the advice may be decisive. But, if the matter is *ex parte*, the value of the advice depends largely upon the information and ability of the judge, and is probably binding only on the receivers, for the judge may change his mind on hearing full argument.

Under section 4 of the Interstate Commerce Law, relating to the charges for the long and short haul, it seems that where the circumstances and conditions are dissimilar there is no prohibition; where the circumstances and conditions are similar the prohibition attaches; and that where it is difficult to point out clearly the circumstance or condition which produces dissimilarity, the doubt should go in favor of the object of the law, and the circumstances and conditions should be taken as substantially similar. Where the circumstances and conditions are similar, or substantially similar, and the result to the carrier is injurious, relief can be had only through the Commission.

The bulk of the petition presented, of the evidence, and of the master's report, is an argument against the Interstate Commerce Act, and a rather vivid showing of the disastrous effects of an enforcement of the Act with the popular construction given to the long and short haul clause, so far as the lines of the Texas & Pacific Railway are concerned; and if any specific question is presented for the answer of the court, it is whether competition

between carriers is a circumstance or condition of the carriage in the sense in which these words are used in the 4th section of said law.

The effect of the enforcement of the law upon the particular property in the hands of the receivers need not be considered, when the whole question is one of how to comply with the law. That competition, the life of trade, cuts an important figure in the conditions and circumstances attendant upon transportation of property and passengers, cannot well be overlooked nor denied. Nor can it well be denied that, as between the short and long haul competition may exist to that extent that what would otherwise be similar circumstances and conditions will be dissimilar circumstances and conditions. Whether in any particular case there is that competition on the long haul that will justify a lower charge for the long haul than as charged for the short haul, under otherwise similar circumstances and conditions, must be determined on the facts of the particular case; keeping in mind that, where the matter is not clear, the object and the policy of the law should prevail.

As to the competition and its effects, and generally as to the questions under the said Interstate Commerce Act, the receivers are referred to the late decision of the Commission upon the petition of the Louisville & Nashville and other railroads, rendered June 16, instant. This decision is elaborate and well considered, and answers all the points made by receivers' petition herein specifically as their general nature will permit.

The lights furnished by the Commission, with a disposition to enforce the law (giving the same an enlightened and liberal construction, to the end that the mischiefs at which the law is aimed may be prevented without unnecessary injury to any species of property) ought to be sufficient to guide any railroad traffic manager and to enable him to protect himself and his company against any serious complaint of unjust discrimination or unlawful conduct.

UNITED STATES CIRCUIT COURT, DISTRICT OF NEBRASKA.

LOWRY v. CHICAGO, B. & Q. R. Co.

(See S. C. 46 Fed. Rep. 88.)

1. The fact that a plaintiff rests his case on a common law liability will not deprive defendant of the right to remove it, if he bases his defense on an Act of Congress.
2. A suit to recover damages for acts which constitute a violation of the Interstate Commerce Act, the construction of which is in dispute be-

- tween the parties, presents a Federal question for which it may be removed to a Federal court.
3. On a motion to remand, the court will not anticipate the trial of the case, by deciding a Federal question for which the right of removal is claimed.

Decided May 6, 1891.

MOTION to remand on action removed from a state court.

Messrs. John L. Webster, G. M. Lamberton, and John P. Maule, for plaintiff.
Messrs. Marquette, Dewese & Hall, for defendant.

Caldwell, J., delivered the opinion of the court:

This is a suit at law, brought by the plaintiff against the defendant as an interstate common carrier by rail, upon three separate causes of action. The following is a brief summary of the facts constituting the causes of action: (1) That the defendant unjustly discriminated against the plaintiff in respect to rates and charges on shipments of grain from points in Nebraska to points in other states, by giving other shippers, who made like shipments under similar circumstances and conditions, and from and to the same places and at the same time lower rates and better advantages, in respect to the number of cars, weight, and promptness in dispatch of shipment, than were given to the plaintiff. (2) That from 1884 to 1889 the plaintiff shipped over the defendant's road from Staplehurst and other points in Nebraska, to Chicago and other cities in the United States, large quantities of wheat and other grains, for the carriage of which the defendant "unlawfully demanded, charged, received, and exacted from the plaintiff a rate that was unjust, extortionate and unreasonable." (3) That through the fault and negligence of the defendant, and its connecting lines, agents, and employes, all the grain shipped by the plaintiff was not delivered to the consignees. The aggregate amount of damages claimed by the plaintiff is \$145,000. The suit was brought in the state court, where the defendant appeared, and in apt time filed an answer to the first cause of action, and a petition to remove the suit into this court, upon the ground that it arises under the Act of Congress commonly known as the "Interstate Commerce Act." The suit is not, in express terms, based on that Act, but the statement of the cause of action follows very closely the language of the Act, and the complaint was undoubtedly framed to bring the case within its provisions. The first section of the Act of March 3, 1887, declares:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States."

And section 2 of the Act provides:

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, . . . may be removed by the defendant to the circuit court of the United States."

It will be observed that the first section gives the circuit courts original jurisdiction of all

suits arising under the Constitution or laws of the United States, and by the provisions of the second section any suit of which the circuit court is given original jurisdiction by the first section may be removed by the defendant to the circuit court. If, then, this is a suit arising under a law of the United States, it is removable. That it is such a suit cannot be controverted. The Interstate Commerce Act declares all charges for transportation of passengers or property "shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Unjust discrimination is "prohibited and declared to be unlawful;" and the giving of "any undue or unreasonable preference or advantage" to one shipper or locality over another is prohibited. The 8th section of the Act declares:

"That in case any common carrier, subject to the provisions of this Act, shall do, cause to be done, or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

The 9th section of the Act provides:

"That any person or persons claiming to be damaged by any common carrier, subject to the provisions of this Act, may either make complaint to the Commission as hereafter provided for or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction."

This suit is brought to recover from the defendant damages for acts which constitute a violation of the provisions of the Interstate Commerce Act. The suit, therefore, arises under that Act, and might have been originally brought in the circuit court. This makes it a removable cause.

Notwithstanding the suit arises under a law of the United States it would not be removable if the parties were at one as to the application and construction of that Act, and the only controversy was over questions of fact or of general law. But the parties in the case are not agreed on the proper construction of the Act. For the purpose of the transfer of a cause, the petition for removal performs the office of pleading. The petition in this case complies with the rule, and sets out with unusual fullness and particularity the facts and

the provisions of the Interstate Commerce Act which are relied upon as constituting a defense. The petition for removal, among other things, alleges that the defendant printed and posted up, for public inspection, schedules, showing the rates and fares and charges for the transportation of passengers and property, which it had established, as required by the sixth section of the Act, and that the rates so established were just and reasonable, and were the rates charged the plaintiff and all others, without any discrimination, and that in a suit or proceeding brought by the Lincoln Board of Trade, of which body the plaintiff was at the time a member, before the Interstate Commerce Commission, against the defendant, to test the justice and reasonableness of the defendant's schedule of rates and charges, that tribunal adjudged that they were just and reasonable. Upon these facts the defendant claims the question whether its schedule rates are reasonable and just is *res judicata*; and that, if that be not so, the Act makes the schedule rates lawful until directly attacked and set aside; and, finally that under the Act the schedule rates are *prima facie* just and reasonable, and that whether they are so or not is a question arising under the Act, and depending largely for its correct decision upon the construction of the various provisions of the statute. A suit is removable when it clearly appears from the record that its determination will necessarily involve the construction of an Act of Congress the meaning of which is in dispute between the parties. All this clearly appears from the record in this case.

The construction of the Act contended for by the defendant is not so fallacious or absurd as to warrant the court in treating it as an idle or false pretense. The court will indulge the presumption that the petition for removal was filed in good faith, and that the defendant, knowing the proverbial uncertainty of the law, is animated by a lively hope that its construction of the Act may prevail. The court will not, on the motion to remand, anticipate the trial of the case, and proceed to construe the Act of Congress and determine the rights of the parties thereunder. It cannot eliminate the Federal question from the case by a premature decision of it, and then remand the suit on the theory that there is no longer a Federal controversy in the case. It is said in argument that the suit cannot certainly be said to arise

under the Act of Congress because the complaint states a good cause of action at the common law. It must be conceded that the complaint would be good at common law. And it is true that the provisions of the Interstate Commerce Act prohibiting unjust and unreasonable charges and unjust discrimination are merely declaratory of the common law. 2 Redf. Railways, 95; Hutchinson, Car. 243, 302; *Brown v. Pool*, 9 L. R. A. 767, 81 Iowa, 455; *Seafeld v. Lake Shore & M. S. R. Co.*, 48 Ohio St. 571, 54 Am. Rep. 846. And the remedies afforded by the Act of Congress for such practices are cumulative, and not exclusive of the remedies existing at common law. The Act declares that "nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." The law would have been the same independently of this provision. The rule is that when a statute gives a remedy in the affirmative (without a negative express or implied) for a matter which was actionable at common law, this does not take away the common law remedy, but the party may still sue at common law as well as upon the statute. Potter, Dwar. Stat. 275, note 5. It is highly probable that in the progress of the case it will be found that, as to some of the plaintiff's causes of action, the statute is in some respects more favorable to the plaintiff than the common law. And the learned counsel for the plaintiff enter no disclaimer of their intention to avail themselves of these statutory advantages on the trial of the cause. But if the plaintiff's case was based, in terms, on the common law alone, that fact would not affect the question of removal. The plaintiff may be content to rest his case on the common law liability of common carriers, but he cannot thereby deprive the defendant as a carrier of interstate commerce of any defense it has under the Act of Congress, which covers the ground of the common law, and much more. It is enough that there is a Federal question in the case, whether it is relied on by the plaintiff or the defendant. A case arises under a law of the United States whenever the law is the basis of the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom it is set up. *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648.

The motion to remand is overruled.

UNITED STATES CIRCUIT COURT, DISTRICT OF SOUTH CAROLINA.

Re D. M. LANGFORD.

(See S. C. 57 Fed. Rep. 570.)

1. Liquors imported into a state arrive therein so as to be subject to its police power under the Wilson Act providing that all intoxicating liquors shall, upon arrival in a state or territory, be subjected to the operation and effect of its laws enacted in the exercise of its police powers, to the same extent as if produced in such state or territory, when they reach their destination in such

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state, although they are not then delivered by the carrier to the consignee.

2. The provision of S. C. act of Dec. 24, 1892, § 25, subd. 2, that any servant, agent, or employee of a railroad or express company or other carrier, who shall remove any intoxicating liquors from any railroad car, vessel or other vehicle of transportation, at any place other than the usual and

established stations or places of business of such carriers within an incorporated city or town where there is a dispensary, shall be punished,—is not a valid exercise of the police power of the state, since it singles out one class of persons from the whole community for prosecution and punishment in contravention of S. C. Const. art. 1, § 12, providing that no person shall be liable to

any other punishment or subjected in law to any other restrictions or disqualifications in regard to any personal rights, than such as are laid on others under like circumstances.

3. A Federal court will not, through principles of comity, hold its hand and leave the determination of the validity of a state statute to the state courts.

Decided August 21, 1898.

PETITION for a writ of habeas corpus to obtain the discharge of petitioner from the custody of the sheriff of Newberry county to which he had been committed for an alleged violation of the State Dispensary Act. *Petitioner discharged.*
The facts are stated in the opinion.

Messrs. Cothran, Cothran & Wells for petitioner.
Mr. D. A. Townsend, Atty. Gen., and *Mr. Ansel* for respondent.

Simonton, D. J., filed the following opinion:

This case comes up upon petition for habeas corpus, the writ, and the return thereto. The petition sets forth that the petitioner, a citizen of the United States and of the state of South Carolina, is the agent of the receivers of the Richmond & Danville Railroad at Prosperity, a town in South Carolina; that on the 14th of July, 1898, as such agent, he received by a regular train, over a railroad of the receivers, a keg of whisky consigned to A. A. Singley, a resident of said town, which keg, as shown by the way bill, was shipped from Pleasant Ridge, in North Carolina, to said town in South Carolina; that he delivered the keg to the consignee, and that soon thereafter he was arrested under a warrant issued by a trial justice of said state, charged with violating the provisions of an act of the legislature of South Carolina entitled "An Act to Prohibit the Manufacture and Sale of Intoxicating Liquors as a Beverage Within this State Except as Herein Provided;" and that he is yet in custody. The petition further shows that the delivery by him of the keg of whisky, as aforesaid, was made by him under and pursuant to the laws regulating commerce between states, and that the act of the legislature of the state under which he has been arrested and is held in custody is in conflict with said Interstate Commerce Law, and is null and void, so that his arrest is illegal. He prays his discharge from arrest. The return of the sheriff having him in custody admits that the petitioner is held for violation of the said act, by reason of the delivery of the keg of whisky as stated, and denies that the act is in conflict with the Interstate Commerce Law, and, on the contrary, avers that it comes within the provisions of the Act of Congress approved August 8, 1890, commonly known as the "Wilson Act." It further avers that the petitioner is in custody for trial in the courts of the state for a crime against the state, and that this court, in comity to the courts of the state, ought not to interfere herein until the said state courts have first passed upon the question involved in the case.

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In *Cantini v. Tillman*, 54 Fed. Rep. 970, the alleged conflict of the dispensary act with the Constitution and laws of the United States was discussed, and the validity of the act was sustained. The opinion, however, expressly reserved any question as to the validity of this twenty-fifth section. The case at bar raises the issue on this section. The petitioner is in custody under the charge of violating section 25 of the act of the legislature referred to. This section is in these words:

"No person shall knowingly bring into this state, or knowingly transport from place to place within this state, by wagon, cart, or other vehicle, or by any other means or mode of carriage, any intoxicating liquors, with the intent to sell the same in this state in violation of law, or with intent that the same shall be sold by any person, or to aid any other person in such sale, under a penalty of \$500, and costs for each offense, and in addition thereto shall be imprisoned in the county jail for one year. In default of payment of said fine and costs, the party shall suffer an additional imprisonment of one year. Any servant, agent, or employé of any railroad corporation, or of any express company, or of any persons, corporations, or associations doing business in this state as common carriers, who shall remove any intoxicating liquors from any railroad car, vessel, or other vehicle of transportation, at any place other than the usual and established stations, wharves, depots, or places of business of such common carriers within some incorporated city or town, where there is a dispensary, or who shall aid in or consent to such removal, shall be subject to a penalty of \$50, and imprisonment for thirty days for every such offense: provided, that said penalty shall not apply to any liquor in transit, when changed from car to car to facilitate transportation. All such liquor intended for unlawful sale in this state may be seized in transit, and proceeded against as if it were unlawfully kept and deposited in any place. And any steamboat, sailing vessel, railroad, express company, or other corporation, knowingly transporting or bringing such liquor into the

state, shall be punished upon conviction by a fine of five hundred dollars and costs for each offense. Knowledge on the part of any authorized agent of such company shall be deemed knowledge of the company."

There can be no doubt that but for the passage of the Wilson Act the provisions of this section would be in conflict with the Interstate Commerce Law, and void. *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700; *Leisy v. Hardin*, 3 Inters. Com. Rep. 38, 135 U. S. 100, 34 L. ed. 128. This last case induced the passage of the Wilson Act. Caldwell, J., in *Re Van Fleet*, 48 Fed. Rep. 766.

The Wilson Act is as follows:

"An Act to Limit the Effect of the Regulations of Commerce Between the Several States and with Foreign Countries in Certain Cases.

"That all fermented, distilled, or other intoxicating liquors or liquids, transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquors or liquids had been produced in such state or territory and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

What were the interstate commerce regulations which were in existence at the passage of this Act, from which intoxicating liquors were by it exempted? This question is answered in the two cases quoted above. The first of these cases had declared that under the interstate commerce regulations the right to import intoxicating liquors into any state existed, and the second case declares that this right of importation involved the right to the importer to sell so long as the liquor remained in the original package; that therefore the police power of the state could not prevent the importation except under restrictions, nor forbid the sale of the importation by the importer so long as it remained in the original package. The Wilson Act put the imported package, whether in its original shape or otherwise, under the police power of the state, upon its arrival in such state, precisely as other intoxicating liquor in the state is subject to such police power.

What is the meaning of the term "upon its arrival?" The respondent insists that by this term is meant its entrance within the borders of the state. Thus it is a prohibition of the importation of intoxicating liquors into this state. That does not seem to be within the scope of the Wilson Act. It provides "for all fermented, distilled or other intoxicating liquors or liquids transported into any state," and declares them not exempt from the operation of the police laws by reason of being introduced therein in original packages or otherwise. It is clear that the Wilson Act deals with liquors after their introduction within the state, and therefore the word "arrival" cannot be construed to be at the border of the state. Goods "arrive" when they reach their destination. In the term is

involved a cessation of the transit. Goods shipped from Virginia to Alabama cannot be said to arrive in North Carolina, South Carolina, or Georgia. They "arrive" when they reach their destination in Alabama.

On the other hand, the petitioner contends that the Wilson Act does not subject the imported package to the operation of the police regulations of the state until the whole duty of the carrier has been performed; that the carrier does not perform his whole duty until the goods are delivered; that when the Act uses the expression, "upon arrival in such state," it means when the delivery by the carrier has been made. This position depends upon the construction to be given to this word "arrival." Words used in a statute, not technical in their character, must be taken in their ordinary signification. Persons and goods arrive when they reach their destination. It is proper to say that, after a man arrives at a city, he goes to his home therein, or to the home of a friend, or to his hotel. So goods, after "arrival" at their destination, are either delivered to the consignee after notice of arrival, or are held until the freight is paid, or C. O. D., or are stored. The money for the freight or the cash delivery cannot be demanded until the goods have arrived, and because of such arrival. If the freight be not paid, or if the cash on delivery be not produced, or the consignee be not known or do not appear, these cannot in any way affect the arrival of the goods, or permit us to say that they have not arrived. The delivery of goods is not an essential element of their arrival at their destination. Compare *Benjamin, Sales*, pp. 759, 760, §§ 878, 874. The same conclusion would appear in using the analogy of stoppage *in transitu*. This right of stoppage ends upon the delivery into possession of the consignor. Says *Benjamin, Sales*, p. 1070, § 1245: "The vendor's right of stoppage in transitu is very frequently not ended on their arrival at their ultimate destination, because of his retention of the property in them."

The package in question, upon its arrival at Prosperity, in South Carolina, came within the exercise of the police power of the state.

The next question is, is this 25th section of the act of assembly, December, 1892, a lawful exercise of the police power? Examining this section we find that it contains four distinct subdivisions: (1) No person shall knowingly bring into this state, or knowingly transport from place to place within the state, by wagon, cart, or other vehicle, or by any other means or mode of carriage, any intoxicating liquors, with intent to sell the same in this state in violation of law, or with intent that the same shall be sold by any other person, or aid any other person in such sale. (2) Any servant, agent, or employé of any railroad corporation, or of any express company, or of any persons, corporations, or associations doing business in this state as common carriers, who shall remove any intoxicating liquors from any railroad car, vessel, or other vehicle for transportation, at any place other than the usual and established stations, wharves, depots, or places of business of such common carriers,

within some incorporated city or town where there is a dispensary, or who shall aid in or consent to such removal, etc. (3) All such liquor intended for unlawful sale in this state may be seized in transit, and proceeded against as if it were deposited in any place. (4) Any steamboat, sailing vessel, railroad, express company, or other corporation knowingly transporting or bringing such liquor into the state, shall be punished, etc. Knowledge on the part of any authorized agent of such company shall be deemed knowledge of the company.

Thus, in every subdivision but the second above set forth, there must exist on the part of the person charged the knowledge that the intoxicating liquors were intended for sale. The liquors to be seized must be intended for sale. No private carrier or other person can offend this section if he does not know that the liquor is brought in for sale. The liquor cannot be seized in transit unless it is intended for sale. The company transporting the liquor into the state is punishable only when its authorized agent knows that it was intended for sale. This is in harmony with all the other parts of the act, the purport and purpose of which is to regulate the sale of intoxicating liquors. This is plainly shown in the first section:

"The manufacture, sale, barter, or exchange, or the keeping or offering for sale of any spirituous, malt, vinous, fermented or other intoxicating liquor or compound or mixtures thereof by whatever name called, which will produce intoxication by any person, business, firm, corporation or association, shall be regulated and conducted as provided in this act."

More than this, no criminality is attached to the person receiving from the common carrier the liquors mentioned in the second subdivision of this 25th section. But this second subdivision makes it a criminal offense for one special class of persons, servants, employes, and agents of a special class of common carriers, to remove from the car, etc., any intoxicating liquor whatever, without any sort of qualification. No knowledge on the part of such servant, agent, or employe that it is intoxicating liquor is required. Nor does it make any difference whether the liquor be intended for sale, personal use, or consumption in any other way. None of the safeguards thrown around every other criminal offense exists. The only qualification is that the city or town in which the package is has no dispensary. This is discrimination,—the separation of a class from the whole community, and singling it out for prosecution and punishment. It is the class on whom interstate commerce largely depends, without whom it cannot be conducted. And if we are permitted to infer from the words of the act the motive for this discrimination, the natural inference would be that it is intended to prevent any possible chance of competition with dispensaries elsewhere

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established; and intention sought to be perfected, not by punishing all persons connected with the act,—the importer and the consumer,—but confining the crime and the punishment to this one class; creating for this special class a new crime. If this be assumed to have been done in the exercise of the police power, it will be difficult to sustain it. The Wilson Act created no new power in the states. It professed to do no more than to limit the regulations of interstate commerce. But the most broad and liberal construction of the Act would not permit a state, under the guise of the policy power, to single out and punish the agents of interstate commerce for a crime specially created for them, in the teeth of the 14th Amendment to the Constitution of the United States.

It is extremely difficult, if not impossible, to give an exact definition of, and to describe the limits of, the police power. It is clear, however, the legislature of a state cannot assume the exercise of the police power in a way forbidden by the constitution of the state. The constitution of South Carolina (article 1, § 12) provides "no person shall . . . be liable to any other punishment for any offense, or be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances." This limits the power of the legislature, and prevents this provision of the act of 1892, known as the "Dispensary Act," from being an exercise of the police power. This being so, the provisions of the 25th section under this act contravene the Interstate Commerce Law and the 14th Amendment (*Leeper v. Texas*, 139 U. S. 468, 35 L. ed. 225; *Bowman v. Lewis* ("Missouri v. Lewis") 101 U. S. 22, 25 L. ed. 999) and are null and void. The arrest of the petitioner, based on these provisions, is void.

The return suggests that comity between the courts should induce this court to hold its hand, and leave the determination of the questions involved in this case to the state courts. It is the duty of a judge, when relief is sought before him in a matter within his jurisdiction, speedily to hear the plaintiff, and, if the party is entitled to the relief, to give it. He cannot shift from his shoulders the responsibilities of his judicial function, and impose them upon another. Strong as the temptation is, and agreeable as it would be, to do so, he cannot do it without loss of self respect. Besides this, both parties to this controversy desire a speedy solution of it. The public interest demands that the legal questions arising in, we may say impeding, this grave and interesting experiment of the dispensary act, be shortly settled. An appeal from this court lies directly to the Supreme Court. A final decree of the tribunal of last resort is very near at hand.

It is ordered that the defendant be released from custody.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF TEXAS.

LOLA HOUCK v. SOUTHERN PAC. R. CO.

(See S. C. 38 Fed. Rep. 226.)

*A railway company, in the management of its complicated interests, may be authorized in law, —on showing a proper or sufficient state of facts, to establish in the opinion of the court the reasonableness of the rule,—in setting apart one or more cars for the use exclusively of colored passengers, and a like number, more or less, as the

service may require, for the use exclusively of white passengers; but whenever the company enforces such a rule the company is charged with the duty of furnishing to colored people who pay first class fare cars to ride in that are as safe and comfortable in their conditions and appointments as the cars furnished to white passengers who pay first class fare.

*Head note by the court.

Decided Nov. 16, 1888.

ACTION for personal injuries. Judgment for plaintiff, and defendant moves for new trial. At law. On motion for a new trial.

Messrs. Wheeler & Rhodes and Labatt & Nobles for plaintiff.
Messrs. Waul & Walker for defendant.

Boorman, J., delivered the opinion of the court:

Plaintiff claims damages in the sum of \$7500 against defendant railway company for personal injury to Mrs. Houck. The undisputed evidence in the case shows that Mrs. Houck is a young married woman with some degree of negro blood in her veins; that casually looking at her or her husband it would be difficult to distinguish either of them from white persons; that she is a graduate of one of the high schools in Texas, where colored persons are educated for school teaching, and she and her husband were known at their home, Victoria, Tex., as respectable colored people; that she was, at the time mentioned in her petition, to some extent pregnant, but otherwise in good health; that, having received a telegram stating that her infant child was very sick at the home of her mother in Galveston, she, anxious to see and be with her child, purchased at Victoria a ticket over defendant's line of railway, which entitled her to first class passage from Victoria to Rosenberg—about 90 miles; that the train which she entered at Victoria had but two passenger cars in it; one of them, the rear car, was set apart by the rules of the company for the accommodation, exclusively, of white people; the other, the front car, was known in Texas as the "Jim Crow-Car," and was for the use of colored people, though white people often rode in it. It was a combination, or compartment car, and was divided, unevenly as to length, into two divisions, which were separated by a partition with a doorway connecting the compartments. In one of these compartments, passengers, white or colored, were allowed to smoke; in the other compartment, smoking was forbidden by the rules, though these

rules were often violated. The seats in the smoking division were inferior, uncushioned seats; those in the other division were good seats. Mrs. Houck, having purchased her ticket at Victoria, went upon the platform of the rear car to go inside of it, when the brakeman, meeting her at the door, forbade and denied her entrance thereto. He shut the door in her face, and locked it from the inside, and, holding the keys up against the door glass, told her that he was inside and she was outside, and she could not come in because she was a negro. She remained on the platform, riding several miles, when the conductor came along and took up her ticket. He refused to allow her to go in the rear car, and told her to go into the first car, because the rules did not allow negroes to ride in the rear car, and, fearing she would follow him if he opened the door, passed his punch through a window in to the brakeman, and directed him to take up the tickets, collect fares, etc.; then, going to the front, he left her on the platform. When the train reached the next stopping place the brakeman, keeping the front door locked against Mrs. Houck, took some passengers who wanted to enter the rear car around to the back door, to let them in. She followed them to the back door, thinking she could enter with them; but, on reaching the rear platform and attempting to go in the car, she was again prevented and kept out of it by the brakeman. The train starting before she had time to go back to the front platform of the car, she remained on the rear platform until the train reached the next station, when she went back to the front of the car, and endeavored again in vain to get inside. There were a number of unoccupied seats in the rear car, and she had previously ridden in the rear car of the train, or one

reserved for white people by the company on the defendant's line; and she has since then ridden there without any question. When she went on the platform at Victoria she put a pot of plants or flowers on it, and when she returned from her ride on the rear platform, she asked the brakeman for it, and he said he had thrown it overboard, and spoke roughly to her. She, refusing to go in the "Jim Crow Car," rode on the platform until the train reached Rosenberg. It was an ugly, rainy September day, and she got wet while on the platform. The conductor said she acted "very ladylike" all the time. This summary statement so far makes up the uncontradicted facts. Mrs. Houck, in her own evidence, says the brakeman during the time talked very roughly to her without any provocation; that he several times called the attention of men about the train to the fact that he had a negro riding on the platform; that one or more white people took her part and remonstrated with the brakeman for treating her so rudely; that the front car had a rough lot of white and colored people in it, and some of them were boisterous and drinking; that the attention of those people had been directed to her by the language and acts of the brakeman, and she was afraid to go in among them; that the brakeman, when he kept her from entering the rear door of the rear car, pushed her, and she fell against the wheel of the brake, and but for her holding to the wheel she would have been thrown to the ground; that the brakeman, in pushing her, tore her dress in his effort to push her from the door. The brakeman denies these statements of Mrs. Houck. He said that when she had traveled before with him he did not know she was a negro, and he only knew she was a colored woman after the bootblack on the train told him about her being a colored woman. The statements of Mrs. Houck as to the brakeman calling attention of men about or in the cars to the fact that he had a negro riding on the platform; that her dress was torn; that white passengers remonstrated with the brakeman,—are corroborated by a white passenger on the train with her.

The defendant contends that the evidence shows that the front car, which was set apart by the company for colored people was as safe, and was substantially equal in its conditions to the rear car, to which she was denied entrance. These recitals make up the issues of law and fact. In accordance with the contention of defendant's counsel, the court charged the jury that a common carrier—a railway company—may or might be, under a proper showing of facts, justified and authorized in law, in the management of its complicated interests, in setting apart one or more coaches for the use exclusively of white people, and to set apart other cars for the use exclusively of colored people; but when the management undertakes to carry out such a rule it is charged with the duty of giving or furnishing to the colored passenger who pays first class fare over the line a car to ride in, as safe, and substantially as inviting, to travel in, as it (the management) furnishes to white passengers. The defense having shown some facts in rela-

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tion to the population along the railway, and as to the kind and character of persons who often become passengers on their trains, which were thought by the court to be sufficient to authorize the management to require by its rules that the rear car, or one of the cars in the train should be kept exclusively for white people, the jury were directed to consider, for the purpose of this case, that the defendant company was justified in law in the enforcement of such a rule, and the plaintiff cannot complain of any injury coming to her because she was denied entrance to the rear car, provided that it was shown satisfactorily to them that the car into which Mrs. Houck was told to go by the conductor was as safe and substantially as comfortable in its conditions as the car to which she was denied admission. Having so advised the jury, the issue of fact disclosed by the evidence as to the relative comfort of the two cars,—the rear and front one,—was submitted to them. They were charged if they found against defendant company on that issue, they should find for the plaintiff in such a sum as will repair the injuries which came to Mrs. Houck in consequence, proximately, of the defendant's wrongful acts.

Counsel for plaintiff contended that the facts showed that the sickness, which confined Mrs. Houck to her bed for some weeks, was caused by the wrongful acts of the company's officers on the train. The court directed the jurors' attention to this contention of plaintiff's counsel, and charged them that they should hold defendant liable only for such injuries sustained by Mrs. Houck as came to her in consequence of the rude and wrongful acts of the brakeman and that they should not charge defendant with any injury or sickness which was caused by her riding or being exposed on the platform for so long a distance, because, if she remained on the platform in the rain, and became sick in consequence thereof, she, by her own negligence in not going to a better place for protection against the rain and weather, was at fault; that if the miscarriage and illness was caused, not by the mental irritation, humiliations, annoyances, and rude acts caused by the faults and wrongs of the brakeman, but by the physical discomforts and fatigue which her ride, unseated, on the platform, gave her, she could not recover for the injury inherent in the illness or the miscarriage.

This presentation of the case shows two issues of fact. The jury by their verdict are shown to have decided both of these issues in favor of plaintiff. They gave plaintiff \$5000 damages—\$2000 for punitive damages, and \$3000 for actual damages. The evidence in the case impressed me with the thought that the car in which Mrs. Houck was directed to ride was in itself nothing like as comfortable to ride in as the car kept exclusively for white people, and that the "Jim Crow Car" was occupied by boisterous passengers, both white and colored, who were smoking and drinking, as is usually the case in such cars, and was in no way as inviting to travel in as the rear car, to which plaintiff was denied entrance,—notwithstanding the ticket agent, knowing her to be a colored

woman, had sold her a first class ticket,—because she was a negro. I thought the evidence unquestionably showed that the brakeman treated plaintiff, who “acted all the time in a lady-like manner,” rudely and wrongfully, and, in some degree, maliciously. But I do not think the jury were warranted by the facts in allowing \$3000 for actual damages, because it was not at all clear that the miscarriage or illness was of a serious nature; nor was it made sufficiently clear that either the miscarriage or illness came to Mrs. Houck proximately in consequence of the acts of the brakeman, or of the conductor, in denying her admission to the rear car. It

was shown by the defendant's testimony that the brakeman was not discharged because of his rude treatment of plaintiff; but, on the contrary, he was promoted by the railway company to a higher place in the service. The company did not deny that the rear car was set apart exclusively for white passengers, and admitted that the brakeman was acting under orders when he excluded Mrs. Houck from the rear car because she was a negro. I shall now refuse a new trial, but will grant one in case the plaintiff within 10 days does not enter a *remittitur* of \$2500 in the item for actual damages.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES, *Appt.*,

v.

TRANS-MISSOURI FREIGHT ASSOCIATION ET AL.

(58 Fed. Rep. 58.)

1. A statute must be read in the light of all general laws upon the same subject in force at the time of its passage.
2. Words which have acquired a well understood meaning by judicial interpretation must be presumed to be used in that sense in a subsequent statute, unless the contrary clearly appears.
3. Common law terms used in an Act of Congress creating an offense without defining the terms may be interpreted by the common law.
4. Contracts between carriers are not necessarily invalid because they incidentally restrict competition, but this depends upon their reasonableness.
5. An alleged violation of the Anti-Trust Act of Congress must be clearly within its provisions, as the statute is a criminal one.
6. Fraud and illegality in contracts are not to be presumed.
7. An association of railroad companies for mutual protection by establishing and maintaining reasonable rates, rules and regulations is not illegal as a restraint of trade, under the Anti-Trust

Act of Congress, merely because it incidentally tends to restrict competition in some degree, where each member of the association must still compete with other members for business, and while regular monthly meetings are provided for, at which action may be taken, five days' notice of any proposed reduction of rates or change of rules must be given, and members are bound by the decision of the association, unless they give written notice in ten days thereafter to the contrary, and any member may withdraw on thirty days' notice.

8. An association of railroad companies cannot be held to create a monopoly, within the meaning of the Anti-Trust Act of Congress, where it is not intended to have any trade of its own, but to be a mere adviser of its members, who are competitors of each other.
9. A contract between competing railroad companies is not necessarily “in restraint of trade” and illegal, within the meaning of the Anti-Trust Act of Congress, because it in some manner imposes a restriction upon competition.

Decided October 2, 1898.

APPPEAL by plaintiff from a decree of the Circuit Court of the United States for the District of Kansas in favor of defendants in a proceeding to dissolve the Trans-Missouri Freight Association on the ground that it violated the United States Anti-Trust Act. *Affirmed.*

Statement by **Sanborn, C. J.**:

This is an appeal from a decree of the circuit court dismissing a bill brought by the United States, against the Trans-Missouri Freight Association and eighteen railroad companies, under the provisions of the Act of Congress of July 2, 1890, entitled “An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,” commonly known as the “Sherman Anti-Trust Act” (26 Stat. at L. 209, chap. 647; Rev. Stat. Supp. 762) to dissolve the association, and enjoin the railroad companies from fulfilling an agreement with each other to have and maintain joint rules, regulations, and rates for carrying freight between competing points upon their several roads. The case was heard on the bill and the answers of the several defendants.

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The bill alleges that the defendant rail-

road companies were corporations and common carriers, and that they owned independent and competing lines of railroad in that part of the United States west of the Mississippi and Missouri rivers; that they were engaged in transporting freight among the states and to and from foreign nations, and that they had been encouraged to construct and maintain these competing lines of railroad independent of each other by subsidies and grants of lands from the United States and the people of the states and territories west of these great rivers. The bill then alleges that, not being content with the rates of freight they were receiving, intending oppressively to augment those rates, to counteract the effect of free competition upon them, to establish and maintain arbitrary rates, and to procure large sums of money from the people of those states and territories engaged in interstate commerce, they entered into an agreement on March 15, 1889, which, as subsequently modified, reads thus:

"Memorandum of agreement, made and entered into this fifteenth day of March, 1889, by and between the following railroad companies, viz: Atchison, Topeka & Santa Fé Railroad, Chicago, Rock Island & Pacific Railway, Chicago, St. Paul, Minneapolis & Omaha Railway, Burlington & Missouri River Railroad in Nebraska, Denver & Rio Grande Railroad, Denver & Rio Grande Western Railway, Fremont, Elkhorn & Missouri Valley Railroad, Kansas City, Ft. Scott & Memphis Railroad, Kansas City, St. Joseph & Council Bluffs Railroad, Missouri Pacific Railway, Sioux City & Pacific Railroad, St. Joseph & Grand Island Railroad, St. Louis & San Francisco Railway, Union Pacific Railway, Utah Central Railway, and such other companies as may hereafter become parties hereto. Witnesseth, for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions:

"Article I.

"The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

"1. All traffic competitive between any two or more members hereof passing between points in the following described territory, commencing at the Gulf of Mexico, on the 95th meridian; thence north to the Red river; thence *via* that river to the eastern boundary line of the Indian territory; thence north by said boundary line and the eastern line of the state of Kansas to the Missouri river, at Kansas City; thence *via* the said Missouri river to the point of intersection of that river with the eastern boundary of Montana; thence *via* the said eastern boundary line to the international line, —the foregoing to be known as the 'Missouri River Line;' thence *via* said international line to the Pacific coast; thence *via* the Pacific coast to the international line between the United States and Mexico; thence

via said international line to the Gulf of Mexico, and thence *via* said Gulf to the point of beginning, including business between points on the boundary line as described.

"2. All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri river line.

"Exceptions.

"(a) The D. & R. G. and the D. & R. G. W., except their business to and from points in Colorado west of the D. & R. G. line between Denver and Trinidad; also business *via* their lines between points in Colorado and points in Utah.

"All local business between Denver and Trinidad and intermediate points; all local business of the A., T. & S. F. between Pueblo and Canon City, Colo.; all stone traffic having both origin and destination within the state of Colorado.

"The jurisdiction of this association, in so far as the business of the Denver & Rio Grande and the Denver & Rio Grande Western railway companies is concerned, covers the following traffic, namely:

"All freight traffic to, from, or through all common or junction points in the states of Nebraska and Kansas and the Indian territory, originating at or destined to Denver, Colorado Springs, Pueblo, or Trinidad.

"All freight traffic between Ogden, Spanish Fork, and intermediate points on the one hand, and to, from, or through points in Kansas or Nebraska upon or east of the 103d meridian, on the other hand.

"Traffic which may be excluded under the application of the above is only such as may be delivered to or received from the Denver & Rio Grande Railroad and Denver & Rio Grande Western Railway.

"(b) Traffic included in the Trans-Continental & International Association.

"(c) Traffic passing between points in Kansas or Nebraska and Mississippi river points, Carondelet and south; also traffic passing between points in Kansas or Nebraska and points in the southern states east of the Mississippi river and south of the south line of Kentucky and Virginia, regardless of the route by which the business crosses the Mississippi or Ohio rivers.

"(d) Traffic passing between Missouri river points and points in the territory east of said river.

"(e) All traffic to points on the Northern Pacific and Manitoba railways.

"(f) Traffic to points in Arkansas.

"(g) Coal, stone and gravel from Colorado, Wyoming and Dakota, to points in Kansas and Nebraska, and to Sioux City, Council Bluffs, or Pacific Junction, Iowa, St. Joseph, Kansas City, or Boswell, Mo.

"(h) The interchange of traffic with the Colorado Midland and South Park Companies, to or from Aspen, Colorado, Glenwood Springs, Colorado, and intermediate points, including coal branches therefrom, and Buena Vista, Colorado, and Leadville, Colorado.

"(i) Business to and from Florence, Colorado, by all lines.

"Article II.

"Sec. 1. The association shall, by unanimous vote, elect a chairman of the organization. The chairman may be removed by a two thirds vote of the members.

"Sec. 2. There shall be regular meetings of the association at Kansas City, unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together, which notice shall be given not less than four days before the day set for the meeting. When a meeting, regular or special, is convened, it shall be incumbent upon each party hereto to be represented by some officer authorized to act definitely upon any and all questions to be considered. Each road shall designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings when possible, and shall represent his road, unless a superior officer is present. If unable to attend, he shall send a substitute, with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents.

"Sec. 3. A committee shall be appointed to establish rates, rules, and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order; but if they differ the question at issue shall be referred to the managers of the lines parties hereto, and if they disagree it shall be arbitrated in the manner provided in article 7.

"Sec. 4. At least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates, or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah.

"Sec. 5. At each monthly meeting the association shall consider and vote upon all changes proposed of which due notice has been given, and all parties shall be bound by the decision of the association so expressed, unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association: provided, that, if the member giving notice of the change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of said majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates, to take effect upon the same day. By unanimous consent any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

"Sec. 6. Notwithstanding anything in this

article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulation as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman upon investigation shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate it shall be reported to the association, and, if the association shall decide by a two thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

"Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: provided, however, that when one road has a proprietary interest in another the divisions between such roads shall be what they may elect, and shall not be the property of the association: provided, further, that, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

"Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine by a majority vote (the member against whom complaint is made to have no vote) what, if any, penalty shall be assessed, the amount of each fine, not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction or change in rates, or change in the rules or regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

"Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

"Sec. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which

due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented.

"Article III.

"The duties and powers of the chairman shall be as follows:

"Section 1. He shall preside at all meetings of the association, and make and keep a record thereof, and promulgate such of said proceedings as may be necessary to inform the parties hereto of the action taken by the association.

"Sec. 2. He shall at all times keep and publish for the use of the members a full record of the rates, rules, and regulations prevailing on all lines parties hereto on business covered by this agreement, and each of the parties hereto agrees to furnish such number of copies of the rates, rules, and regulations issued by it as the chairman may require.

"Sec. 3. He shall construe this agreement and all resolutions adopted thereunder, his construction to be binding until changed by a majority vote of the association.

"Sec. 4. He shall publish in joint form all rates, rules, or regulations which are general in their character and apply throughout the territory of the association, and shall also publish in the manner above such rates, rules, or regulations applying on traffic common to two or more lines as may be agreed upon by the lines in interest.

"Sec. 5. He shall be furnished with copies of all waybills for freight carried under this agreement when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Railway Association agreement as to lines members thereof.

"Sec. 6. He shall render to each member of the association monthly statements of the expenses of the association, showing the proportions due from each, and shall make drafts on members for the different amounts thus shown to be due.

"Sec. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect, and dispose of the fines for such violations as provided for herein.

"Sec. 8. The chairman shall be empowered to authorize lines in the association to meet the rates of another line or other lines in the association when in his judgment such action is justified by the circumstances; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member.

"Sec. 9. Only parties interested shall vote upon questions arising under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not, subject to appeal, as provided by section 8 of article 8 of the agreement.

"Article IV.

"Any willful under billing in weights or billing of freight at wrong classification shall be considered a violation of this agreement.

ment, and the rules and regulations of any weighing association or inspection bureau as established by it, or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful violation of them shall be subject to the penalties provided herein.

"Article V.

"The expenses of the association shall be borne by the several parties in such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to the association, which shall, at its first regular meeting thereafter, determine the matter, which may be done by a two thirds vote of the members.

"Article VI.

"There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall approve the appointment and salaries of necessary employees, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

"Article VII.

"In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be brought before the association, it shall be referred to an arbitration board, which shall consist of three members of the executive board of the Interstate Commerce Railway Association: provided, however, that, in case of arbitration in which the members of this association only are interested, they may, by unanimous vote, substitute a special board.

"Article VIII.

"This agreement shall take effect April 1, 1889, subject thereafter to thirty days' notice of a desire on the part of any line to withdraw from or amend the same."

The bill further alleges that this agreement took effect April 15, 1889; that under it rules, regulations, and rates for carrying freight over the railroads of the defendant companies were fixed by the association, and have since been maintained by them; that since that date these railroad companies have declined and refused at all times to fix or give rates for the carriage of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular road; and that the people engaged in interstate commerce have been compelled to pay the arbitrary rates of freight, and to submit to the arbitrary rules and regulations established and maintained by the association formed under the agreement, and have been and are deprived of the benefits that might be expected to flow from free competition between the several lines of railroad of the defendant companies, and that in this way the defendant companies have combined in restraint of trade and commerce among the states, and have attempted to monopolize, and have monopolized, a part of this commerce.

Three of the railroad companies were not

members of the association, and will not be further noticed. The answers of the 15 companies who were members of the association are substantially the same. The first defense in these answers is that the Interstate Commerce Law of February 4, 1887, entitled "An Act to Regulate Commerce" (24 Stat. at L. 379, chap. 104; Rev. Stat. Supp. 529) and the acts amendatory thereof, constitute a complete code of laws regulating that part of commerce among the states and with foreign nations which relates to transportation, and that the Act of July 2, 1890, is not applicable to, and does not govern, them or their actions.

Coming to the merits of the suit, these defendants admit that they are common carriers; that, with some exceptions not important here, they owned independent and competing lines of railroad in that part of the United States west of the Missouri and Mississippi rivers, and that they were engaged in the transportation of freight among the states and territories, and to and from foreign nations, in that region, but they deny that they owned the only through lines of railroad engaged in that business there; and allege that there were several others, to wit, the Northern Pacific Railroad Company, the Great Northern Railway Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company. They admit that some of them were assisted and encouraged to construct and maintain through competing lines of railroad, independent of each other, by subsidies, land grants, and donations from the United States, and from the people of the various states and territories west of the great rivers. They admit that they entered into the agreement March 15, 1889, and that rules, regulations, and rates of freight have since been fixed and charged by the association thus formed, and that they have complied with and maintained them. They deny, however, that at the time they entered into the agreement they were dissatisfied with the rates of freight they were receiving. They deny that they intended, in connection with the formation of the association or otherwise, to unjustly or oppressively augment such rates, or to counteract the effect of free competition on prices or facilities of transportation, or to establish or to maintain arbitrary rates, or to prevent any one of the defendants from reducing rates, or to procure unreasonably great sums of money from the people of the states and territories west of the great rivers engaged in interstate commerce. They deny that the formation and operations of the association have had any such effects, but aver that they have tended to decrease rates, and to benefit the people and the roads. They deny that they had any intention by the formation of the association to monopolize or attempt to monopolize the freight traffic of the region affected by it, and deny that it has had any such effect. They allege that they were subject to the provisions of the Act of Congress of February 4, 1887, entitled, "An Act to Regulate Commerce," and the acts amendatory thereof. They aver that under that Act they were required to make all charges reasonable and just; that they

were prohibited from making any unjust discriminations, or any undue or unreasonable preferences, or from giving any undue advantages, and that they were required to establish a classification of freight and rates of freight, and to publish and file with the Interstate Commerce Commission schedules showing this classification and these rates, and then to abide by and maintain them; that, in order to comply with this law, consultation between and concerted action of the railroad companies conducting the transportation business west of the great rivers was essential; and that they made this agreement and formed this association in order that they might more effectually comply with the provisions of this law than they could do acting independently. They allege that the rates they have established and maintained have been reasonable and just; that since the organization of the association more than 200 reductions of rates have been made through its action; that their agreement forming the association was filed with the Interstate Commerce Commission under the Act, and that the rules, regulations, and rates they have established and maintained have been in strict conformity to the provisions thereof. They deny that the people have been deprived of the benefits which might be expected to flow from free competition in the business of transportation, and allege that the utmost freedom compatible with obedience to the Interstate Commerce Act and with the preservation of the existing agencies of competition prevails, and they insist that their association and action under this contract constitute no combination or conspiracy in restraint of interstate or international commerce.

The opinion filed by the court below when the bill was dismissed is reported in 53 Fed. Rep. 440.

Argued before **Sanborn**, Circuit Judge, and **Shiras** and **Thayer**, District Judges.

Mr. J. W. Ady for appellant.

Mr. George R. Peck, for appellees:

I. The Act of July 2, 1890, commonly called the Anti-Trust Act, does not include, and was not intended to include, combination or agreements between railway companies. The provisions of the Act operate, and were intended to operate, upon other and different combinations, and have no application to agreements or combinations between railway companies.

The Act itself does not assume to deal with transportation or with the carrying trade of the country.

A comparison of the different provisions of the Act, shows that the idea that railway combinations are included in it, cannot for one moment be entertained.

All statutes are read in the light of history.

Church of Holy Trinity v. United States, 148 U. S. 457, 36 L. ed. 227.

When the Act under which this suit is brought was passed, the public mind was in an agitated and excited state on the subject of trusts. When the Fifty-first Congress met in December, 1889, a great number of trusts ex-

isted, some small and some large, some local and some national,—and even international.

So far as congressional regulation of railways was concerned it was a time of profound peace. The people had already demanded a law upon that subject and had obtained it. The subject of Congressional Railway Legislation had had its day; the Interstate Commerce Act had been passed and all of its provisions were in active operation.

Historically considered, trusts were the evils specially in mind when Congress passed the Act under consideration.

Traffic associations were well known, both when the Interstate Commerce Act was passed and when the Anti-Trust Act was passed.

In the very first annual report of the Interstate Commerce Commission, an elaborately prepared official document, the Commission, with all the facts before it, had spoken in high commendation of traffic associations.

With this report, before Congress, is it possible to believe that they intended by the Anti-Trust Act to prohibit traffic associations—the very instrumentalities upon which the Interstate Commerce Commission relied for assistance in carrying on its great work?

Congress positively refused to include transportation.

An amendment was introduced in the House of Representatives specifically including transportation, and it was rejected, as shown by the Congressional record which the court can examine.

Blake v. National City Bank of New York, 90 U. S. 28 Wall. 307, 23 L. ed. 119. See Cong. Rec. vol. 21, part 1, p. 96; Cong. Rec. vol. 21, part 4, p. 3153; Cong. Rec. vol. 21, part 4, p. 3857; Cong. Rec. vol. 21, part 5, p. 4099; Cong. Rec. vol. 21, part 5, p. 4104; Cong. Rec. vol. 21, part 5, p. 4123; Cong. Rec. vol. 21, part 5, p. 4753; Cong. Rec. vol. 21, part 5, p. 4857; Cong. Rec. vol. 21, part 6, p. 5113; Cong. Rec. vol. 21, part 6, p. 5950; Cong. Rec. vol. 21, part 6, p. 5981; Cong. Rec. vol. 21, part 7, p. 6116; Cong. Rec. vol. 21, part 7, p. 6208; Cong. Rec. vol. 21, part 7, p. 6812.

Taken as a whole, the Interstate Commerce Act is special and regulative, while the Anti-Trust Act is general and prohibitive.

The penalties, the procedure, the entire machinery by which the two acts are enforced is so different as to make it impossible that they were intended to cover the same subject.

Where a statute in general words is compared with a statute which is special or particular, the general gives way to the special and will not be held to embrace the subject contained in the special statute unless the intention that it should be so is clearly manifested.

Endlich, *Interpretation of Statutes*, § 225; Bishop, *Written Laws*, § 126; *Brewer v. Blougher*, 39 U. S. 14 Pet. 178, 10 L. ed. 408; *Atkins v. Fiber Disintegrating Co.* 85 U. S. 18 Wall. 272, 21 L. ed. 841; *United States v. Saunders*, 89 U. S. 22 Wall. 492, 22 L. ed. 786; *Townsend v. Little*, 109 U. S. 504, 27 L. ed. 1012.

II. The agreement of March 15, 1889, between the defendants is neither a "contract, combination in the form of trust or otherwise,

or conspiracy in restraint of trade or commerce among the several states," nor by virtue of it do the defendants "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states." The agreement, therefore, is not a violation of the Act of July 2, 1890.

Whatever in the way of restraint of trade or commerce, or of monopolizing, is illegal at the common law, is illegal under this statute, and not otherwise.

Patterson, Contracts in Restraint of Trade, 52, 53.

Restraint of trade, at the common law, meant that restriction upon freedom of action which, first, deprived the public of the restricted party's industry, and, secondly, precluded the restricted party from pursuing his occupation, and thus prevented him from supporting himself and family.

Oregon Steam Nav. Co. v. Winsor, 87 U. S. 20 Wall. 64, 22 L. ed. 815.

A monopoly was originally a grant by the crown to certain persons or corporations of the exclusive right to carry on some business, trade or avocation.

The Monopolies, 11 Coke, 84 b.

Monopoly, at the present day, simply means the obtaining, without a grant from the sovereign, of the exclusive power to carry on a certain trade or business.

Is the Trans-Missouri Association an organization in restraint of trade or commerce? An indispensable element of restraint of trade, in its proper legal sense, is that one or more of the parties to the contract must agree to go out of business, and surrender that which before belonged to him or them to the other parties making the agreement.

The contract between the defendants, constituting the Trans-Missouri Freight Association, is clearly not within the section of the Act which prohibits restraint of trade.

Mitchell v. Reynolds, 1 P. Wms. 181, 192. 197; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 815.

The Anti-Trust Act does not forbid contracts and combinations merely on the ground that they are against public policy, but only such as are in restraint of trade or which monopolize or attempt to monopolize.

The phrase "public policy" can only mean the settled policy of a state or government which appears in its constitution, laws and judicial decisions.

Richardson v. Mellish, 2 Bing. 229, 252; *Mogul S.S. Co. v. McGregor* [1892] 3 App. Cas. 25, 45, 46; *Vidal v. Philadelphia*, 43 U. S. 20 How. 127, 11 L. ed. 205; *Hadden v. Barney*, 72 U. S. 5 Wall. 107, 18 L. ed. 518.

If the statute has not been violated by the defendants the government can well afford to wait for another opportunity to vindicate public policy.

Contracts in restraint of trade involve a diminution of the number of persons engaged in trade or of the supply furnished the public. If a contract alleged to be in restraint of trade contains one of these elements, then and not until then can public policy come in to determine whether the restraint is of such a char-

acter or goes to such extent as to make it violative of public right.

Patterson, Contracts in Restraint of Trade, 17; *Fowle v. Park*, 181 U. S. 88, 38 L. ed. 67; *Diamond Match Co. v. Roeder*, 106 N. Y. 478, 60 Am. Rep. 464; *Beal v. Chase*, 31 Mich. 490; *Proctor v. Sargent*, 2 Scott, N. R. 289.

The mere fact that a contract places a restriction upon trade or competition is not sufficient to avoid it.

Shrainka v. Scharringhausen, 8 Mo. App. 522; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; *Roussillon v. Roussillon*, L. R. 14 Ch. Div. 866; *Leather Cloth Co. v. Loraont*, L. R. 9 Eq. 845; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157; *Perkins v. Lyman*, 9 Mass. 522; *Gloucester Isinglass & G. Co. v. Russia Cement Co.* 154 Mass. 92; *Jones v. Fell*, 5 Fla. 510; *Master Stevedores Asso. v. Walsh*, 2 Daly, 1; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Re Greene*, 52 Fed. Rep. 104.

The Anti-Trust Act is not intended, and does not profess, to enforce public duties; it is a general Act applicable to individuals as well as to corporations, and as it makes no distinction in the penalties imposed, it is plain that so far as the Act is concerned, it does not place corporations engaged in public duties on any different footing from individuals or corporations engaged in purely private pursuits.

The rule as to agreements in restraint of trade manifestly ought to be much more stringent in respect to individuals and private corporations than it is in respect to railway corporations, for the reason that individuals and private corporations are not subject to the limitations upon their charges which are imposed upon railway corporations by the law of their existence.

Oregon Steam Nav. Co. v. Winsor, 87 U. S. 20 Wall. 64, 22 L. ed. 315; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519; *Joe v. Smith*, 19 N. Y. S. R. 556; *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 8 Inters. Com. Rep. 319, 9 L. R. A. 689; *Shrewsbury & B. R. Co. v. London & N. W. R. Co.* 2 Macn. & G. 324, 17 Q. B. 652; *Hare v. London & N. W. R. Co.* 2 John. & H. 80; *Ex parte Koehler*, 28 Fed. Rep. 529, 21 Am. & Eng. R. Cas. 57.

The agreement between the different companies constituting the Trans-Missouri Freight Association, discloses not a single element of a monopoly at common law.

The purpose of the agreement was not to raise rates, but to establish and maintain just and reasonable rates; and to establish just and reasonable rates is a right which belongs to every railroad company in the United States. It can never be legally wrong to contract for what is legally right.

The public are deprived of no facilities to which they are entitled; all the roads are in full operation, and as shown by the pleadings, the public are served for just and reasonable rates; how, then, can it be claimed that a monopoly has been established, or that the people have been or can be oppressed?

Stewart v. Erie & W. Transp. Co. 17 Minn. 372; *Ontario Salt Co. v. Merchants Salt Co.* 18 Grant, Ch. 540; *Wickens v. Evans*, 3 Younge & J. 318; *Mogul SS. Co. v. McGregor*, L. R. 21 Q. B. Div. 544, 28 Q. B. Div. 598, [1892] 2 App. 4 INTER S.

Cas. 25; Eclipse Tugboat Co. v. Pontchartrain R. Co. 24 La. Ann. 1.

No such legal doctrine as free and unrestricted competition ever existed. Competition was always a legal public right; but free and unrestrained competition, like unregulated liberty of any kind, has always belonged to the literature of doctrinaires and theorists, and never to the sober and sensible jurisprudence of the Anglo-Saxon race.

Kellogg v. Larkin, 8 Pinney, 150; *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 8 Inters. Com. Rep. 319, 9 L. R. A. 689.

Bargaining to limit competition, when it is kept within the bounds of reasonable protection, is legal, either assumed or expressly affirmed.

Mitchell v. Reynolds, 1 P. Wms. 181; *Perkins v. Lyman*, 11 Mass. 76, 6 Am. Dec. 153; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Bowser v. Bliss*, 7 Blackf. 844, 43 Am. Dec. 98; *Grundy v. Edwards*, 7 J. J. Marsh. 868, 23 Am. Dec. 409; *Morgan v. Perhamus*, 36 Ohio St. 517, 38 Am. Rep. 607; *Pike v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741; *Morse Twist Drill & M. Co. v. Morse*, 103 Mass. 72, 4 Am. Rep. 513; *Hoyt v. Holly*, 39 Conn. 326, 13 Am. Rep. 890; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Cook v. Johnson*, 47 Conn. 173, 36 Am. Rep. 64.

Our legislative, judicial and commercial history for the past twenty-five years has all been against the doctrine of unrestrained competition.

As executive officers of the government in the control of railways, what the Interstate Commerce Commission has said and done on this subject amounts to an executive construction of the existing laws on the subject, and as such will be followed by the courts, except upon the most clear and conclusive showing that it is erroneous.

Brown v. United States, 113 U. S. 568, 28 L. ed. 1079.

The only criticism upon the associations, to be found anywhere in their reports, is that they have not in all cases lived up to their articles of agreement as closely as they ought, and that they should be strengthened and made more effective in their organization.

The agreement establishing the Trans-Missouri Freight Association was made long before the passage of the Anti-Trust Act. Making the agreement, therefore, was not a violation of this Act, for the Act was not then in existence. Whatever violation is now asserted consists, and must consist, in doing something—in acts that contravene the law. If the question of tendency is before the court, how can that tendency be established except by a consideration of what has actually happened by carrying out the agreement? What will happen can only be determined by a consideration of what has happened.

Stewart v. Erie & W. Transp. Co. 17 Minn. 372; *Mogul SS. Co. v. McGregor*, [1892] 2 App. Cas. 25; *Egerton v. Brownlow*, 4 H. L. Cas. 108.

Freedom to contract is the rule, and all restraints upon it the exception.

Spangler v. Cleveland, 43 Ohio St. 526, 536; *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. 233, 236; 1 High. Inj. 9.

Courts do not enlarge the meaning of statutes for the purpose of affording a doubtful

relief or of embracing an act not clearly and undoubtedly within its meaning.

United States v. Eaton, 144 U. S. 677, 36 L. ed. 591; *Chase v. Curtis*, 113 U. S. 452, 28 L. ed. 1038.

Messrs. B. P. Waggener, Wolcott & Vaile and Wallace Pratt, adopted the foregoing brief on behalf of companies represented by them.

Mr. John M. Thurston with *Messrs. A. L. Williams, N. H. Loomis and R. W. Blair*, for the Union Pacific Railway Co. *et al* appellees:

I. The articles of agreement of the Trans-Missouri Freight Association are justified by the provisions of the Interstate Commerce Act; and the objects sought to be attained by that association, as shown by its articles of agreement, are made necessary by the requirements of that Act.

Congress has left it entirely to the voluntary action of the carriers subject to the Act, to arrange the details for the interchange of traffic between them.

"Where the law commands anything to be done, it authorizes the performance of whatever may be necessary for executing its commands."

Sutherland, Stat. Constr. § 841; *Re Neagle*, 135 U. S. 1-87, 34 L. ed. 55-79; *New York v. Sands*, 105 N. Y. 210; 1 Kent, Com. 464.

II. The Interstate Commerce Act and its amendments form a special code of laws for the regulation of common carriers engaged in interstate traffic.

III. The Anti-Trust Act, under which this suit is brought, is general in its nature, and it is only by a literal construction of the Act, which is broad enough to include contracts of every kind and nature, that it can be said to include the articles of agreement in question.

IV. A statute in general terms, or treating the subject in a general manner, will not repeal the particular provisions of a prior statute, unless the general act indicates a plain intention to do so.

Sutherland, Stat. Constr. § 157; *Ex parte Orow Dog*, 109 U. S. 570, 27 L. ed. 1035; *State v. Archibald*, 43 Minn. 323; *Chew Heong v. United States*, 112 U. S. 536, 28 L. ed. 770; *Robbins v. State*, 8 Ohio St. 131; *Orane v. Reeder*, 22 Mich. 322; *State v. Bishop*, 41 Mo. 16; *State v. Judge of St. Louis Prob. Ct.* 38 Mo. 584; *Rushville v. Rushville*, 32 Ill. App. 320; *Arthur v. Homer*, 96 U. S. 187, 24 L. ed. 811; *Brown v. Philadelphia County Comrs.* 21 Pa. 37.

V. The Interstate Commerce Act is one special in its nature, and with a particular object in view. The Act under which this suit is brought is one of a general nature, disclosing no intent to repeal any of the provisions of the Interstate Commerce Act. It follows, therefore, that none of the provisions of that Act are repealed by the Anti-Trust Act, and that the articles of agreement in question, which are authorized and made necessary by the provisions of the Interstate Commerce Act, are not in conflict with the Anti-Trust Act.

VI. The provisions of the Anti-Trust Act, under which this action is brought, were not intended to and do not relate to the business of common carriers, and therefore the articles

of agreement in question are not in conflict with that Act.

The different portions of a statute are to be construed with reference to each other and in a sense which harmonizes with the subject matter and general purpose of the statute.

Sutherland, Stat. Constr. § 241; 1 Kent, Com. 461; *Breuer v. Blougher*, 39 U. S. 14 Pet. 198, 10 L. ed. 417; *Smith v. People*, 47 N. Y. 336; *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 227.

VII. The articles of agreement of the Trans-Missouri Freight Association are not in restraint of trade and commerce, they do not create, nor attempt to create a monopoly, and are in no wise obnoxious to the provisions of the Anti-Trust Act.

By the common law, contracts in restraint of trade were those which prevented a person from pursuing his trade or from engaging in business either generally, or within a particular locality, or for a certain period of time.

2 Parsons, Cont. §§ 253-259; *Mitchell v. Reynolds*, 1 P. Wms. 181; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315.

In *Ray*, on Contractual Limitations, p. 194, a work frequently quoted in complainant's brief, the modification of the ancient rule is thus referred to:

"The tendency of recent adjudications is to conform to the spirit which induced such modified legislation, and it is now clearly marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and unjust rule of that kind has ever been the law of England.

"The law has for centuries permitted contracts in restraint of trade when reasonable, and in *Horner v. Crafts*, 7 Bing. 735, Tindal, *Ch. J.*, considered a true test to be, whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so advantageous as to interfere with the interest of the public. When the restraint is general, but at the same time is coextensive only with the interest to be protected and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. There is no public reason which necessarily condemns the one and not the other.

See also *Diamond Match Co. v. Roeber*, 106 N. Y. 478, 60 Am. Rep. 464; *Whittaker v. Hove*, 3 Beav. 383; *Roussillon v. Roussillon*, L. R. 14 Ch. Div. 315; *Beal v. Chase*, 31 Mich. 490; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519; *National Benefit Co. v. Union Hospital Co.* 11 L. R. A. 437, 45 Minn. 272.

"In each particular case the surrounding circumstances are to be considered in determining whether the covenant will operate as a restraint, injurious to the public."

Ray, Contractual Limitations, 200; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979. See also *Beal v. Chase*, 31 Mich. 490.

The articles of agreement in question are not in restraint of trade, in the sense of being contrary to public policy.

Public policy is defined as "that principle of the law which holds that no one can lawfully do that which has a tendency to be injurious to the public, or against the public good."

19 Am. & Eng. Enc. Law, 565; *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Swann v. Swann*, 21 Fed. Rep. 299; *Davies v. Davies*, L. R. 36 Ch. Div. 364; Ray, Contractual Limitations, p. 187, § 44.

Unlimited competition between railroads is not essential for the protection of the public.

Morawetz, Priv. Corp. § 1131; *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 3 Inters. Com. Rep. 319, 9 L. R. A. 639. See also, Ray, Contractual Limitations, 260; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; *Gloucester Iceglass & Glue Co. v. Russia Cement Co.* 13 L. R. A. 563, 154 Mass. 92; *Kellogg v. Larkin*, 8 Pinney, 150.

A definition of the word "monopoly" is given by the Supreme Court of the United States in *Charles River Bridge v. Warren Bridge Props.* 36 U. S. 11 Pet. 607, 9 L. ed. 847.

It is an exclusive right granted to a few, of something which was before of common right.

4 Bl. Com. 159; Bac. Abr. *Prerogative*, F. 4. *Messa. R. M. Spencer, C. A. Mosman, J. D. Strong and W. F. Guthrie* also for appellees.

Sanborn, C. J., delivered the opinion of the court:

Contracts between competing corporations, commonly termed "pooling contracts," to divide their earnings from the transportation of freight in fixed proportions, have long been held void by the courts as against public policy. Such contracts do not simply restrict competition, they tend to destroy it; and, if they do not effect that result, it is only because they do not completely accomplish their main purpose. When acting independently, the spur of self-interest drives each corporation to furnish the people with the best accommodations and the safest and most rapid transportation at the lowest profitable rates, in order that it may attract larger patronage and gather increased gain. But under the operation of a pool this incentive to exertion is withdrawn. Each carrier finds it to its interest to enhance the price of carriage, and finds that its profits are not sensibly diminished by furnishing poor facilities for transportation and inexpensive and mean accommodations. In 1887 Congress recognized and adopted this rule of public policy, and by section 5 of "An Act to Regulate Commerce," commonly called the "Interstate Commerce Act" (24 Stat. at L. 379, chap. 104; Rev. Stat. Supp. 529) prohibited such contracts between common carriers engaged in interstate or international commerce. That Act, however, prohibited contracts for the pooling of freights of different and competing railroads only; it prohibited contracts that thus destroyed competition; it did not prohibit all contracts that in any way restricted or regulated competition. By the Act of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly called the "Anti-Trust Act" (26 Stat. at L.

209, chap. 647; Rev. Stat. Supp. 762) Congress provided that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act."

The government bases this suit on these provisions of the latter Act. It claims that the contract in question, and the association formed under it, are illegal on three grounds: First, because the contract prevents free and unrestricted competition between competing lines of railroad; second, because it tends to create a monopoly; and third, because the railroad corporations have through this contract abandoned the discharge of some of their duties to the public.

The first ground stated is chiefly relied on, and it presents questions of deep interest, the decision of which must have a far-reaching and important influence on the transportation system of the nation. The government does not claim that the contract and association assailed effected a pooling of freights, or that they tend to retard improvement in the facilities afforded for safe, quick, and convenient transportation, or that they are obnoxious to any of the provisions of the Interstate Commerce Act; but it insists that the Anti-Trust Act prohibits all contracts and combinations between competing railroad corporations which in any manner restrict free competition. The argument is, the Anti-Trust Act prohibits any contract between competing railroad companies that restricts competition. This contract restricts competition; therefore it is illegal. Is, then, every contract between competing railroad companies that in any manner imposes a restriction upon competition a "contract in restraint of trade" and illegal within the meaning of the Anti-Trust Act? Is the existence of restriction upon competition the standard by which the legality of these and all other contracts must be measured under that Act? and if not, by what standard shall their legality be determined? These are questions that the position of the government compels us to consider before we can determine whether or not this contract is void. Their determination demands a careful examination and construction of that part of the Anti-Trust Act which declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," is illegal. No definition of these terms is found in this Act,

but the terms are not new. For more than 200 years before it was passed the courts of England and America had from time to time declared that certain classes of contracts in restraint of trade were against public policy, and therefore illegal and void under the common law. The line of demarcation between these illegal contracts and the innumerable valid agreements that are daily made in the business world had been drawn by long lines of decisions, and had been repeatedly pointed out by the Supreme Court of the United States. *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 409, 32 L. ed. 979, 984; *Fontle v. Park*, 131 U. S. 88, 33 L. ed. 67. Two years before its passage Congress had enacted the Interstate Commerce Law. They had there provided a code of rules and established a commission for the express purpose of regulating that part of interstate and international commerce which relates to transportation. Under these circumstances, three well settled rules of construction must be applied to ascertain the meaning and scope of the Act:

(1) It must be read in the light of all general laws upon the same subject in force at the time of the passage of the Act.

(2) Where words have acquired a well understood meaning by judicial interpretation, it is to be presumed that they are used in that sense in a subsequent statute, unless the contrary clearly appears.

(3) Where Congress creates an offense, and uses common law terms, the courts may properly look to that body of jurisprudence for the true meaning of the terms used, and, if it is a common law offense, for the definition of the offense if it is not clearly defined in the Act adopting or creating it. *United States v. Armstrong*, 2 Curt. 446; *United States v. Coppersmith*, 4 Fed. Rep. 198; *Re Greene*, 52 Fed. Rep. 104, 111; *McCool v. Smith*, 66 U. S. 1 Black, 459, 469, 17 L. ed. 218, 221; *McDonald v. Hovey*, 110 U. S. 619, 628, 28 L. ed. 269, 271.

Thus we are brought to a consideration of the statutes in force and the decisions that had been rendered when this Act was passed to determine what contracts in restraint of trade were then illegal, for it is clear both from the rules to which we have referred and from the title of the Act, viz: "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," that it was such contracts, and such contracts only, that Congress intended to declare unlawful and criminal in interstate commerce.

Under the common law, the ground on which contracts in restraint of trade were declared unlawful was that they were against public policy. But when it becomes necessary to consider grounds of public policy in the determination of a case, it is well to bear in mind the oft quoted remarks of Justice Burrough in *Richardson v. Mellish*, 2 Bing. 252, that public policy "is a very unruly horse, and when you once get astride of it you never know where it will carry you. It may lead you from the sound law." Public policy changes with the changing conditions of the times. It is hardly to be expected that a people who are transported by steam with a rapidity hardly conceived of a century

ago, who are in constant and instant communication with each other by electricity, and who carry on the most important commercial transactions by the use of the telegraph while separated by thousands of miles, will entertain precisely the same views of what is conducive to the public welfare in commercial and business transactions as the people of the last century, who lived when commerce crept slowly along the coasts, shut out of the interior by the absence of roads, and hampered by an almost impassable ocean. In 1415 a writ of debt was brought on an obligation by one John Dier, in which the defendant alleged the obligation in a certain indenture which he put forth, and on condition that if the defendant did not use his art of a dyer's craft, within the city where the plaintiff, etc., for half a year, the obligation to lose its force, and said that he did not use his art within the time limited. Hull, J., said: "In my opinion, you might have demurred upon him that the obligation is void, inasmuch as the condition is against the common law; and, per Dieu, if the plaintiff were here, he should go to prison till he paid a fine to the king." Y. B., 2 Hen. V. fol. 5, pl. 26. In 1841, Lord Langdale, master of the rolls, held that a contract made by a lawyer not to practice his profession in Great Britain for 20 years was not against public policy, and that it was valid. *Whitaker v. Howe*, 3 Beav. 383. In 1843, the court of exchequer held that an agreement not to practice as a surgeon dentist in London or in any other town where the plaintiffs might have been practicing was reasonable and lawful so far as it related to London, but against public policy and void as to the other towns. *Mallan v. May*, 11 Mees. & W. 652, 667. In 1869, Vice Chancellor James sustained a contract by vendors not to carry on or allow others to carry on in any part of Europe the manufacture or sale of certain kinds of leather so as in any way to interfere with the exclusive enjoyment by the purchasing company of the manufacture and sale thereof, and issued an injunction to enforce it. *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345. In 1889 the supreme court of New York sustained a contract not to manufacture or sell thermometers or storm glasses throughout the United States for ten years. *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 168. And in 1891 the supreme court held that a contract of a railroad corporation giving the Pullman Southern Car Company the exclusive right to furnish all drawing room and sleeping cars required by that road during a period of fifteen years was not an illegal restraint of trade, and sustained it. *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97. It is with the public policy of to-day, as illustrated by public statutes and judicial decisions, that we have now to deal. In considering that subject, we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard of determination might be unconsciously varied by the per-

sional views of the judges who constitute the court. The public policy of the nation must be determined by its Constitution, laws, and judicial decisions. So far as they disclose it, it is our province to learn and enforce it, beyond that it is unnecessary and unwise to pursue our inquiries. *Vidal v. Philadelphia*, 43 U. S. 2 How. 127, 197, 11 L. ed. 205, 233; *Swann v. Swann*, 21 Fed. Rep. 299.

Turning first, then, to the decisions, we find that it has long been settled that contracts or combinations of the producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize their supply or enhance their price, pooling contracts, or combinations between such producers or dealers to divide their profits in certain fixed proportions, and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void; while contracts or combinations between employers or workmen to fix and abide by certain prices for labor or services may be valid in their inception, but become illegal restraints of trade whenever the associations formed under them interfere with the freedom of those who are not members to refuse to abide by their prices, or to employ or be employed at other rates, or whenever such associations undertake to prevent nonmembers from using their property or their labor as they see fit. The main purpose of contracts of these classes that are thus held illegal is to suppress, not simply to regulate, competition; and, if suppression is not effected, it is because the contracts fail to accomplish their purpose. It is evident that there is a wide difference between such contracts and those the purpose of which is to so regulate competition that it may be fair, open, and healthy, and whose restriction upon it is slight, and only that which is necessary to accomplish this purpose. It does not necessarily follow that contracts of the latter class constitute illegal restraints of trade because those of the former classes do.

To maintain his proposition that any contract between common carriers that restricts competition in any degree is an illegal restraint of trade, the counsel for the government has cited numerous cases where such expressions as the following are found in the opinions of the courts: "The people have a right to the necessities and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition." *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.* 14 N. Y. Supp. 277. "It is against the general policy of the law to destroy or interfere with free competition, or to permit such interference or destruction." *Stewart v. Erie & W. Transp. Co.* 17 Minn. 372. "Combinations and conspiracies to enhance the price of any article of trade and commerce are injurious to the public." *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501. "Whatever destroys, or even restricts, competition in trade, is injurious, if not fatal, to it." *Hooker v. Vandewater*, 4 Denio, 349, 353, 47 Am. Dec. 4 INTER 8.

258. A careful and patient examination of the cases cited, however, discloses the fact that the contracts considered in those cases, which are not of doubtful authority, were of one of the classes to which we have referred, or rest upon some other ground than the existence of restriction upon competition. They were cases involving contracts of competing producers or dealers to limit the supply and enhance the price of, or to monopolize, staple commodities, like *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *India Bagging Assn. v. Kock*, 14 La. Ann. 168; *United States v. Jellico Mountain Coal & C. Co.* 12 L. R. A. 753, 46 Fed. Rep. 432; *Santa Clara Valley Mill & L. Co. v. Hayes*, 76 Cal. 387; *DeWitt Wire Cloth Co. v. New Jersey Wire Cloth Co.* 14 N. Y. Supp. 277; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; and *People v. North River Sugar Ref. Co.* 54 Hun, 354; or cases involving pooling contracts, like *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Anderson v. Jett*, 6 L. R. A. 390, 89 Ky. 875; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979; *Morrill v. Boston & M. R. Co.* 55 N. H. 531; *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 15 Fed. Rep. 650; and *Woodruff v. Berry*, 40 Ark. 252; or cases involving combinations of workmen which compelled nonmembers to abide by the prices for labor which they had fixed or to abandon their employment, like *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501, and *United States v. Workmen's Amalgamated Council*, 54 Fed. Rep. 994, 1000; or cases where the contracts were *ultra vires* the corporations, and their purpose and effect was to monopolize trade, like *Central R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, G. & N. A. R. Co.* 43 Ga. 13; and *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781; or cases of questionable authority, like *Com. v. Cartisle*, Bright. (Pa.) 36, 39. See, *contra*, *Snow v. Wheeler*, 113 Mass. 179, 185; *Bowen v. Matheson*, 14 Allen, 499; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; and *Carew v. Ruthersford*, 106 Mass. 1, 14, 8 Am. Rep. 287. It was natural that in the discussion of contracts of these classes the courts should condemn in unmeasured terms the suppression of competition, but in none of these cases were they required to hold, and in none of them did they hold, as we understand the opinions when read in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal. These decisions rest upon broader ground,—on the ground that the main purpose of the obnoxious contracts was to suppress competition, and that they thus tended to effect an unreasonable and unlawful restraint of trade; they rest on the well settled rules, and come within the well defined classes, to which we have above referred.

A more extended view of the authorities strengthens this conclusion, and makes plain the line of demarcation which separates legal contracts that incidentally restrict competi-

tion from illegal contracts in restraint of trade. The decision in the leading case upon this subject (*Mitchell v. Reynolds*, 1 P. Wms. 181, 1 Smith, Lead. Cas. [7th Am. ed.] pt. 2, p. 708) the case which *Chief Justice* Fuller says is the foundation of the rule in relation to the invalidity of contracts in restraint of trade (*Gibbs v. Consolidated Gas Co.* 180 U. S. 409, 32 L. ed. 984) held that a contract that clearly restricted competition was not an illegal restraint of trade. The action was upon a bond the condition of which was that the obligor, who was the assignor of a lease of a bakehouse and messuage in the parish of St. Andrews Holborn, would not exercise his trade of a baker within that parish for three years. The contract was held valid, and the action sustained. This decision was rendered in 1711. *Chief Justice* Parker, in delivering it, declared that contracts in partial restraint of trade were valid if made upon sufficient consideration, but that contracts in general restraint of trade were illegal, because they deprived the party restrained of his livelihood and the subsistence of his family, and the public of a useful member. The point actually decided, that contracts in partial restraint of trade may be sustained, has been uniformly approved, but in the development of the law applicable to this subject there has been added to it the further condition that the restriction imposed must be reasonable in view of all the facts and circumstances of each particular case. The remark of *Chief Justice* Parker that contracts in general restraint of trade are illegal—a remark that was not necessary to the determination of the question before him—has been, to say the least, greatly modified by subsequent decisions. There is a plain tendency in the later authorities to repudiate the proposition that there is any hard and fast rule that contracts in general restraint of trade are illegal, and to apply the test of reasonableness to all contracts, whether the restraint be general or partial. In *Tallis v. Tallis*, 1 El. & Bl. 391, the court of queen's bench held, in 1858, that a covenant restricting competition, which bound the covenantor not to exercise his trade of a canvassing publisher in London or within 150 miles of the general postoffice, or in Dublin or Edinburgh, or within 50 miles of either, or in any other town where the covenantee or his successors had an establishment or might have had one within six months preceding, was not an illegal restraint of trade, and enforced it. In *Mogul SS. Co. v. McGregor*, 21 Q. B. Div. 544, certain shipowners engaged in the carrying trade between London and China had formed an association for the purpose of keeping up the rate of freights in the tea trade, and securing that trade to themselves. They accomplished this purpose by allowing a rebate of 5 per cent on all freights paid by shippers who shipped in their vessels only, and thus partially or entirely excluded the plaintiffs, who were competing shipowners, from the tea carrying trade. The latter brought suit for an injunction and damages, but, notwithstanding the obvious restriction upon free competition, Lord Coleridge held that the association was not an unlawful combination in restraint of 4 INTER 8.

trade, and gave judgment for the defendants. This decision was rendered in 1888. It was sustained on appeal (23 Q. B. Div. 598), and finally affirmed by the house of lords. [1892] App. Cas. 25. In *Perkins v. Lyman*, 9 Mass. 522, the supreme judicial court of Massachusetts held, in 1813, that a contract by a merchant not to be interested in any voyage to the northwest coast of America was not invalid as in restraint of trade. In *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, a contract of a match manufacturer never to manufacture or sell any friction matches in the District of Columbia, or in any part of the United States except Idaho and Montana, was sustained and enforced. In *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315, decided in 1873, a contract between two steam navigation companies engaged in the business of transportation on the rivers, bays, and waters of California, and on the Columbia river and its tributaries, respectively, was declared by the Supreme Court not to be in restraint of trade, although it prohibited the use of a certain steamer in the waters of California for ten years. And in 1890 the supreme court of New Hampshire in an exhaustive and persuasive opinion held that contracts by which a railroad corporation leased its road and rolling stock to a competitor for many years were not necessarily against public policy or void at common law, when the purpose of the contracts and combinations did not appear to be to raise the rate of transportation above the standard of fair compensation, or to violate any duty owing to the public by non-competing companies. *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 3 Inters. Com. Rep. 319, 9 L. R. A. 689. If further authority is wanted for the proposition that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade, it will be found in *Foule v. Park*, 181 U. S. 88, 97, 33 L. ed. 87, 74; *Gibbs v. Consolidated Gas Co.* 180 U. S. 396, 32 L. ed. 979; *Re Greene*, 52 Fed. Rep. 104, 118; *Horner v. Graves*, 7 Bing. 735, 743; *Hubbard v. Miller*, 27 Mich. 15, 19, 15 Am. Rep. 153; *Rounillon v. Rounillon*, L. R. 14 Ch. Div. 351, 363; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345, 354; *Wickens v. Evans*, 3 Younge & J. 318; *Ontario Salt Co. v. Merchants Salt Co.* 18 Grant, Ch. 540; *Mallan v. May*, 11 Mees. & W. 652, 657; *Whittaker v. Howe*, 3 Beav. 383; *Kellogg v. Larkin*, 3 Pinney, 123, 150; *Beal v. Chase*, 31 Mich. 490; *Skrainka v. Scharringhausen*, 8 Mo. App. 523, 525; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 389; *Gloucester Isinglass & G. Co. v. Russia Cement Co.* 154 Mass. 92, 94; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 163; *Master Stevedore's Assn. v. Walsh*, 2 Daly, 1; *Hodge v. Sloan*, 107 N. Y. 244; *Brown v. Rounsavell*, 73 Ill. 589; *Jones v. Fell*, 5 Fla. 510, 515.

From a review of these and other authorities, it clearly appears that when the Anti-Trust Act was passed the rule had become firmly established in the jurisprudence of England and the United States that the va-

lidity of contracts restricting competition was to be determined by the reasonableness of the restriction. If the main purpose or natural and inevitable effect of a contract was to suppress competition or create a monopoly, it was illegal. If a contract imposed a restriction that was unreasonably injurious to the public interest, or a restriction that was greater than the interest of the party in whose favor it was imposed demanded, it was illegal. But contracts made for a lawful purpose, which were not unreasonably injurious to the public welfare, and which imposed no heavier restraint upon trade than the interest of the favored party required, had been uniformly sustained, notwithstanding their tendency to some extent to check competition. The public welfare was first considered, and the reasonableness of the restriction determined under these rules in the light of all the facts and circumstances of each particular case.

But it is said that railroad corporations are quasi public corporations, and any restriction upon their competition is against the public policy of the nation. It is not to be denied that there are some expressions to be found in adjudged cases, notably in *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 409, 32 L. ed. 979, 984; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600, 625; *Chicago Gaslight & C. Co. v. Peoples Gaslight & C. Co.* 121 Ill. 530, and *Western U. Tele. Co. v. American U. Tele. Co.* 65 Ga. 160, 38 Am. Rep. 781,—to the effect that where a business is of such character that it cannot be restrained to any extent whatever without prejudice to the public interests, the courts decline to enforce or sustain contracts imposing such restraint, however partial. But the language employed by the courts in these cases should be read in the light of the circumstances under which it was uttered, and with due reference to the point actually adjudicated. Thus in the earliest of these cases (*Western U. Tele. Co. v. American U. Tele. Co.*) it was held that a contract between a railroad company and a telegraph company by which the former granted to the latter the exclusive right to construct a telegraph line along its right of way, necessarily excluded all other telegraph lines from the use of a right of way that by condemnation had been devoted to public uses, and was void, because it was in restraint of trade, and tended to create a monopoly. In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* it was held that an owner of 2000 acres of oil land could not grant to one pipe line company an exclusive right to lay a pipe line across said lands, because the legislature, by authorizing pipe line companies to condemn lands for the construction of such lines, had thereby declared that the public had an interest in their construction, and that a contract which precluded such companies from laying a line across an extensive tract of land was necessarily opposed to public policy. In *Chicago Gaslight & C. Co. v. Peoples Gaslight & C. Co.* the court held that a gas company, which had accepted a charter authorizing it to lay pipes and to supply gas throughout the entire limits of the city,

could not disable itself from the performance of the public duty it had undertaken by entering into a contract with another company not to lay pipes and supply gas in a large section of said city. And in *Gibbs v. Consolidated Gas Co.* a like contract by one gas company with another to abandon the discharge of public duties which had been devolved upon it by its charter was held, on that account, to be against public policy, and void, and to be void on the further ground that the contract was in open violation of a statute which prevented the company from "entering into a . . . contract with any other gas company whatever."

No doubt can be entertained that the contract involved in each of the cases last referred to was against public policy for its marked tendency to create a monopoly, and to suppress healthy competition. Two of the contracts were also vicious in the respect that the corporation had attempted to disable itself from exercising powers which had been conferred upon it for the public advantage. But we think, in view of the state of facts on which the decisions were predicated, and the points actually adjudicated, it would be unwise to deduce an unbending rule that any and every contract between two railway companies which enjoins or contemplates concert of action in the matter of establishing freight or passenger rates between competitive points is against public policy, and an unlawful restraint of trade. No case, we believe, has yet gone to that extent, or has declared that the business of transporting freight and passengers by rail is of such character that no restraint whatever upon competition therein is permissible. On the contrary, contracts between common carriers which imposed some restrictions upon competition have been frequently sustained by our highest courts, and the rule has been often applied that the test of their validity was not the existence, but the reasonableness, of the restriction imposed. *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 32 L. ed. 315; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97; *Mogul SS. Co. v. McGregor*, 21 Q. B. Div. 544; *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 3 Inters. Com. Rep. 319, 9 L. R. A. 689; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 389, 39 Am. Rep. 519. But even if such an extreme view, as is above indicated, was once tenable, we fail to see how it can well be maintained since the passage of the Interstate Commerce Law, and the action that has been taken thereunder by the government Commission which was created to enforce its provisions. The Interstate Commerce Law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and Congress has thereby expressed its conviction that unrestrained competition between carriers is not, at the present time, and under existing conditions, most conducive to the public welfare, but that other things are quite as essential to the public good. Mark the difference in public policy towards merchants and railroad companies exhibited by the common law and by the In-

terstate Commerce Act. Merchants may refuse to sell their wares at all, they may refuse to transact any business; but railroad companies are common carriers; they must furnish transportation when requested; they must operate their roads or forfeit their franchises; merchants may charge any price they see fit for their wares, but railroad companies are restricted to reasonable and just charges for transportation (Interstate Commerce Act, § 1); merchants may sell articles of like character and value for as many different prices as they have different customers, but railroad companies are restricted to the same charges to all their customers for like services (Interstate Commerce Act, § 2); merchants may give to any customers or any localities any preference or advantage they choose over other customers or localities, but railroad companies are prohibited from giving any undue preference or advantage to any party or place (Interstate Commerce Act, § 3); merchants may sell articles of inferior value for higher prices than those they charge and receive for those of greater value, but railroad companies are prohibited from charging or receiving a greater compensation for a short haul than for a long haul (Interstate Commerce Act, § 4); merchants may keep their prices secret; railroad companies must publish their rates for transportation, and are prohibited from charging or receiving a greater or less compensation than that specified in the published schedules (Interstate Commerce Act, § 6); merchants may change their prices instantly and without notice, railroad companies are prohibited from increasing their rates except after ten days' public notice or from decreasing them except after three days' public notice (Interstate Commerce Act, § 6); merchants may transact their business free from the supervision or interference of the government; but railroad companies are subject to the supervision of a Commission, established by the government, authorized to take the necessary proceedings for the enforcement of these restrictions (Interstate Commerce Act, § 12). These restrictions relate almost exclusively to rates for the transportation of freight and passengers. They are numerous, radical, and effective. They became operative by an Act of Congress three years before the Anti-Trust Act was passed, and they establish beyond cavil that from that date the public policy of the nation was that competition between railroad companies engaged in interstate commerce should not go wholly unrestricted.

If we turn now to the published reports of the Interstate Commerce Commission, whose opinion on such matters is certainly entitled to great consideration, we find the view even more clearly expressed that it was the purpose of Congress to place important restraints upon competition, that uncontrolled struggles for patronage by railway carriers are frequently detrimental to the public welfare, that rate wars are especially injurious to the business interests of the country and contrary to the spirit of existing laws, that the Interstate Commerce Act invites conferences between railway managers, and that concert of action in certain matters by railway com-

panies is absolutely essential to enable it to accomplish its true purpose.

In the Fourth Annual Report of the Commission, at page 19, we find the following statement:

"It is thus seen at every turn that the regulation of rates on a consideration of the pecuniary or other situation of any single road, and without a survey of the whole field of operations whereby its business may be affected, and under a supposition that what is done in respect to that road may be limited in its consequences, is entirely antagonistic to all principles of railroad transportation. The railroad managers have perceived this from the very first, and it is because they have perceived this that they have been compelled to organize themselves into railroad associations, for the purpose of agreeing upon classifications and rates, and upon a great variety of other matters pertaining to the methods of conducting interlocking and overlapping business, and all business affected by competitive forces." And on page 21 of the same report the following:

"In former reports, the Commission has referred to the undoubted fact that competition for business between railroad companies is often pushed to ruinous extremes, and that the most serious difficulties in the way of securing obedience to the law may be traced to this fact. When competition degenerates to rate wars, they are as unsettling to the business of the country as they are mischievous to the carriers, and the spirit of the existing law is against them."

In the Second Annual Report, on page 25, when speaking of the unity of railroad interests, the Commission uses this language:

"But the voluntary establishment of such extensive responsibility would require such mutual arrangements between the carriers as would establish a common authority, which should be vested with power to make traffic arrangements, to fix rates, and to provide for their steady maintenance, to compel the performance of mutual duties among the members, and to enforce promptly and efficiently such sanctions to their mutual understandings as might be agreed upon."

And in the same report, on page 28, we find the following:

"A short road may sometimes make itself little better than a public nuisance by simply abstaining from all accommodation that could not by law be forced from it. It would not be likely to do this unless for some purpose of extortion from other roads, but the existence of a power to annoy and embarrass is a fact of large importance. The public has an interest in being protected against the probable exercise of any such power. But its interest goes further than this; it goes to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibilities, just as far as may be possible, so that the public may have, in the services performed, all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest com-

petition. They are of general convenience to the carriers as well as to the public, and their voluntary extension may be looked for until, in the strife between roads, the limits of competition are passed, and warfare is entered upon. But, in order to form them, great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated."

In the First Annual Report, on page 83, the Commission further said:

"To make railroads of the greatest possible service to the country, contract relations would be essential, because there would need to be joint tariffs, joint running arrangements and interchange of cars, and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation, and, even if they were not, could be best settled, and all the incidents and qualifications fixed, by the voluntary action of the parties in control of the roads respectively. Agreement upon these and kindred matters became, therefore, a settled policy, and short independent lines of road seemed to lose their identity, and to become parts of great trunk lines, and associations were formed which embraced all the managers of roads in a state or section of the country. To these associations were remitted many questions of common interest, including such as are above referred to. Classification was also confided to such associations, it being evident that differences in classification were serious obstacles to a harmonious and satisfactory interchange of traffic. But what perhaps, more than anything else, influenced the formation of such associations, and the conferring upon them of large authority, was the liability, which was constantly imminent, that destructive wars of rates would spring up between competing roads to the serious injury of the parties and the general disturbance of business. Accordingly, one of the chief functions of such associations has been the fixing of rates, and the devising of means whereby their several members can be compelled or induced to observe the rates when fixed."

It would extend this opinion to an unreasonable length if we assumed to state the reasons which probably influenced Congress to impose some restrictions upon competition in the matter of railway transportation, and to place railway carriers under the operation of a law which, for its successful execution, as pointed out by the Interstate Commerce Commission, seems to some extent to invite conference and concert of action. It is likewise unnecessary for us to state the reasons why railroad companies should be accorded the privilege of entering into arrangements with other companies which may, to some extent, regulate competition. Reasons to that effect have been stated with great ability and persuasive force in some of the cases to which we have already referred, notably in *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 3 Inters. Com. Rep. 319, 9 L. R. A. 669. But, without entering into that discussion, it is sufficient to say that, in our judg-

ment, there was no hard and fast rule in force when the Anti-Trust Act was enacted which made every contract between railroad companies void on grounds of public policy if it in any wise checked competition. In our judgment, the more reasonable doctrine then prevailed, especially in view of the recent passage of the Interstate Commerce Act, that such contracts were void, if, judged in the light of all the circumstances and conditions under which they were made, they unreasonably restricted competition.

In view of the foregoing principles, it remains for us to examine the contract which is alleged to be in violation of the Anti-Trust Act, but before doing so a preliminary observation will not be out of place. The Anti-Trust Act is a criminal statute, and it should not be so construed as to subject persons to the penalties thereby imposed unless the contract complained of is one that is clearly within the provisions of the statute. It is also well to note that the case comes before us simply on bill and answer. The bill alleges that its purpose, and that of the association formed under it, was to suppress competition, enhance rates of freight, and monopolize the traffic. The answers deny these averments, and allege that the purpose of the contract and association was to carry into effect the provisions of the Interstate Commerce Act, and to make rates public and steady. The bill alleges that the effect of the contract and association has been to raise the rates of freight above those which the public might have reasonably expected to obtain from free competition. The answers deny this allegation, and aver that the effect has been to maintain reasonable rates, and that more than 200 reductions of rates have been effected through the association. Upon a hearing on bill and answer the averments of fact contained in the bill are overcome by the denials of the answer, and the averments of fact in the answer stand admitted. *Tainter v. Clark*, 5 Allen, 66; *Brinckerhoff v. Brown*, 7 Johns. Ch. 217; *Perkins v. Nichols*, 11 Allen, 542.

The result is that the government's right to relief here rests upon the contract itself, and the fact that the rates maintained under it have not been unreasonable, and that many reductions have been made under its operation. The ordinary rules of interpretation must then be applied to the language of this contract, and, if it appears that its purpose and tendency were to unreasonably restrict competition, it must be declared illegal. *Dillon v. Barnard*, 88 U. S. 21 Wall. 490, 487, 22 L. ed. 673, 676; *Interstate Land Co. v. Marvell Land Grant Co.* 139 U. S. 569, 577, 35 L. ed. 278, 281.

In construing the contract it must also be remembered that fraud and illegality are not to be presumed, and that the purpose of the contract is that which is clearly manifest by its terms. In *Mitchell v. Reynolds*, 1 P. Wms. 181, the unfortunate remark "that wherever such contract *stat indifferenter*, and for aught appears, may be either good or bad, the law presumes it *prima facie* to be bad," fell from Chief Justice Parker. This seems to be the reverse of the proposition that every man is

presumed to be innocent until he is proved to be guilty. It has long been repudiated by the courts of England and America. The burden is on the party who seeks to put a restraint upon the freedom of contract to make it plainly and obviously clear that the contract is against public policy, and the true rule of construction is that neither fraud nor illegality is to be presumed, but the contract is to be assumed to have been made in good faith for the purpose which appears on the face of it, and not colorably for any other. *Printing & N. Reg. Co. v. Sampson*, L. R. 19 Eq. 463; *Tallis v. Tallis*, 1 El. & Bl. 391; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, 365; *Stewart v. Erie & W. Transp. Co.* 17 Minn. 873, 391; *Marsh v. Russell*, 66 N. Y. 288; *Phippen v. Stickney*, 3 Met. 384, 389.

Proceeding, then, to an examination of the contract, we find it to be substantially as follows: In the preamble there is a declaration that the association is formed for "mutual protection by establishing and maintaining reasonable rates, rules, and regulations, both through and local." Article 1 declares that substantially all traffic competitive between two or more members in that part of the United States between the Mississippi and Missouri rivers and the Pacific ocean shall be governed by the association. It is provided by article 2 that the association shall choose a chairman by unanimous vote; that there shall be regular monthly meetings of the association in which each member must be represented by some responsible officer authorized to act definitely on all questions to be considered; that a committee shall be appointed to establish rates, rules, and regulations for the traffic, and that these shall be put into effect; that any railroad company may give five days' written notice prior to any monthly meeting of any proposed reduction of rates or change of rules, and eight days' notice as to the traffic of Colorado or Utah; that thereupon the reduction or change shall be considered and voted upon by the association at the next monthly meeting, and all members shall be bound by the decision of the association, "unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification notwithstanding the vote of the association;" that any member may without notice, at its peril, make any rate, rule, or regulation necessary to meet the competition of outside lines, subject to a liability to pay a penalty of \$100 if the association decides by a two thirds vote that the rate, rule, or regulation was not necessary for that purpose; that all arrangements with connecting lines for the division of through rates relating to traffic covered by the agreement shall be made by authority of the association, and that the chairman of the association shall punish violations of the agreement by fines not exceeding \$100 in any case. Article 3 makes the chairman the executive officer of the association, requires him to publish and furnish to the members of the association the rates, rules, and regulations established, and all changes in them, and requires him to enforce the provisions of the contract. Article 4

prohibits under-billing or billing at a wrong classification. Articles 5 and 6 provide for the appointment of the necessary employees and the payment of the necessary expenses of the association. Article 7 provides for arbitration in case the managers of the parties to the agreement fail to agree upon any question arising under it; and article 8 provides that any member may withdraw from the association on 30 days' notice.

It is obvious at a glance that this agreement is not affected by any of the vices of an ordinary pooling contract. The income of each member of the association under the terms of the agreement is still measured by the amount of freight and the number of passengers it carries, and it is still to the interest of each member of the association to make that patronage as great as possible, by affording to the public superior facilities for safe, speedy, and convenient transportation. Under the operation of the agreement, each company must still compete with its associate members in the character of its roadbed, quality of its equipments, length of route, convenience of its terminal facilities, and in the efficiency of its management, for all of these considerations will necessarily have a marked influence upon the amount of its patronage.

In other of its features, also, the contract is not subject to criticism. In these days, when persons engaged in many other callings and avocations are in the habit of meeting at intervals, as associations, for the purpose of cultivating more friendly relations and establishing regulations conducive to the general welfare of the trade, it is difficult to see upon what just grounds representatives of railway companies can be denied the right of forming associations for the purpose of friendly conference and to formulate rules and regulations to govern railway traffic. The fact that the business of railway companies is irretrievably interwoven, that they interchange cars and traffic, that they act as agents for each other in the delivery and receipt of freight and in paying and collecting freight charges, and that commodities received for transportation generally pass through the hands of several carriers, renders it of vital importance to the public that uniform rules and regulations governing railway traffic should be framed by those who have a practical acquaintance with the subject, and that they should be promulgated and faithfully observed. The advisability of establishing such rules and regulations in the mode above indicated, particularly for the uniform classification of freight, has been frequently pointed out in the reports of the Interstate Commerce Commission. Indeed, the benefits that would result from uniform rules and regulations, and from uniformity in the classification of freight, seem to us so obvious that we need not stop to enumerate them.

We are of the opinion, therefore, that the stipulations of this agreement enjoining a monthly conference between representatives of the various members of the association, and the appointment of a committee to formulate rules and regulations governing the

traffic embraced by the agreement are not only not opposed to public policy, but, if faithfully carried out, will tend to promote the public interests. It is also obvious, we think, that the stipulation requiring five days' written notice of a proposed reduction in rates does not, in and of itself, render the contract unlawful. It is certain that a contract not to reduce established rates without a public notice of three days, and not to increase them without a notice of ten days, would not be against public policy, because the Interstate Commerce Act has prohibited such changes with less notice. The plain object of this provision was to prevent competitors from resorting to secret, unfair, and ruinous methods of warfare, to make competition fair and open, and to enable shippers to modify their action to suit the coming changes. There is no purpose of the provision, or of the policy that dictated it, that would not be as well, if not better, served by a notice of fifteen or forty days, as one of three days.

But it is urged that the contract in question restrains competition in rates, and is therefore unlawful. That it does have some tendency to check competition in that respect will not be denied; but that the restraint imposed is slight, that there is abundant room within the terms of the agreement for the play of all the healthy forces of competition, and that it has a pronounced tendency to prevent sudden and violent fluctuations in rates, commonly termed "rate wars," seems to us to be equally manifest. It is not reasonable to suppose that any member of the association which, by virtue of its situation, can really afford to transport freight or passengers between any two competitive points for a substantially less sum than its competitors, will be likely to forego the advantage that its situation gives it, even under the operation of the agreement. It is much more probable that, under the operation of the agreement, as under the influence of free competition, the rates between competitive points will be largely, if not entirely, based upon the rate which the road having the shortest line and best facilities esteems fair and reasonable compensation.

It will be observed that under the terms of the agreement no member of the association has bound itself to be governed by a rate fixed by a vote of the majority for a longer period than ten days after the monthly meeting next succeeding its notification of a proposed change in rates; and for that reason the limitation imposed by the contract upon the right of a member of the association to adopt such a rate as it sees fit is very slight, and the power reposed in the association is correspondingly small. We fail to see, therefore, that the natural or probable effect of this contract will be to sensibly raise either freight or passenger rates above the level which they would attain under the influence of what is termed "unrestricted competition." On the other hand, it seems highly probable that the contract in question will prevent sudden and violent fluctuations in freight rates, such as often upset the business calculations of entire communities, and that this was one of the

main reasons which led to the formation of the association. We are also persuaded that it will have a sensible tendency to induce a more uniform system of classification throughout the great region where the association operates, and also to induce the establishment of a more perfect code of rules and regulations governing freight traffic. It may also tend to prevent stealthy, secret, and unfair methods of warfare, and to make the strife for patronage among the members of the association open, fair, and honorable. All of these are objects that are in line with the true spirit of the Interstate Commerce Act and an intelligent public policy.

The result is that this contract, in view of all the circumstances of the case and the situation of the parties thereto, does not impose such unreasonable restraints on competition as will warrant us in holding that it is one of those contracts or conspiracies in restraint of trade and commerce among the several states which fall within the inhibition of the Anti-Trust Act of July 2, 1890.

Nor is there any monopoly of trade, or any attempt to monopolize trade, within the meaning of that Act, evidenced by this contract. So far as can be learned from it, the association has never intended to have, and never has had or attempted to have, any trade. It has not held or attempted to obtain or hold any property except the moneys necessary for the bare expenses required to pay its officers and employes. It has been and is a mere adviser with its members upon disputed questions submitted by the contract to its consideration. So far as can be learned from the contract, each member of the association is striving with every other in its territory, whether a member of the association or not, to divert from the latter and gather to itself all possible trade. There are provisions in the contract that the chairman may authorize members to meet the rates of competitors who are not members of the association, and that any member may meet the rates of such a competitor at its peril; but these provisions were necessary for the protection of members of the association against the attacks of non-members. Without such provisions unreasonably low rates established by the latter would draw away the business of the members, and deprive them of the opportunity to compete on equal terms. These provisions give no company any higher right or greater power than it had before the contract was made, but simply reserved to each the privilege of exercising its original right to meet competition without giving the fifteen days' notice in case of a warfare upon it by a non-member.

A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control. There is nothing in this contract indicating any purpose or attempt to obtain such a monopoly. The great transportation systems of the Great Northern Railway Company, the Northern Pacific Railroad Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company were operated in the

region subject to the regulation of this association, but none of these companies were members of it; and, even if they had been, there would still have been no evidence of any attempt to monopolize trade here, because each member is left to compete with every other for its share of the traffic. *Re Greene*, 52 Fed. Rep. 104, 115.

The position that these railroad companies have so far disabled themselves from the performance of their public duties by the execution of this contract as to give ground for the avoidance of the contract, and for a forfeiture of their franchises, cannot be successfully maintained. It is well settled upon principle and authority that, where a corporation by a contract entirely or substantially disables itself from the performance of the duties to the public imposed upon it by the acceptance of its charter, the contract is void, and its franchise may be forfeited. The reasons for this rule, and some of the limitations of it, were stated by this court in *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.* 10 U. S. App. 98, 51 Fed. Rep. 809, 317-321; and it is unnecessary to repeat them here. It goes without saying that this rule in no way limits the power of a corporation to discharge its duties through agents of its own selection. There is no doubt that each of these corporations could lawfully appoint an expert or a committee of experts upon the subject of classification and rates of freight upon its road, empower him or them to fix the rates, and then maintain them for forty days unchanged. Practically the fifteen representatives of these companies, at a meeting of the association, their chairman, and their committee that originally fixed the rates and rules, together constitute an advisory committee on rates and rules of traffic, composed of men whose intimate knowledge of the needs of the shippers, and of the character and quantities of the commodities transported through the different portions of the wide area traversed by these railroads, and whose wide experience in the effect of various rates upon the accommodation of the public and the business of the companies fit them well to carefully consider and wisely establish just and reasonable rates throughout this territory. Such a committee each company acting independently might have appointed, and it is not perceived that the fact that two or more companies appoint the same men to establish rates and rules for the traffic upon their respective roads in any way invalidates the appointment of either.

Moreover, the power delegated to the association, its committee and chairman, is so limited in extent and so restricted in time that it is hardly worthy of serious consideration as the ground for the avoidance of a contract and the forfeiture of a franchise. The power granted to the committee originally chosen to establish the rates and rules expired by limitation upon a thirty days' notice of withdrawal from the association; the power of the association itself to prevent modifications and changes in the rules and rates established ceases after fifteen days' notice of an intention to make the modifications and changes notwithstanding its ac-

tion. It is true that there is a provision in the second article of the agreement that regular meetings of the association shall be held, "unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together," but the remark of the counsel for the government that this gives the chairman power to prevent the consideration of proposed changes in rates, and thus to maintain them indefinitely, by preventing a meeting of the association, cannot be seriously considered. The effect of the contract is that, when a company gives notice of a proposed change of any importance, the meeting shall be held. Such a notice presents business to be transacted that does warrant calling the members together. If, under such circumstances, the chairman gives notice that there is no such business, he violates the contract. The presumption is that he will not violate it; and, if he does so, that is no ground for an avoidance of the contract.

The result is that neither this contract nor the association formed under it can be held to be obnoxious to the provisions of the Anti-Trust Act in view of the facts admitted by the pleadings in this suit, and in the absence of other evidence of their consequences and effect.

Many of the considerations to which we have referred are presented upon the argument of the question whether or not the Anti-Trust Act applies to or in any way governs transportation companies that are engaged in that part of interstate and international commerce which consists solely of the transportation of persons and property, in view of the very substantial regulation of this part of commerce provided by the Interstate Commerce Act. The views we have expressed render it unnecessary to determine this question, and we express no opinion upon it. We rest this decision on the ground that, if the Anti-Trust Act applies to and governs interstate and international transportation and its instrumentalities, the contract and association here in question do not appear to be in violation of it.

The decree below is affirmed, without costs.

Thayer, D. J., concurs.

Shiras, D. J., dissenting:

I am unable to concur in the conclusion reached by the majority of the court in this case, and propose to state the reasons for such nonconcurrence.

Assuming that the Anti-Trust Act of July 2, 1890, is applicable to interstate railroad companies and the business transacted by them, it seems to me entirely clear that the contract entered into by the railway companies forming the Trans-Missouri Freight Association is in contravention of the statute, in that it deprives the public of the benefit of free competition between the associated railway companies, and thereby subjects the commerce of the regions tributary to these lines of railway to the possibility, if not the certainty, of paying increased rates for the transportation of freight over the same.

It is doubtless entirely true that at the present time a more liberal rule prevails than in the earlier days in regard to contracts affecting the business carried on by private citizens or corporations, when the same is essentially of a private nature, and only indirectly affects the public at large. As is pointed out in the opinion of the court, the use of steam and electricity in connection with the mercantile and commercial business of the world has so greatly increased the facilities for commercial intercourse that contracts which a century ago would have been in fact an unreasonable restriction upon trade in its then condition would not now produce the same result, and hence would not fall within the condemnation of the principle which declares unlawful all contracts or combinations which work an unreasonable restriction upon trade and commerce. The principle itself, however, remains in force at the common law even in regard to business enterprises which deal only with matters of private interest, and only incidentally affect the community at large. At an early day a distinction was recognized at the common law between the rules applicable to business pursuits of a purely private nature and those connected with matters directly affecting the community at large; as, for instance, the dealing in commodities forming the necessities of life. Contracts or combinations tending to create a monopoly in the latter articles were condemned as contrary to public policy, when like contracts affecting other kinds of property were held to be valid; and the same principle holds good at the present time. Another distinction which is now firmly established and enforced grows out of the nature of the business contracted about, and the relation the contracting parties bear thereto. An individual or a private corporation engaged in a purely private enterprise may lawfully enter into contracts or combinations in regard thereto which would be invalid and illegal if the business was of a public nature, and the corporation was created for the purpose of engaging therein. Thus in *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 779, the Supreme Court, speaking by Mr. Chief Justice Fuller, declared that—

"The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. . . . Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract (*Printing & N. Reg. Co. v. Sampson*, L. R. 19 Eq. 462) yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600; *Chicago Gas-*

light & C. Co. v. People's Gaslight & C. Co. 121 Ill. 530; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781. . . .

Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi public character, which are manifestly prejudicial to the public interest, cannot be upheld."

In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600, it is said:

"If there be any sort of business which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however partial, on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however partial, must be regarded by the court as prejudicial to the public interest."

In *Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 121 Ill. 530, it is declared that—

"The ordinary rule that contracts in partial restraint of trade are not invalid does not apply to corporations like appellant and appellee, because they were engaged in a public business, and in furnishing that which was a matter of public concern to all the inhabitants of the city."

It is not necessary to extend the citation of authorities upon this general proposition, but it is of vital importance to bear in mind the distinction that exists in this particular between private individuals or corporations engaged in ordinary business avocations and public corporations engaged in the performance of a public or governmental duty, like that of building and operating a public highway in the form of a railway line.

From the earliest days the duty of constructing and maintaining the public roads of a country has been recognized as one incumbent upon the government. To secure the construction of a railway running over the property of many individuals, the right of eminent domain must be called into exercise, and thus the character of a public enterprise is impressed upon it both by reason of the purpose it is intended to subserve and by reason of the governmental power exercised in its creation and maintenance. So, also, corporations created for the purpose of building and operating public highways in the form of railroads are of necessity public, not private corporations, because they are formed for the purpose of engaging in the public work of constructing and operating a highway for the use of the people at large, and because they are authorized to call into exercise the governmental right of eminent domain, a right which cannot be lawfully conferred upon a private corporation engaged solely in enterprises private in their nature. The failure to recognize the distinction existing between private enterprises carried on by individuals or private corporations, and public duties performed through the agency of public corporations, in my judgment has

misled the court in reaching the conclusion announced in the majority opinion.

As applied to private associations, the modern authorities undoubtedly sustain the proposition therein laid down, "that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade;" but that, in my judgment, is not the test of validity when the action of public corporations relative to public duties is brought in question.

Parties engaged in the manufacture or sale of lumber, dry goods, or other like articles primarily owe no duty to the public in connection therewith. They may limit or enlarge, continue or discontinue the business, as they please, and may charge exorbitant prices or the contrary. In these particulars they owe no special duty to the public, for they are not exercising any sovereign or public powers in carrying on such private enterprises, nor are they charged with the performance of a public duty. Hence they are at liberty to enter into contracts with other private parties engaged in like pursuits which may tend to regulate or restrict the business carried on by them, subject, however, to the rule that restrictions unreasonably affecting the freedom of trade and commerce cannot be sustained, because thereby the public interests are affected. Touching contracts between private parties in regard to pursuits essentially private in their nature, the test of validity we thus find to be the actual effect thereof on the public welfare. In regard to such private enterprises the public has no voice in the management thereof, nor any right of dictating what shall or shall not be done by the owners thereof, nor have the latter become bound to carry on the business in the interest or for the benefit of the public primarily. The contrary is true with regard to public corporations, clothed with the power to fulfill public duties, and engaged in enterprises the purpose of which is to discharge a governmental duty, and which require in their performance the exercise of the sovereign right of eminent domain.

Such public corporations owe primarily a duty to the community, and the relations existing between them and the public are in many particulars radically different from those pertaining to private corporations. Neither extended argument nor the citation of authorities is needed to show that the business of railway transportation is one of a public character, and which reaches and affects the business interests of the entire community. When a highway in the form of a railroad is constructed and put in operation, all parties living in the regions adjacent thereto are dependent upon the railroad for the carrying on of all business which involves the transportation of persons or property in connection therewith. The farmer is compelled to use the railway for the transportation of the products of his farm to market. The merchant must use the same agency in bringing to his place of business the merchandise in which he deals. Practi-

cally the business of the community, whether in connection with articles of prime necessity, like food or fuel, or the other articles which are produced or dealt in by the people at large, becomes of necessity wholly dependent upon the facilities for transportation furnished by the given railway. As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements. By reason of this fact the action of the corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer, and the merchant from the sale of the products of the farm, the workshop, and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country.

Certainly, if it be true, as held in *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, that the supplying of gas for illuminating purposes is a business of a public nature, because it supplies a public necessity, and that it is of such a character that contracts between companies engaged therein, looking to a regulating of competition, cannot be sustained because inimical to the public welfare, then it must also be true that the furnishing facilities for the transportation of the products of the country by means of railways is likewise a public business, and one of such character that contracts or combinations between the corporations engaged therein, intended to limit the effect of free competition upon the rates charged the public, must be held to be prejudicial to the public interests, and therefore to be invalid. It is said in the opinion of the court that—

"We find that it has long been settled that contracts or combinations of producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize their supply or enhance their price, pooling contracts or combinations between such producers or dealers to divide their profits in certain fixed proportions and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void."

Are not railway companies engaged in the transportation of articles of prime necessity to the people? Do they not handle the food products of the country, the fuel, and all the other necessities of life? Do not the rates charged for the transportation of these articles have as much to do with determining the prices paid by the community as the rates charged by those engaged in buying and selling the same upon the open market? If combinations among the dealers in such articles to avoid competition and enhance the cost to the consumer are illegal and void, why are not combinations among common carriers engaged in the transportation of the same articles, tending to enhance the cost to

the consumer by avoiding the effect of competition upon the rates of transportation, equally void?

If I correctly understand the opinion of the majority, it is therein admitted that it is the settled law that contracts or combinations between producers or dealers in staple commodities of prime necessity to the people, tending to monopolize the supply or enhance the price, are contrary to public policy and therefore void; and yet it is maintained that public corporations like railway companies may combine to fix the rates to be charged for the transportation of the like commodities, which, of necessity, affects the cost to the consumer as well as the value to the producer, and that contracts thus arbitrarily establishing the rates to be charged, and avoiding the effect of competition thereon, cannot be held to be invalid, unless it be clearly shown that the rates thus fixed are unreasonable. It seems to me the two propositions are clearly at variance.

The right to freely contract and combine possessed by private parties engaged in private pursuits is limited and denied when they come to deal with staple commodities, because the whole community is interested in these articles of prime necessity, and any contract affecting them affects the public; and clearly public corporations are under a more stringent rule in this particular.

Unlike private parties engaged in private pursuits, which only incidentally, if at all, affect the public welfare, corporations created for the purpose of constructing and operating the modern form of public highways owe primarily a duty to the public. They are created to subserve a public purpose, to wit, to furnish the means for the transportation of the people and property of the country, and they are under constant obligation to use their corporate powers in the interest of and for the benefit of the community from which these powers have been derived.

The right to demand transportation for one's self or property over such highways belongs to every member of the community, and the rate to be paid for such service is a question which affects every one using the highway, and, in addition, every member of the community is affected by the rates charged, for the amount thereof enters into and affects the price of every article that is bought and sold in the community. The duty of transporting persons and property over a line of railway is a public duty, assumed by the corporation operating the particular line, and in the proper performance thereof the public has a direct interest. The proper performance of this duty includes the rate of compensation to be charged for the services rendered, and this is a question in which the public has a direct and most important interest, and all contracts or combinations intended to affect the rate to be charged directly affect the public welfare. Clearly, therefore, railway transportation of persons and property comes within the classes of business, which, in the language of the Supreme Court in *Gibbs v. Consolidated Gas Co.* 190 U. S. 396, 32 L. ed. 979, are of such a public character that presumably they

cannot be restrained to any extent whatever without prejudice to the public interest.

In the opinion of the majority it is practically assumed that the same freedom to contract or combine with others is possessed by the public corporations engaged in railway transportation as belongs to private parties engaged in private pursuits. It does not so seem to me, either upon principle or authority. Private corporations are not created for the primary purpose of furthering the public interests, nor do they assume the performance of a public duty. Conducting private enterprises for private gain, there is no presumption that their acts will affect the public welfare, and hence their freedom of contract and action is not to be limited or denied, unless it clearly appears that the interests of the community will be injuriously affected by the action proposed to be taken. On the other hand, in the case of public corporations engaged in carrying on a public enterprise, it is apparent that every course of action intended to affect the business transacted by the corporation must of necessity affect the public interests.

A railway corporation engaged in the transportation of the persons and property of the community is always carrying on a public business, which at all times directly affects the public welfare. All contracts or combinations entered into between railway corporations, intended to regulate the rates to be charged the public for the service rendered, must of necessity affect the public interests. By reason of this marked distinction existing between enterprises inherently public in their character and those of a private nature, and further, by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public, and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein.

In the case of railway companies engaged in the public business of transporting persons and property from state to state over the highways of the country, it is, in my judgment, clearly contrary to the public welfare, and therefore illegal, for these public corporations to enter into contracts and combinations intended to limit or nullify the effect of free and unrestrained competition upon the rates to be charged the public for the services rendered in the transportation of persons or property over the public highway. So far as the national government has dealt with this question, it has as yet not undertaken to declare by statute what rates shall be charged by the railway companies, nor has it established a fixed maximum or minimum limit. In this particular the public has relied upon the effect of competition in

keeping the rates charged within reasonable bounds. Hence it is that all sections of the country have so eagerly striven to secure the construction of competing lines of railway. There is scarcely a town or city in the community that has not felt the need of securing access to rival lines of transportation, in order that it might enjoy the benefits of competition in reducing the freight and passenger tariffs of the railway companies. If, after a community has by donations or taxation, expended a large sum in securing the construction of a second line of railway for the purpose of thereby enjoying the benefits of competition, it is open to the two railway corporations to combine together, and by contract establish a tariff of rates which neither company is at liberty to depart from, it is clear that the community is thereby deprived of its only protection against unfair charges.

In my judgment, the community is absolutely entitled to the protection against unfair rates which is afforded by free and unrestrained competition between the companies engaged in the transportation business of the country, and any contract or combination which is intended to restrict competition in this particular is inimical to the public welfare, and is therefore illegal.

In the opinion of the majority of the court it is urged, in substance, that it is lawful to place a reasonable restriction upon competition, and that, therefore, the question in each case is whether the restriction placed upon competition results in the imposition of unreasonable rates for the services rendered. This is the rule in regard to private parties engaged in private pursuits, because as to such pursuits a restriction upon competition does not affect the public unless it is unreasonable, and the public has no right of complaint until its interests are unfavorably affected; but, as I have endeavored to maintain, in the case of public railway corporations, the work they are engaged in is inherently of a public nature, and any contract or combination entered into between them, intended to affect the rates to be charged, must of necessity affect the entire community. In view of the public interest in the rates charged for transportation over the public highway, and in the absence of legislation affording other means of protection, the community cannot be deprived of the safeguard secured by free and unrestricted competition between the different lines of railway without placing the welfare of the public in subjection to the interests or supposed interests of those managing these corporations, which certainly cannot be lawfully done.

But it may be argued that due protection in this particular is afforded by holding that reasonable restriction upon competition as to rates will be sustained, and unreasonable restrictions will be held invalid. I apprehend that no other meaning can be given to this proposition than that, if the rates established under a given restriction upon competition are reasonable, then they will be sustained; otherwise not. The reasonable rates which the community is entitled to enjoy are those which result from free and unrestrained com-

petition, and not those which are agreed upon by the railway companies in the absence of competition. In the absence of legislation establishing a standard for reasonable rates, and in the absence of rates fixed by free competition, what practicable criterion is there for determining whether a tariff of rates agreed upon by railway companies is or is not reasonable with reference to the public? If it be the law that railway companies may combine together, and by contract agree upon the schedule of rates to be charged, and bind themselves under penalties not to depart from the schedule thus established, and if the individual citizen can obtain no relief against the exaction of rates thus fixed, unless he can in each instance prove to a court and jury that the rate charged is unreasonable, then he is in fact wholly without remedy. The great cost and other evils of litigation of this character would ordinarily deter the private citizen from the effort to maintain his rights by an appeal to the courts.

But if the citizen should assume these burdens, and should contest the rightfulness of the charges complained of, he would, under the view advanced in the majority opinion, be compelled to establish by competent evidence that the rate complained of was unreasonable. By what criterion is the question of the reasonableness of the rate charged to be determined? The article shipped is perhaps a carload or two of livestock or of wheat or other like products. Is the citizen to be compelled to attempt to prove what it really costs the railway company to transport these cars? Is the inquiry to embrace an investigation into the cost of the construction of the road, of the equipping the same, and of operating the road on the one hand, and into the total amount and character of the business done by the road, and of the amounts received therefrom, so as to ascertain whether a due relation exists between the income and expenditure? It must be apparent to any one that it would be wholly impracticable to enter upon such an investigation, and, if it was entered upon, the citizen would be at such a disadvantage as to amount to a total denial of justice to him. If it be said that the reasonableness of the rate charged is to be ascertained by comparison with the rates charged for like services by other railroads, then the rates accepted as the standard of comparison must be such as are the result of free competition, because it would not do to accept as a standard rates fixed by a combination, for it could not be known that these rates are reasonable, and the proposed standard would be without value as evidence. The difficulties that would of necessity be encountered by any citizen in establishing the unreasonableness of a particular rate charged him are such as to render a remedy by that method of no value, and hence it is that at all times the citizen is entitled to the protection afforded him by absolutely free competition between railway companies. Any contract or combination which tends to deprive the citizen of the protection thus afforded him is contrary to public policy.

In the opinion of the majority a very full and careful analysis is made of the various

provisions of the contract entered into by the defendant companies, and the benefits to be derived therefrom are pointed out. I do not doubt that in many respects the provisions of this contract, if carried out, would operate beneficially for the companies and without injury to the public; but the illegality of the contract, in my judgment, lies in the fact that its main purpose is to protect the companies from the effects of free competition in reducing the rates to be collected for the transportation of freight over the lines of railway operated by the contracting corporations. Certainly the defendants, if they considered themselves bound by this agreement, were no longer at liberty to compete with each other in the matter of rates to be charged the public.

The rates are to be established by a committee, and are to be observed by all the contracting parties, with a liability to a penalty for any breach of the contract. It is clearly evident that the defendants entered into this contract in the expectation that thereby a schedule of rates would be fixed which would differ from those which would prevail in the absence of such concerted action.

The several companies are no longer left free to fix rates based upon considerations pertaining to their own lines of railway, the cost of operating the same, and the facilities possessed for handling the business. If the making and enforcement of this contract would not have the effect of establishing a schedule of rates other and different from what would obtain in the absence of the contract, what induced the companies to enter into it?

I can place no other construction upon this contract than that its main object was to remove the question of rates from the field of competition. In my judgment, it is not necessary to enter upon a minute examination of the averments made in the bill and denied or admitted in the answer. The bill charges and the answer admits that the defendant companies entered into the contract in question, and the main issue in controversy is as to the validity of the contract. As I construe it, the invalidity thereof is apparent upon its face, in that it clearly appears that the purpose of the contract was to establish by agreement a schedule of rates which was to bind all the contracting companies, and which each company was bound to enforce as against its patrons; thus depriving the public of the protection resulting from free and unrestrained competition between these public corporations. It matters not that the particular rates now enforced under this contract may be wholly reasonable. That is not the question. The point to be decided is whether these public corporations, engaged in a public enterprise, have the right to agree that they will cease to compete with each other.

Whether these corporations shall or shall not be relieved from the effects of free and fair competition in the carrying on of the public work they are engaged in is a question to be decided by the people, acting through the proper governmental agency. It is not for the railway companies to decide

when they will compete with each other and when they will not. The public welfare demands that they should remain always subject to the operation of this principle of free competition, unless they are freed therefrom by legislative action, whereby other safeguards are substituted for that afforded the public by the operation of the principle named.

If I correctly apprehend that portion of the majority opinion which deals with the effect of the Interstate Commerce Act, it is therein argued that this Act radically changes the rights of the railway companies and the public in this particular, and that it was intended thereby to free the companies from the effects of free competition. With all due deference to my brethren, I must yet be permitted to say that it seems to me that the opinion always loses sight of the distinction existing at the common law between parties following private pursuits and public corporations engaged in public enterprises.

The Interstate Commerce Act did not materially change the rights pertaining to the public. It created certain machinery for the better enforcement and protection of the public interests, but the rights to be protected were already in existence, and the statute in this respect is only declaratory of common law principles. Before the enactment of that statute, railway companies were recognized to be public corporations, charged with the duties and obligations pertaining thereto. As common carriers they were under legal obligation to deal with the public, and to afford equal facilities to every citizen, and they were only entitled to demand reasonable, and not exorbitant, compensation for the services rendered by them. The purpose of the Interstate Commerce Act was not so much to change the legal rights of the common carriers and of the public as it was to compel a change in the practices of the railway companies, and to enforce compliance on their part with the duties and obligations which rested upon them under the principles of the common law. The line of argument followed by the majority seems to assume that the main purpose of the Interstate Commerce Act is to regulate the relations between the competing lines of railway, and to protect the weaker lines of railway and the capital invested therein from being absorbed by the stronger competitor. That there are evils of this nature of great magnitude is not to be denied, but the Interstate Commerce Act was not enacted for their eradication.

The primary purpose of that Act was to deal with the relations existing between the common carriers and the public, and to enforce the rights of the latter. Experience had shown that railway companies had, in many instances, favored particular localities or particular parties or particular classes of business at the expense of the community at large, and the Act was, in the language used by the Supreme Court in *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 896, intended "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all ship-

persons on an absolute equality." The uniformity and equality of rates sought to be secured by that Act are not between the schedules of rates charged by the several companies, but between the charges actually made by each railway company to its patrons. The Act does not require the schedule of rates adopted by one company to conform to that of a rival company. What it does demand of each company is that, in dealing with its customers, it shall make no unjust discrimination, but shall, for the like service performed under similar circumstances, charge the same rate to all. The Act provides that all charges for the transportation of persons or property from state to state shall be reasonable and just, but no standard for ascertaining whether a given rate is reasonable or not is established by the Act.

I fail, therefore, to perceive the force of the argument that the adoption of the Interstate Commerce Act worked a radical change in the relations existing between railway companies and the public, and that one effect thereof was to authorize the former to combine together for the purpose of escaping the effect of competition upon the rates to be charged the public for the services rendered. Before the adoption of that Act the community was certainly entitled to the protection derived from free competition between the lines of railway engaged in interstate traffic, and there is nothing in that Act which deprives the public of this safeguard. That Act was intended to secure to the public the enjoyment of the pre-existing right to reasonable rates upon interstate commerce, and to defend the public against the evils resulting from unjust discrimination on behalf of favored parties, localities, or classes of businesses.

In the opinion of the court are found citations from the reports of the Interstate Commission in which are depicted the evils that are occasioned to the railway companies and the public by warfares over rate charges, and the advantages that are gained in many directions by proper conference and concert of action among the competing lines. It may be entirely true that, as we proceed in the development of the policy of public control over railway traffic, methods will be devised and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition and from rate wars which unsettle the business of the community, but I fail to perceive the force of the argument that, because railway companies, through their own action, cause evils to themselves and the public by sudden changes or reductions in tariff rates, they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition the stronger competitor may crush out the weaker. Fluctuations in prices may be caused that result in wreck and dis-

aster, yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be. There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they cannot, by combination and agreements among themselves, bring about this change. The fact that the provisions of the Interstate Commerce Act may have changed in many respects the conduct of the companies in the carrying on of the public business they are engaged in, does not show that it was the intent of Congress in the enactment of that statute to clothe railway companies with the right to combine together for the purpose of avoiding the effects of competition on the subject of rates.

There are three general methods by which these rates may be established. It may be done by direct legislative enactment (whereby either fixed rates or a maximum or minimum limit are enacted by the statute or by provisions for the adoption of rates by a commission) or the rates may be adopted by the independent action of each company, acting under the spur of self-interest, and controlled by the effect of free competition, or the rates may be fixed by means of agreements or combinations between the rival lines of railway, whereby each contracting company is bound to charge the rate thus fixed and agreed upon. Congress has not yet undertaken to establish a standard of rates, either directly or through the action of a commission or the equivalent. Neither, in my judgment, has Congress, in enacting the interstate commerce statute and the amendments thereto, conferred upon the railways the right to enter into combinations for the purpose of compelling the members to charge the rates fixed by a committee of the association, in whose deliberations the public have no part, and the avowed purpose of which is to evade the operations of the law of competition, which is as yet the only safeguard upon which the public can rely for the securing of the adoption of reasonable charges upon interstate traffic. I had always supposed that the enactment of the interstate commerce statute was the result of a popular demand, which insisted upon relief being given to the community as against the methods pursued by the railway companies which, in some particulars at least, were deemed to be inimical to the public interests. Looking at the causes which brought about the enactment of this statute, and the evils at which it was aimed, it does seem clear that it is wholly wrested from its purpose when it is held that it creates numerous radical and effective changes in the public policy of the nation touching competition

between railroad companies engaged in interstate commerce. For the better protection of the rights of the public, and to sweep away the system of discriminations in favor of localities, individuals, or classes of business which had come into vogue, the Interstate Commerce Act was intended to introduce radical changes in railway methods, but it never was intended to curtail the rights of the public and enlarge those of the railway corporations in any substantial particular. The argument of the majority is that, even if it were admitted that under common law principles all contracts or combinations between public common carriers for the establishment of rates would be held to be contrary to public policy, nevertheless the enactment of the Interstate Commerce Act revolutionized the law in this particular, and authorized railway companies to enter into combinations for the purpose of establishing reasonable restrictions upon the freedom of interstate commerce.

Reading that Act in the light of the causes leading to its enactment, I cannot find in any of its provisions foundation for the theory that it was intended to confer upon railway companies the right to enter into combinations which, under the principles of the common law, would be illegal, because contrary to public policy. The reasoning of the court is to the effect that "the interstate commerce law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and Congress has thereby expressed its conviction that absolutely free competition between carriers is not at the present time conducive to the public welfare, and that other things are more essential to the public good."

I do not quarrel with the proposition that the Interstate Commerce Act imposes important restrictions (not upon the right, however) but upon the practice of railway companies to do as they please in the matter of making and altering rates. But how does that fact tend to show that the Act places restrictions upon the rights of the public? The Congress of the United States may place restrictions upon the rights of the railway companies and upon the rights of the public, but the fact that Congress may enact laws which are intended to change the methods pursued by the companies in certain particulars does not necessarily restrict the rights of the public. But if it be admitted that by some possible mode of construing the Interstate Commerce Act, and the action of the Commission created thereby, it can be held that under its provisions the railway companies became clothed with the right to combine together, and by mutual agreement to create restrictions upon the freedom of interstate commerce so long as the same are reasonable,—which is the position of the court,—then would it not follow that the right thus created by the Interstate Commerce Act is abrogated by the later enactment found in the Anti-Trust Act, which expressly declares, not that unreasonable contracts, combinations, or restrictions are illegal, but that every contract, combination in the form of

trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is illegal? The statute declares that restraint of interstate commerce, all restraints, every restraint of such trade and commerce brought about by contracts, combinations in the form of trusts or otherwise, or by conspiracy, are illegal. The statutory declaration in effect is that interstate trade and commerce are to remain free from restriction. The declaration of the court is, in effect, that railway companies engaged in interstate commerce may place restrictions upon such commerce; that the right so to do, if not existing under the common law, is conferred upon railway companies by the provisions of the Interstate Commerce Act; that such restrictions cannot be held to be illegal unless it is shown that they are unreasonable, and the presumption is in favor of their reasonableness and consequent legality. I cannot believe that such is the meaning of the Interstate Commerce and the Anti-Trust acts. When the latter Act was adopted, it had been declared by the Supreme Court of the United States to be the law that, with regard to the classes of business that are of a public nature, and are carried on to meet a public necessity, contracts imposing restraints thereon, however partial, cannot be sustained, because in contravention of public policy. It cannot be successfully questioned that railway companies engaged in interstate trade and commerce are carrying on a business of such public character as of necessity places it in the class declared by the Supreme Court to be of such a nature that no restraint thereof, however partial, is permissible. It is a familiar principle that statutes are to be construed with reference to and in the light of the law existing at the date of their enactment. Thus reading the Anti-Trust Act, is not the first section thereof intended to clearly enunciate in statutory form the principle already declared to be the law by the Supreme Court? The Interstate Commerce and Anti-Trust acts were passed for the protection of the interests and enforcement of the rights of the public. The view taken thereof in the opinion of the court results in curtailing the rights of the public and in enlarging the powers of railway companies. If the law be as is therein declared, then these public corporations, engaged in carrying on the public duty of constructing and operating the public highways, over which, of necessity, nearly the entire traffic of the country must be carried, are at liberty to combine together and determine in secret conclave the rates they will demand from the public for the services rendered, and enforce the imposition of the schedules thus fixed by penalties assessed against any party to the combination which may vary from the agreed schedule, and the individual citizen has no relief against rates thus fixed, unless he can satisfy some court or jury that the rate charged is unreasonable.

It is admitted in the opinion of the court that the contract in question has some tendency to check competition in rates, but it is said the restraint is slight, and therefore lawful. If the natural tendency is to check competition in the matter of rates, and to place

a restraint, though but slight, upon the freedom of interstate traffic, what tribunal is to determine when the proper boundary has been passed, and by what standard is the lawfulness of the restraint to be measured? The legal consequence of the position of the court is that railway companies, by combinations between themselves, may fix the schedule of rates to be charged the public, and may bind themselves under penalties not to depart from the rates thus agreed upon, and the citizen is bound to pay the tariff thus established, unless he can satisfy a court that the sum charged is unreasonable. It may sound well to say that the courts are open to the citizen, and that they will afford him protection against the exaction of unreasonable rates, but we know that the supposed remedy would only aggravate the original wrong. It is said in the opinion of the court that there is nothing in the contract described in the bill which indicates any purpose or attempt to obtain a monopoly of the trade of the region traversed by the defendant corporations; that the systems of the Great Northern, the Northern Pacific, the Southern Pacific, and Texas Pacific railway companies are operated in the region subject to the regulations of the defendant association, but they are not members of it, and therefore the defendant companies cannot monopolize the entire traffic of the region. The great majority of the patrons of the several lines of railway represented in the association in question do not live at competitive points. As to each of them the line of railway nearest to them has, of necessity, an absolute monopoly of the carrying trade belonging to the business in which they are engaged. Of what advantage to a farmer, a merchant, or a manufacturer doing business at or adjacent to a station upon a given line of railway is the fact that 20 or 50 or 500 miles from his place of business there is another railway line? The distance is so great, and the cost of reaching the same is so great, that he is practically debarred from making use of the same, and he has no choice in the matter. Parties doing business at competitive points may have free choice, and as to them it may be true that neither competing line has a monopoly of the business transacted at places where competition, being free and unrestricted, may work out its legitimate results, but this is not true of persons engaged in business at noncompetitive points. As to them, the control of the railway company adjacent to them is practically absolute. Of necessity, in such case the railway company has a complete monopoly of the entire transportation traffic of the region in which there is in fact no competing line. Against the evil tendencies of this monopoly, protection is afforded to the citizen by securing free and unrestrained competition between the lines of railway at the several points or localities where they in fact come into active competition, and, reasonable rates having thus been secured at these points, we have a standard established by which it may be determined whether the rates charged from intermediate noncompetitive points are reasonable or not, and the provisions of the Interstate Commerce Act forbidding a greater

charge for a shorter than a longer haul under similar circumstances may be invoked to secure a proper proportionate relation between the rates at competitive and noncompetitive points. If, however, the railway companies may combine together to fix the rates to be charged at competitive points, thus eliminating the effect of free competition, how fares it with the citizen residing at the noncompetitive point? By the very necessities of his location he is debarred from choosing the line of railway he will patronize. He is compelled to avail himself of the facilities afforded by the line nearest him. The railway therefore has the absolute monopoly of the transportation pertaining to the business of the citizen. It likewise has the exclusive control of the rates to be charged; and if the company, by contracts and combinations with the other lines of railway operating in the same region, may free itself from the restrictions afforded by free competition, what is lacking to constitute a complete and absolute monopoly of the transportation business thus dependent upon the given line of railway? The direct and necessary consequence of the contract entered into by the defendant companies is to create and perfect an absolute monopoly in each of the contracting parties over that part of the business carried over their respective lines which comes from that portion of the territory in which there is not in active operation a competing line; and, even as to regions which are so situated that competition might be had in the absence of contracts preventing the effects thereof, a like monopoly is created by the contract entered into by the defendant companies.

In the matter of rates, competitive points are those where the transportation business of the locality is sought by two or more competing lines. In the case of sales of property at public auction, it is the rule that combinations among proposed purchasers, whereby it is agreed that they will not bid against one another, but the property shall be bid off at an agreed price for the common benefit of all the contracting parties, are illegal, and a sale thus made is voidable, because all fair competition is prevented by such combination. If the competitors for the transportation business of a given locality agree that there shall be no competition between them on the subject of rates to be charged, does not the same evil result? In the one case it is sought to deprive the owner of his property, without paying to him the fair value that would probably be bid in case competition was not stifled by the agreement between the purchasers. In the other the citizen is subjected to the payment of charges which are not the result of free competition, but are the result of combinations and mutual agreements, entered into for the express purpose of eliminating competition as an element in the determination of the rate to be charged. Thus points and localities which are competitive so long as there is active rivalry between the railway lines seeking the business of the region cease to be such when the rival lines combine and become, in effect, but one upon the subject of the charges

to be demanded of the citizens. In such event the citizen becomes subject to a monopoly as complete and absolute as though there was but a single line of railway within his reach. Thus is found in the contract and combination entered into by the defendant companies elements which directly tend to the establishment of a monopoly, complete and absolute, over the transportation traffic in the region traversed by the lines of the defendant companies, due to the undeniable fact that the price charged for the transportation of the property of the community exercises a controlling influence over the question of the success or failure of the various business pursuits and avocations upon which the citizens are dependent for a livelihood, and, moreover, it directly affects and controls the cost to the public of all the necessities of life.

The declaration found in article I. of the contract shows upon its face the main purpose of the combination, it being therein recited that "the traffic to be included in the Trans-Missouri Freight Association shall be as follows: (1) All traffic competitive between any two or more members hereof passing between points in the following described territory," etc. Does not this clearly show that the main purpose of the contracting parties is to deal with that traffic which, in the absence of combinations between the railway companies, would be controlled by the results of competition, and to deal with it in such manner that it will cease to be competitive traffic and become the subject of combinations and agreements whereby the rates to be charged—which is the essential element in which the public has a vital interest—is removed from the protection derivable from free and unrestrained competition, and is left to the determination of committees appointed by the railway companies, whose action is binding upon the members of the association, and against which the individual citizen is without adequate remedy, no matter how unjust the rate fixed by the committee may in fact be?

Another feature observable on the face of this contract is that by the exceptions contained in article I. the traffic between many points and in some classes of freight are excepted out from the operation of the agreement, and thus it appears that it is the express purpose of the defendant companies to carry on part of their business subject to the

results flowing from combinations between the carriers, and other portions are not to be affected thereby. Is it not the natural result that the public will be subjected to different burdens, and that differences in rates will be charged, which in effect will result in discriminations for or against particular localities? But I shall not dwell upon this and other points of minor importance. As I view the subject, the inherent and fatal vice existing in the combination and agreement entered into between the defendant railway companies is found in the fact, patent upon the face of the contract, that it is the main purpose of the contracting parties to stifle competition in the matter of rates to be charged the public. The illegality of such purpose is not dependent upon the extent of the restraint placed upon the freedom of the public business, but upon the fact that the avowed intent is to place a restraint, whether slight or great, upon a class of business which is inherently and always of a public nature, and touching which the declaration of the law, both common and statutory, is that it must remain wholly free and unrestricted. If the protection afforded by fair and free competition can be evaded and nullified by means of combinations such as are contemplated and provided for in the contract entered into by the defendants in this case then the only safeguard against unreasonable rates will be stricken down, and thus interstate commerce will be subjected to the restraints and injuries flowing from the imposition of tariff rates agreed upon by the companies, but in the establishment of which the public has no direct control through legislation, nor direct influence through the effect of free competition.

In my judgment, the right to insist upon free competition between railway companies engaged in carrying on interstate commerce is a right which belongs to the public, of which it cannot be deprived except by its own consent, and every contract or combination between these public corporations which tends to remove the business carried on by them from the influence of free competition tends to deprive the public of this right, of necessity tends to subject interstate commerce to burdens which are a restraint thereon, is inimical to the public welfare, is contrary to public policy, and in contravention of both the language and spirit of the Anti-Trust Act of July 2, 1890.

INTERSTATE COMMERCE COMMISSION.

C. O. MORRELL, *Complainant*,

v.

THE UNION PACIFIC RAILWAY COMPANY, THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, THE OREGON RAILWAY & NAVIGATION COMPANY, *Defendants*.

1. Rates maintained and which may be reasonable under the conditions existing in one section or part of the country afford no safe criterion by which to measure reasonable
 2. Rates and charges in force on lines of rival
- 4 INTER S.

companies or on different branches or lines of the same company are entitled to consideration in connection with the question of

reasonable charges for transportation services rendered under like conditions.

Complaint filed February 16, 1891.—Answers filed March 9 to May 18, 1891.—Heard at Spokane Falls, Washington, May 29, 1891.—Briefs filed September 9 to October 9, 1891.—Decided December 22, 1893.

R EASONABLE rates on wheat. See Complaint and Answer, 3 Inters. Com. Rep. 641, 642.

Messrs. B. L. & J. L. Sharpstein for complainants.

Messrs. J. M. Thurston and W. W. Cotton for defendants

REPORT AND OPINION OF THE COMMISSION.

Morrison, Commissioner:

In this proceeding complaint was made against the Union Pacific Railway Company that it operated a railroad from Pullman, in the state of Washington, to Portland, in the state of Oregon; that its rate of charges, \$6.50 per ton—32½ cents on the hundred pounds—of wheat from Pullman to Portland was “unjust, unreasonable and extortionate,” and that any higher rate than \$4 per ton—20 cents on the hundred pounds—of wheat in carloads from Pullman to Portland was unreasonable. The complainant asked that investigation be made, the reasonable rate ascertained and determined, and that the sum of \$2.50 per ton—\$48.11—should be awarded to him, that being the amount paid in excess of 20 cents per hundred pounds on one carload of wheat shipped by him from Pullman to Portland, January 19, 1891.

The Union Pacific Company for answer denied that it operated any railroad between Pullman and Portland or that it operated any line or lines of railroad in the states of Oregon and Washington, and it appearing that the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company were proper parties to be named as defendants, they were so named, and a copy of the complaint herein was duly served on them.

The Oregon Railway & Navigation Company, thus made a defendant, answering the complaint says, that prior to August 1st, 1887, it owned and operated a line of railway between Pullman, Washington, and Portland, Oregon; that by agreement or lease dated January 1st, 1887, which became effective August 1st, 1887, all the road owned and operated by this defendant in the states of Washington and Oregon at the date of said agreement had been leased to the Oregon Short Line & Utah Northern Railway Company for a fixed rental in no

way dependent upon the earnings of the leased property; that said Oregon Short Line & Utah Northern Railway Company had, at the time said agreement became effective, entered into the use and possession of all the railway lines owned by this defendant, and was at the time of the commencement of this proceeding, and still is, in the possession and use thereof; and that it, the Oregon Railway & Navigation Company, is not, and has not since August 1st, 1887, been engaged in operating or in making rates for transportation or interested in the profits or earnings of any railway in the states of Oregon or Washington.

The Oregon Short Line & Utah Northern Railway Company, answering in obedience to the order of the Commission, admits that it operates a line of railroad from Pullman, Washington, to Portland, Oregon, by virtue of a lease from the owner, but denies that the rate charged, 32½ cents for the hundred pounds, is unreasonable, and avers that the rate of \$4 per ton—20 cents on the hundred pounds—prayed to be established would be unreasonable and unremunerative.

The questions in controversy being thus presented, the parties were heard and the investigation made at Spokane, state of Washington.

The facts ascertained and deemed to have a bearing on the questions thus presented for determination are:

1. The complainant, C. O. Morrell, is a farmer and grain grower, residing at Pullman, Whitman county, Washington. In 1890 he produced about 18,000 bushels of wheat. Among shipments made by him was one carload of 38,498 pounds, shipped January 19, 1891, at the regularly published rate of 32½ cents per hundred pounds from Pullman, Washington, to Portland, Oregon, a distance of 379 miles, over the lines owned by the Oregon Railway & Navigation Company, operated by the Oregon

Short Line & Utah Northern Railway Company, and is part of the "Union Pacific System."

2. Whitman county is the center of a productive wheat region in southeastern Washington, where wheat production has largely increased in the past few years. The crop of 1890 for that county is estimated at 8,000,000 to 10,000,000 bushels. About 1,000,000 bushels were shipped from Pullman station. Storage on the farms is insufficient, and wheat is largely delivered for immediate shipment or stored in elevators or warehouses at the various railway stations soon after harvest. In the four months from September 15 to January 15 most of the crop is shipped to market, though shipments continue to a later period and to some extent throughout the year. As a rule, farmers do not ship to market, but sell to dealers at the railway stations. The wheat is sold, delivered and shipped in sacks ready for export. In the spring of 1891, after the crop of 1890 had been mostly sold and shipped, the price was as high as 75 cents. In the years 1887, 1888, 1889, and 1890 it was at times as low and lower than 45 cents, but the average was nearly 50 cents per bushel for the three or four years. The sacks cost 4 cents per bushel. The shipper loads and unloads at a cost of about \$1 per ton. The Pullman rate of 82½ cents is a group rate, and prevails over the southeastern Washington wheat-growing territory north of Snake river, from all stations as far west as Connell or Palouse Junction. These rates have not much changed in the last three or four years.

3. The lines of the Northern Pacific Railroad Company, or Northern Pacific System, extend to Pullman, Washington, and Pendleton, Oregon, and other points in the wheat producing districts of southeastern Washington and northeastern Oregon. The two systems make and maintain a joint tariff of rates to Portland from Pullman and other points in such group rate territory, and the same rates to Portland are made and maintained in separate tariffs by each of the two systems from the several stations on their respective lines in such territory.

The Northern Pacific system makes the same rate on wheat from southeastern Washington and northeastern Oregon over its lines to Tacoma and Seattle as are established by such joint or separate tariffs from the same points to Portland. The distance over the Northern Pacific route or lines from Pullman to Portland is 620 miles; to Tacoma 478 miles, and its wheat rate is 82½ cents to both. The distance over its route or lines from Pendleton to Portland, Oregon, is 453 miles; to Tacoma, Washington, 308 miles; to Seattle 329 miles, and its rate, 28½ cents per hundred pounds, is the same to the three places.

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4. Flour is occasionally carried by the Union Pacific System and connecting lines from Oregon to Galveston, Texas, a distance of 2500 miles, at 75 cents per hundred pounds. Wheat is carried by the Northern Pacific in considerable quantities from points east of the Columbia river in the state of Washington to St. Paul, Minnesota, a distance of 1600 miles, for 50 cents per hundred pounds. In the main, wheat produced in Oregon and Washington is shipped to Portland, Tacoma and Seattle. Previous to 1888 the Northern Pacific did not reach Pullman over its own or leased lines, and wheat from that place and adjacent country was shipped to Portland. This traffic is now divided, and in 1890 nearly one half of it went over the Northern Pacific to Tacoma, from which the ocean rate was for a time 65 cents per ton lower than from Portland.

5. Pullman is a branch line station 19 miles from defendant's line extending from Spokane to Portland, distant from each other about 450 miles. To Portland the rate is the same from Pullman and Spokane. The rate in dispute is over the line or lines of the Union Pacific System from Pullman, by way of Colfax, La Crosse, Walla Walla, and Wallula in Washington, and Umatilla, Oregon, to Portland. On the 135 miles of this route between Pullman and Walla Walla the grades are heavy in both directions, one grade of 150 feet to the mile extending five miles, and another as heavy for a distance of two and a half miles. The remainder of the route, in the main, is down the Columbia river, and the grades are light. In winter the operation of the road is subject to interruption from snow-drifts.

6. This road or line is operated by the Oregon Short Line & Utah Northern Railway Company under a lease from the Oregon Railway & Navigation Company, which became effective August 1st, 1887, for a term of 99 years, and embraces, besides lines of railway, several water lines, ocean and river, including vessels having an aggregate tonnage of 18,000 tons. Under it the Oregon Short Line & Utah Northern Railway Company is in the possession and use and operates all the lines of road owned by the said Oregon Railway & Navigation Company, an aggregate mileage of 1029 miles, situate chiefly in the states of Oregon and Washington. The annual rental for the leased property to be paid by the Oregon Short Line & Utah Northern Railway Company to the Oregon Railway & Navigation Company aggregates \$2,556,593.64, and is the amount of its fixed charges including the interest on \$27,940,000 of bonded indebtedness and a dividend of 6 per cent on its \$24,000,000 of capital stock. The annual payment of this rental is guaranteed by the Union Pacific Railway Company.

7. Besides the lines or road of the Oregon

Railway & Navigation Company operated by the Oregon Short Line & Utah Northern Railway Company, it operates several lines aggregating a mileage of 1400 miles which it owns in the territory of Utah and the states of Wyoming, Montana, Idaho, and Oregon. It owns a majority of the capital stock of the Oregon Railway & Navigation Company, and the Union Pacific Railway Company owns a controlling part or interest of the capital stock of the Oregon Short Line & Utah Northern Railway Company.

8. The annual reports of the directors of the Union Pacific Railway Company contain detailed statements of reported operations of the roads or lines operated by the Oregon Short Line & Utah Northern, including the road of the Oregon Railway & Navigation Company and other leased roads, lines, and property, all of which are stated in said annual reports to be part of the Union Pacific system.

9. For 1886, the year previous to making said lease, the Oregon Railway & Navigation Company reported net earnings of \$3229 per mile on its mileage, then 686 miles; the gross earnings being \$6052, and the operating expenses \$2822, per mile. For the year 1890, with a largely increased mileage, the Union Pacific Railway Company reports decreased gross earnings with increased operating expenses, or \$894,836.79 net earnings on 1029 miles of road in 1890 as compared with \$2,215,686.90 annual net earnings on 686 miles of road reported by said Oregon Railway & Navigation Company for 1886, the year next before its line became part of the Union Pacific system under said lease.

10. The Union Pacific Railway Company also reports the net earnings of the leased railroad and property of the Oregon Railway & Navigation Company as insufficient for the

payment of the agreed rental guaranteed by the Union Pacific. The reported shortage is for 1888, \$349,118.11; for 1889, \$736,205.82, and for 1890, \$1,789,190. For these years the reported net revenue was, for 1888, \$2,228,443.87; for 1889, \$1,542,294.48, and for 1890 \$894,836.79.

11. In explanation of the falling off in net revenue and earning capacity of the Oregon Railway & Navigation Company, the report of the Union Pacific Railway Company for the year 1889, filed as an Exhibit in this proceeding on behalf of the defendants, says:

"This loss in the earning capacity of the Oregon Railway & Navigation Co. was due mainly to deficient crops in eastern Oregon and Washington, caused by the absence of snow during the previous winter, which resulted in a large falling off in earnings from local traffic. The traffic exchanged between the Oregon Railway & Navigation Co. and the lines of the Union Pacific system, the earnings from which appear chiefly in the gross returns of the latter, underwent a large increase during the year."

The appendix to said Union Pacific report contains "part of the report of the Committee of the United States Senate accompanying the Senate bill for the settlement of the Pacific Railroad debts."

In this report of the Senate Committee it says:

"In view of the recent development of the Pacific northwest this alliance of the Oregon Short Line and the Oregon Railway & Navigation Co. has become of the greatest possible value to the Union Pacific, constituting probably to-day one third of the total through business of the Union Pacific Railway."

No evidence was offered in explanation of the falling off in the net earnings for 1890, amounting to nearly one half as compared with the previous year.

The Union Pacific System reports for years ending December 30, 1888, 1889, and 1890, show.

YEAR.	MILEAGE.	GROSS EARNINGS.	OPERATING EXPENSES.	NET EARNINGS.	NET EARNINGS PER ROAD MILE.
1888	5041.86	\$30,195,522.53	\$18,476,428.04	\$10,460,634.74	\$2074.96
1889	7889.55	39,669,600.06	24,516,751.40	18,656,047.41	1848.02
1890	7562.94	48,049,248.36	29,843,961.81	12,288,084.09	1618.16

The gross earnings per mile of road as reported were, for 1888, \$5989.56; 1889, \$5368.34, and for 1890, \$5692.13.

After the hearing and previous to the filing of briefs by counsel for defendants, the rate complained of was, on August 10, 1891, reduced to 28½ cents. On June 7, 1893, a further reduction was made to 28¼ cents, the rate now in force, and the reasonableness of which is now to be determined.

Counsel for defendants insist that 28¼ cents—the rate at the time their brief was filed—was not excessive. It is, they claim, less in proportion to distance than the rate, 28½ cents, 4 INTER 8.

found to be reasonable by the Commission in *Evans v. Oregon R. & Nav. Co.*, 1 Inters. Com. Rep. 641, for carrying wheat from Walla Walla, Washington, 246 miles to Portland, Oregon, in the spring of 1887.

The order of the Commission in that case was:

"That on and after the 15th day of December, 1887, the defendant must cease to charge more than twenty-three and one half cents per hundred pounds, or four dollars and seventy

cents per ton, on wheat transported by it over its railroad lines from Walla Walla, in Washington territory, to Portland, in the state of Oregon, during the present grain season.

"The order is also made in this form as to the present grain season upon the statement in the answer of the defendant that further reductions on wheat rates are intended to be made by defendant as soon as this can be done and upon the general course of dealing of defendant, as shown in the proofs, that the rate for the next season on wheat will doubtless be further modified."

This order provided alone for the wheat season of 1887-1888, which had nearly closed when the order was made; and their counsel overlooked the fact that defendants have not met the reasonable expectation of the Commission that for the then next and subsequent wheat seasons or years the Walla Walla and Portland rate would be further modified.

Previous to the summer of 1887, grain and other freights destined to Portland from points further east, including Pullman, passed over the lines of the Oregon Railway & Navigation Company. In 1887 and 1888 the Northern Pacific Railroad Company extended its lines west to Tacoma, thence to Portland, and east to Pullman and other points in the grain growing region of southeastern Washington, and over its lines so extended the Northern Pacific Company took from Pullman and other points a considerable part of the wheat and other freights which would otherwise have been carried over the road of the Oregon Railway & Navigation Company. The defendants urge this diversion of Pullman and other traffic from their lines in justification of higher transportation charges than would be reasonable if there was no competition for Pullman business.

Competition, or a division of business as the result of building a second road where previously but one existed, should justify lower rather than higher charges.

The falling off in the annual surplus and earnings of the Oregon Railway & Navigation Company, as reported by the Union Pacific Railway Company, is urged as an additional reason for maintaining higher charges from Pullman than might be reasonable with the former rate of reported annual earnings.

The road of the Oregon Railway & Navigation Company is part of the Union Pacific system, and in view of the reported increase in gross earnings of the whole system and the well maintained annual earnings per mile of road, the "large increase" in the interchange of business between this road and the other roads of that system, and the great "value" of the Oregon Railway & Navigation Company to the Union Pacific Railway Company, it may

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be fairly assumed that the apportionment of earnings as made by the Union Pacific is largely a question of book-keeping.

In support of the allegation that the charges complained of were "unjust, unreasonable and extortionate," complainant's counsel in their brief direct attention to the order of the Commission in the Food Products case, investigated in 1890 (3 Inters. Com. Rep. 98) and to the rate of charges in force over the Northern Pacific lines from Pendleton, Oregon, to Seattle, Washington. The Food Products case involved charges on freight carried from Kansas and Nebraska points to Chicago. The conditions upon which these charges are based are so unlike the conditions affecting transportation in Oregon and Washington that the reasonableness of the grain rate from Kansas or Nebraska to Chicago affords no safe criterion for charges between Pullman, Washington, and Portland, Oregon. Transportation rates in force on lines of rival companies or on different branches or lines of the same company have a bearing upon and are entitled to consideration in connection with the question of reasonable charges for transportation services rendered under like conditions.

From Pendleton to Seattle the distance over the Northern Pacific is 329 miles and the rate was 23½ (now 23) cents. The rate from Pullman to Portland, now reduced to 23½, was 32½ cents when the former rate was referred to as evidence of the unreasonableness of the latter. The latter, or Pullman-Portland rate, is now relatively as low as the Pendleton-Seattle rate. The grades are heavy on both lines and the other conditions of transportation are practically the same over these two routes, except that the Pullman-Portland haul is 50 miles longer and the rate 15 cents per ton higher. This rate is but 3½ cents on the hundred pounds, or 75 cents per ton, in excess of the rate of charges which the complainant asked to have established. Substantial reductions have been made since the case was heard which justify the expectation that further reasonable modifications will follow, and further reductions of the Pullman-Portland rate by order of the Commission are not now deemed justifiable.

On the basis of the reductions made in the rate complained of, it was 8½ cents on the hundred pounds in excess of the reasonable rate which the defendants might lawfully charge complainant on the carload of wheat shipped January 19, 1891. The amount of this overcharge we find to be \$40.51, which amount the Oregon Short Line & Utah Northern Railroad Company should pay to the complainant and it is so ordered.

A. S. NEWLAND, T. W. HAUSCHILD, WALTER REEDER, *Complainants*,
v
THE NORTHERN PACIFIC RAILROAD COMPANY, THE UNION PACIFIC RAILWAY COMPANY, THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, THE OREGON RAILWAY & NAVIGATION COMPANY.

1. It is the right of shippers to have their goods carried, and the duty of common carriers to receive and forward freights by the least expensive routes at reasonable through rates.
2. Where there were two routes from the place of shipment to the place of destination, one much longer and much more expensive to operate than the other, the longer and more expensive being operated by one, while the more direct and less expensive route was over continuous lines operated by more than one common carrier: *Held*, That the rate must be reasonable for the transportation by the shorter and less expensive route.
3. Where the roads and branches of two companies extend to and penetrate a wheat producing district, from which they make a joint rate for distances of 480 miles and each company makes the same rate separately from the same district, one for distances of 450 and the other for distances of 650 miles over their respective lines to the same destination, *Held*, That it may be fairly assumed that the rates so jointly and separately made are reasonably remunerative and profitable. *Held further*, That what is reasonable compensation for this longer and more expensive branch line service is excessive for the shorter distance of 811 miles over a less expensive route from the same district to the same destination.
4. The same rate over a district so extensive denies to the producer nearer the market the advantages of his location, for which he receives no compensation in the fact that such rate was established to enable a railroad company to sell its lands more distant from markets at better prices.
5. The practice of making one rate on the same product over a large district is only justifiable under special and exceptional circumstances and is not to be encouraged when the difference in the transportation expense from the various parts of such district is considerable and substantial.
6. That railroad investments may be as secure as other property, the reasonable rates should be liberal until earnings are sufficiently large for a fair return on actual expenditure.
7. Where the market price yields but a scant return for the labor and expense of production, the cost of transportation needs to be as moderate as may be consistent with justice to the carrier.
8. Where a road or system of roads leased and made the road of another company a part of the system, *Held*, That the agreed rental cannot be accepted as the amount which the leased property must earn and the lessee may retain before any reduction can be made in the rates over the leased lines.
9. Where two companies or railroad systems stipulated for a division of traffic and agreed that when one party carried traffic belonging to the other, but one half of the charges should be retained for the transportation service, *Held*, That in the light of this arrangement in connection with the other facts of the case some reduction was warranted.

Complaint filed March 18, 1891.—Answers filed April 6 to May 18, 1891.—Heard at Spokane Falls, Washington, May 29 and 30, 1891.—Decided January 31, 1894.

R EASONABLE rates on wheat. See Complaint and Answer, 3 Inters. Com. Rep. 648, 649.

Messrs. Jones & Voorhees for complainants.

Mr. J. H. Mitchell for Northern Pacific Railway Company.

Mr. John M. Thurston for Union Pacific Railway Company and the Oregon Short Line & Utah Northern Railway Company.

Mr. W. W. Cotton for Oregon Railway & Navigation Company.

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REPORT AND OPINION OF THE COMMISSION.

Morrison, Commissioner:

The complainants for themselves and other farmers of Adams county, in the state of Washington, filed their complaint against the Northern Pacific Railroad Company and the Union Pacific Railway Company, alleging that the rate charged by said Northern Pacific and Union Pacific Companies, 82½ cents on the hundred pounds, for the transportation of wheat in carloads from Ritzville, Washington, to Portland, Oregon, was and is "excessive, unjust and unreasonable." That the distance over the lines of the two companies from Ritzville to Portland through their junction point, Wallula, Washington, is 311 miles, or 97 miles over the Northern Pacific from Ritzville to Wallula and 214 miles over the Union Pacific from Wallula to Portland. That they, the petitioners, at Ritzville on January 10, 1891, offered a carload of wheat ready loaded in a car of the Northern Pacific Railroad Company for shipment *via* Wallula Junction to Portland, which the Northern Pacific Company would only ship, and did ship over its own lines, *via* Pasco Junction, thence across the Cascade Mountains *via* Tacoma, Washington, to Portland, a distance of 478 miles over a circuitous route having many heavy grades and curves. That there are but few ascending grades on the route from Ritzville to Portland *via* Wallula Junction, where the lines of the Northern Pacific and Union Pacific Companies connect at grade, and where traffic is exchanged between these companies.

The complainants further aver that 16½ cents is a reasonable rate on the hundred pounds of wheat in carloads from Ritzville through Wallula Junction to Portland, and "claim that they have a just and reasonable right to have the products of their farms carried to market by the shortest and least expensive routes at a reasonable through rate, and that the refusal of either, or both, of the aforesaid defendants to so carry the said products is arbitrary, unjust, unreasonable, injurious to the public weal and a serious obstruction to interstate commerce."

The complainants pray for investigation and an order requiring the Northern Pacific Railroad Company "to cease and desist from refusing to receive and transport grain from the said Ritzville, Washington, by their own and connecting roads by way of the said Wallula Junction and that both the said defendants be commanded further to perform such service at such a through aggregate rate as after due hearing and investigation shall be deemed just and reasonable, and for such other and further order as the Commission may deem necessary in the premises."

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Answering separately, the Northern Pacific Railroad Company, one of the defendants, admits that it is engaged in the operation of a railroad between points in the state of Washington and points in the state of Oregon, and denies that the rate charged by it for carrying grain from Ritzville, Washington, to Portland, Oregon, namely 82½ cents per hundred pounds is excessive, unjust, or unreasonable.

It admits that the distance from Ritzville, Washington, to Portland, Oregon, is 478 miles over its own line; that it passes over the Cascade Mountains; has many heavy grades and curves, and avers that its line is expensive to maintain and operate.

It admits that its track connects at grade with the Union Pacific Railway at Wallula Junction in the state of Washington, 97 miles distant from Ritzville. It further alleges that its road terminates at Wallula Junction; that it has no line of railroad or route to Portland, Oregon, from Ritzville, Washington, over its own or a leased line by way of Wallula Junction, and that the only route it has from Ritzville to Portland over its own line and leased lines is by way of Pasco Junction and Tacoma, Washington, and submits that it has been improperly proceeded against.

The Union Pacific Railway Company separately answering, states that it is a corporation engaged in operating a line of railroad, but denies that it operates such railroad between the points stated in the complaint or any of them or that it operates a line of railroad in either of the states of Washington or Oregon. On the coming in of this answer the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company were made parties to this proceeding and served with a copy of the complaint, together with a notice to satisfy or answer the same.

The Oregon Railway & Navigation Company thus made a defendant, answering the complaint, says that prior to August 1, 1887, it owned and operated a line of railway between Wallula Junction, Washington, and Portland, Oregon; that by agreement or lease dated January 1, 1887, which became effective August 1, 1887, all the road owned and operated by this defendant in the states of Washington and Oregon at the date of said agreement had been leased to the Oregon Short Line & Utah Northern Railway Company for a fixed rental in no way dependent upon the earnings of the leased property, and that said Oregon Short Line & Utah Northern Railway Company had, at the time said agreement became effective, entered into, was at the time of the commencement of this proceeding, and still is, in the use

and possession of all the railway lines owned by this defendant. That this defendant is not, and has not since August 1, 1887, been engaged in operating or in making rates for transportation or interested in the profits or earnings of any railway in the states of Oregon or Washington.

The Oregon Short Line & Utah Northern Railway Company answering the complaint in this proceeding says, that it operates under a lease from the owner of said property a line of railroad extending from Wallula Junction, in the state of Washington, to Portland, in the state of Oregon, and that its line of railroad connects at said Wallula Junction with the line of railroad operated by the Northern Pacific Railroad Company, one of the defendants, and, further answering, alleges that an arrangement is in existence between it and the said Northern Pacific Railroad Company providing for the exchange of traffic between the said Northern Pacific Railroad Company and this defendant at Wallula Junction aforesaid, under and by virtue of which arrangement the agent of said Northern Pacific Railroad Company at Ritzville "was authorized to forward freights destined to Portland, Oregon, over the line of this defendant *via* Wallula Junction and to issue through billing for the same."

This defendant admits that the distance between Ritzville and Portland *via* Wallula and the line of this defendant is about 311 miles and that the rate on wheat between said points is 32½ cents, and denies that this rate is excessive or unjust or more than fair and reasonable compensation for the service performed, and further avers that if the rate prayed in plaintiff's petition, 16½ cents per hundred pounds, were put in effect it would work a hardship on this defendant and practically compel it to go out of business so far as through traffic originating off the line of its own road is concerned.

The matters thus presented and complained of were investigated and the parties heard at Spokane, in the state of Washington, where the facts upon which the conclusions of the Commission in this proceeding are based were ascertained to be:

1. Ritzville is a station on the main line of the Northern Pacific Railroad Company in Adams county, one of the wheat producing counties of southeastern Washington, and excepting 1889, a year of crop failure, considerable quantities of grain have been since 1887 and continue to be annually shipped from Ritzville and the adjacent country to Portland, Oregon, or other tidewater Pacific Coast points.

2. Wheat production has considerably increased in the past few years both in Washington and Oregon. Storage on the farms is insufficient and wheat is largely delivered for

immediate shipment or stored in elevators or warehouses at the various railway stations soon after harvest. In the four months from September 15 to January 15, most of the crop is shipped to market, though shipments continue to a later period and to some extent throughout the year. As a rule, farmers do not ship wheat to market, but sell to dealers at the railway stations, where it is sold, delivered and shipped in sacks ready for export. In the spring of 1891, after the wheat had been mostly sold and shipped, it was as high as 75 cents. In the three or four years, 1887-8-9 and '90, it was at times as low and lower than 45 cents, but the average was nearly 50 cents per bushel for the three or four years. The sacks cost 4 cents per bushel. The shipper loads and unloads at a cost of nearly one dollar per ton.

3. From Ritzville to Portland there are two routes by rail. The rate, 32½ cents per hundred pounds, is the same over both. The shortest, most direct and least expensive to operate of the two is over the line of the Northern Pacific Railroad Company, *via* Pasco Junction to Wallula Junction, a distance of 97 miles, thence 214 miles to Portland over the lines of the Oregon Railway & Navigation Company, operated by the Oregon Short Line & Utah Northern Railway Company. The two last named companies and the lines owned or operated by them are part of the "Union Pacific System." On this route there are but few ascending grades, and these are comparatively light.

The other route is wholly over the lines operated by the Northern Pacific Railroad Company. This route is from Ritzville to Pasco Junction; thence across the Cascade Mountains through a long tunnel to Tacoma, and thence to Portland, a distance of 480 miles, and by 169 miles the longer route. Transportation on both routes is subject to interruption from snow-drifts in winter.

4. The complainants are farmers and producers of grain, residing in the neighborhood of Ritzville. On the 10th of January, 1891, they, or one of them, loaded a car furnished by and belonging to the Northern Pacific Company with wheat and requested the agent of the company at Ritzville to bill and forward the same through to Portland over its own line to Wallula, thence over the line of the Union Pacific System, the shorter route. There was some controversy as to billing and forwarding the car of wheat and whether or not it would go by the shorter route as complainant had requested. On being advised by the agent that by whatever route the grain was forwarded the charges would be 32½ cents, the complainant consented to the routing by the agent over lines of the Northern Pacific Railroad Company.

5. The road, or that part of the shorter and more direct route, between Wallula and Portland belonging to the Union Pacific System, is operated by the Oregon Short Line & Utah Northern Railway Company under a lease from the Oregon Railway & Navigation Company. This lease became effective August 1, 1887, is for a term of 99 years, and embraces besides lines of railway, several water lines, ocean and river, including vessels having an aggregate tonnage of 18000 tons. Under this lease the Oregon Short Line & Utah Northern Railway Company is in the possession and use and operates all the lines of road owned by the said Oregon Railway & Navigation Company, an aggregate mileage of 1,029, situated chiefly in the states of Oregon and Washington. The annual rental for the leased property to be paid by the Oregon Short Line & Utah Northern Railway Company to the Oregon Railway & Navigation Company aggregates \$2,556,598.64, and is the amount of its fixed charges including the interest on \$27,940,000 of bonded indebtedness and a dividend of 6 per cent on its \$24,000,000 of capital stock. The annual payment of this rental is guaranteed by the Union Pacific Railway Company.

6. Besides the lines of road of the Oregon Railway & Navigation Company operated by the Oregon Short Line & Utah Northern Railway Company, it operates several lines, aggregating a mileage of 1400 miles, which it owns in the territory of Utah and the states of Wyoming, Montana, Idaho, and Oregon. It owns a majority of the capital stock of the Oregon Railway & Navigation Company, and the Union Pacific Railway Company owns the controlling part of the capital stock of the Oregon Short Line & Utah Northern Railway Company.

7. The annual reports of the directors of the Union Pacific Railway Company contain detailed statements of reported operations of the roads and lines operated by the Oregon Short Line & Utah Northern, including the road of the Oregon Railway & Navigation Company and other leased roads, lines, and property, all of which are stated in the said annual reports to be part of the Union Pacific System.

For 1886, the year previous to making said lease, the Oregon Railway & Navigation Company reported net earnings of \$3229 per mile on its mileage, then 686 miles, the gross earnings being \$6052 and the operating expenses \$2822 per mile. For the year 1890, with a largely increased mileage, the Union Pacific Railway Company reports decreased gross earnings with increased operating expenses, or \$964,853.95 net earnings on 1029 miles of road in 1890 as compared with \$2,215,686.90 annual net earnings on 686 miles of road reported by said Oregon Railway & Navigation Company in 1886.

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The Union Pacific Company also reports the net earnings of the leased railroad and property of the Oregon Railway & Navigation Company as insufficient for the payment of the agreed rental guaranteed by the Union Pacific Company. The reported shortage is for 1888, \$349,118.11; for 1889, \$736,205.82; for 1890, \$1,789,190.

8. The Ritzville-Portland rate of 32½ cents is a group rate, and prevails over the southeastern Washington wheat growing territory north of Snake river, including the "Palouse country," and also a small district in Idaho.

The group station nearest to Portland is Connell on the main line of the Northern Pacific Company 266 miles from Portland by the more direct or Wallula route and 435 miles over the Northern Pacific route through Tacoma. The group station farthest from Portland is Julietta in Idaho on the Spokane and Palouse branch of the Northern Pacific 481 miles from Portland over the Wallula route and 650 miles over the Northern Pacific lines through Tacoma.

Besides the "Spokane and Palouse branch" extending from Marshall Junction on its main line 115 miles southeast to Julietta, the Northern Pacific has a branch line, the "Central Washington branch," extending from Cheney on its main line 108 miles northwest to its terminus Coulee City in the group territory and from which terminus the Portland rate is the same as from Connell, Ritzville and Julietta. One rate was first established over this widely extended district by the Northern Pacific Company in 1888 that it might sell its granted lands in every part of the district on equally advantageous terms.

Boiles is 271 miles and the nearest to, while Spokane is 450 miles and the farthest, of the group stations, from Portland reached by lines of the Union Pacific System. On parts of this line or route which is by way of Colfax and near to the Idaho border there are many heavy grades making it comparatively expensive to maintain and operate. The lines of both the Northern Pacific and of the Union Pacific systems extend to various points in the wheat producing district of southeastern Washington, northwestern Idaho and northeastern Oregon. The two systems make and maintain a joint tariff of rates from such group rate territory, and the same rates to Portland are made and maintained in separate tariffs by each of the two systems from the several stations on their lines in such territory. The Northern Pacific System makes the same rate on wheat from northwestern Idaho, southeastern Washington and northeastern Oregon over its lines to Tacoma and Seattle which are established by such joint or separate tariffs from the same points to Portland.

9. Flour is occasionally carried by the Union Pacific System and connecting lines from Oregon to Galveston, Texas, a distance of 2500 miles, at 75 cents per hundred pounds. Wheat is carried by the Northern Pacific in considerable quantities from points east of the Columbia river in the state of Washington to St. Paul, Minnesota, a distance of 1600 miles, for 50 cents per hundred pounds. In the main, wheat and flour produced in Oregon and Washington are shipped to Portland, Tacoma, and Seattle.

10. In explanation of the falling off in net revenue and earning capacity of the Oregon Railway & Navigation Company, the report of the Union Pacific Railway Company for the year 1889, filed as an Exhibit in this proceeding on behalf of the defendants, says:

"This loss in the earning capacity of the Oregon Railway & Navigation Co. was due mainly to deficient crops in eastern Oregon and Washington, caused by the absence of snow during the previous winter, which resulted in a large falling off in earnings from local traffic.

The traffic exchanged between the Oregon Railway & Navigation Co. and the lines of the Union Pacific system, the earnings from which appear chiefly in the gross returns of the latter, underwent a large increase during the year."

The appendix to said Union Pacific report contains "part of the report of the Committee of the United States Senate accompanying the Senate bill for the settlement of the Pacific Railroad debts."

In this report of the Senate Committee it says:

"In view of the recent development of the Pacific northwest this alliance of the Oregon Short Line and the Oregon Railway & Navigation Co. has become of the greatest possible value to the Union Pacific, constituting probably to-day one third of the total through business of the Union Pacific Railway."

No evidence was offered in explanation of the reported falling off in the net earnings for 1890, amounting to nearly one half as compared with the previous year.

The Union Pacific System reports for years ending December 30, 1888, 1889, and 1890 show

YEAR.	MILEAGE.	GROSS EARNINGS.	OPERATING EXPENSES.	NET EARNINGS.	NET EARNINGS PER ROAD MILE.
1888	5041.36	\$30,195,522.53	\$18,476,428.04	\$10,460,694.74	\$2074.96
1889	7389.55	39,669,600.06	24,516,751.40	13,656,047.41	1848.02
1890	7562.94	43,049,248.86	29,843,961.81	12,238,084.09	1618.16

The gross earnings per mile of road as reported were, for 1888, \$5989.56; 1889, \$5368.34, and for 1890, \$5692.18.

Mileage, Earnings, Operating Expenses and Net Earnings of Oregon Railway & Navigation Company, exclusive of water lines.

YEAR.	MILEAGE OPERATED.	GROSS EARNINGS.		OPERATING EXPENSES AND TAXES.		NET EARNINGS.	
		AMOUNT.	PER MILE.	AMOUNT.	PER MILE.	AMOUNT.	PER MILE.
1888.....	¹ 751.90	² \$4,880,000	² \$6490	² \$2,631,000	² \$3499	² \$2,249,000	² \$2991
³ 1889.....	984.90	4,576,136	4646	3,024,488	3071	1,551,648	1575
³ 1890.....	1028.60	4,954,711	4817	4,060,375	3947	894,336	869
Average..			5211		3513		1698

¹ From Report filed with the Commission for Year ending June 30, 1888.

² Estimated from Report of Directors of Union Pacific Railway, for 1888, operation of water lines deducted.

³ From Report of Directors of Union Pacific Railway, Year ending December 31, 1890.

12. The Northern Pacific R. R. reports for years ending June 30, 1888, 1889, and 1890, show:

YEAR.	MILEAGE.	GROSS EARNINGS.	OPERATING EXPENSES.	NET EARNINGS.	NET EARNINGS PER ROAD MILE.
1888	3219	\$15,846,327.88	\$ 9,025,596.14	\$6,820,731.74	\$2118.70
1889	3439	19,707,467.95	11,868,541.47	7,848,926.48	2280.87
1890	3585	22,610,502.78	13,089,186.88	9,521,365.90	2655.89

The Northern Pacific in its report for the year ending June 30, 1889, says of wheat production and shipments in Washington:—

"Large crops were harvested in the Palouse and Walla Walla districts and the business was handled very satisfactorily *via* Cascade Division, as follows: 3775 carloads to Puget Sound; 675 carloads to local intermediate milling points; and 812 carloads to Portland. In addition to the above about 900 carloads of Washington wheat were transported to eastern terminals.

"The rapidity with which Washington is developing, agriculturally, may be realized from the statement that during the last fiscal year nearly half as much wheat was shipped from that territory as from all points on our lines east of the Missouri river."

13. A traffic contract made before the Act to Regulate Commerce was passed between the Northern Pacific Railroad and the Oregon Railway & Navigation Company, the "Union Pacific System," in force and on file with the Commission provides for an interchange of traffic at Wallula Junction; for a division or method of division and adjustment of rates of charges on traffic interchanged; and for compensation for excess of car mileage. One provision of said contract is that traffic "shall be interchanged at Wallula, from the line of the one party to the line of the other, and so far as shall be reasonably practicable and the convenience of the parties will permit, without change of cars; but in no case shall the cars of either party, without its expressed agreement or consent, be run beyond or off the road or roads of the other party. And in cases where it shall be expedient to make a change of cars, the expenses of making the transfer and change of cars shall be borne by the party receiving, from the line of the other, the traffic so interchanged."

14. Said contract designates divisions of territory and the business thereof which shall belong to the contracting companies, respectively, and for the transportation of which there is to be no competition. As to traffic from points reached by the lines of both companies said contract provides:

"Walla being a point common to the main or trunk line of each party, the business originating at, or destined to, Wallula, to or from points or places west of Wallula reached by the lines of both parties, shall be deemed competitive traffic; and the business of the said

branch of the Pacific Company into and beyond the "Palouse Country," and that of the said branch of the Oregon Company *via* Colfax at, and east of, their junction, to or from Wallula or points west of Wallula, shall also be deemed competitive traffic. All other traffic whatsoever shall be deemed noncompetitive traffic.

Section Second. That all competitive traffic shall be pooled, and the rates shall be settled for and divided between the parties by a tonnage division. The rates of all competitive traffic shall be fixed and determined, from time to time, by the said parties, or their respective successors or assigns. In cases where a tonnage division shall not be reasonably practicable, the party carrying any of the competitive traffic belonging to the other party, shall retain one half of the charges for the transportation thereof over its line, and shall pay the other one half of said charges to the other party."

Joint tariffs or rate sheets made and filed with the Commission by the Northern Pacific Company and the Union Pacific System show that on August 10, 1891, after the hearing and investigation at Spokane, the defendants reduced their charges from said group rate territory, including the Ritzville rate complained of, to 28½ cents, and on July 27, 1893, they further reduced these charges from 28½ to 23½ cents, which is the rate now in force and the reasonableness of which remains to be determined. Separate tariffs taking effect June 7, 1893, made and filed with the Commission show the same reductions made by the defendants, respectively, which were made by their joint rate-sheet which took effect July 27, 1893.

In its separate answer to the complaint the Northern Pacific Company averred its line ended at Wallula Junction, and that it operated no line or lines through Wallula to Portland; that its route or the only line or lines operated by it between Ritzville and Portland was through Pasco Junction to Tacoma, thence to Portland, and this route, it correctly avers, passes over the Cascade Mountains, and is very expensive to maintain and operate.

Through these averments the Northern Pacific sought to excuse itself from any obligation to carry, or to participate in carrying, freights from Ritzville over the direct route through Wallula to Portland in connection with the other defendants. At the time this excuse was offered the Northern Pacific had established in connection with its codefendants a joint tariff

of rates and charges from Ritzville and other points on its line to Portland *via* Wallula over this more direct through route and, as recited in the answer on behalf of the Union Pacific system, a traffic contract or arrangement then in existence provided for the interchange of traffic at Wallula Junction, and authorized the Northern Pacific to forward and bill through over that route. The joint tariffs made since the hearing of this case are in accordance with this arrangement.

The complainants "claim that they have a just and reasonable right to have the products of their farms carried to market by the shortest and least expensive routes at a reasonable through rate."

In this we believe no more is demanded by complainants than is their right under the law, and the rate from Ritzville to Portland which the carrier or carriers may lawfully exact must be reasonable for the transportation by the shorter and less expensive route through Wallula Junction.

This route of 811 miles is down to and along the Columbia river with few up grades and these are light. The facilities for the interchange and transfer of freight at Wallula Junction are adequate and convenient. Neither the maintenance nor the operation of the route is arduous or expensive in comparison with other roads or lines of equal length in the same locality or section of the country.

The route of the Union Pacific system from Spokane to Portland 450 miles is over its branch line to and through Wallula, on parts of which there are many costly grades; transportation over it is necessarily subject to the expense of interchanges and the cost of separate operation incident to branch line service while the charges are no more than from Ritzville.

The facts show that grain and grain products are being carried from Ritzville to Portland at the reduced Ritzville-Portland joint rate by the Northern Pacific Company over its own line by way of the long and expensive route across the Cascade Mountains to and through Tacoma.

This company is also shown to be a carrier of grain and its products over its Ritzville, Cascade Mountain and Tacoma main line route to Portland from all points on its Central Washington and its Marshall Junction and Palouse branches. The distance to Portland over this Northern Pacific route from some of the branch line stations on either branch is more than twice as great as the distance from Ritzville over the direct line through Wallula. Transportation over branch lines requires separate equipment and transfer.

It may be fairly assumed that the rates separately made over their respective routes or lines by the Union Pacific system and the Northern Pacific Company, as well as the rates

made by them jointly from these distant branch line points are reasonably remunerative and profitable; and in view of all the ascertained facts we must believe that reasonable compensation for the transportation of like products over these longer lines embracing the much more costly branch line service is excessive and unreasonable for the less expensive service over the more direct and very much shorter Wallula Junction route from Ritzville to Portland.

It was found on the testimony of its general manager that the Northern Pacific had established the same rate from the grouped stations more than 200 miles apart, including all the stations on two branch lines, as a matter of policy to enable that company to sell its lands more distant from markets, at better prices. Between the company and the purchaser of lands so inconveniently located this might be an equitable arrangement with any assurance that it would be continued after the company had disposed of its lands. But such an arrangement affords to grain growers hundreds of miles nearer to market no compensation for the advantages of their location.

The general manager also testified his belief that when the Union Pacific System constructed its branch line into and through the Palouse country to Spokane it became a competitor for business along this line and made the continuance of one rate by the Northern Pacific necessary throughout the group territory. This belief takes no notice of the maintenance of the same rate on the Northern Pacific Central Washington Branch which extends 100 miles and more northwest of points reached by any line of the Union Pacific System.

The defendants make joint tariffs, agree upon rates from all parts of the group territory reached by the lines of the rival companies, and by contract apportion the traffic or part of business to be taken by them respectively.

The practice of making one rate on the same product over a very large district, and thus equalizing the burdens of transportation to the same market, is only justifiable under special and exceptional circumstances. This practice is not to be encouraged when, as in the case under consideration, the difference in the transportation expense from the various parts of such district is considerable and substantial.

In defense of the rate complained of the defendants put in evidence the reported falling off in the surplus earnings of the road and branches of the Oregon Railway & Navigation Company since they were leased and made a part of the Union Pacific System and the insufficiency of the earnings so reduced to pay the promised rent of the leased property.

That the apportionment of earnings as made and reported by the Union Pacific Company is too largely a question of book-keeping to be

made the basis of reasonable rates is fairly inferred from the annual increase in the earnings of the Union Pacific System, the "large increase" in the interchange of business between the road of the Oregon Railway & Navigation Company and the other roads of the "Union Pacific System, the earnings from which appear chiefly in the gross earnings of the latter," and the great "value" of the Oregon Railway & Navigation Company to the Union Pacific Railway Company, as reported by the latter.

That railroad investment may be as secure as other property, the reasonable rate should be liberal until earnings are sufficiently large for a fair return on actual expenditure. The average annual surplus earnings credited by the Union Pacific Company to the Oregon Railway & Navigation Company for the three years next before the commencement of this proceeding was approximately \$1700 per mile of road, which would be a moderate investment return on a road costing not more than \$42,500 per mile. Whether the surplus earnings of the leased lines would have been greater operated independently of the Union Pacific System than they are reported to have been as a part of it, is matter of conjecture. Whatever the fact as to this might be, the amount which the Union Pacific System undertook to pay for the use of the leased road as a feeder to increase the business of the other roads of the system can hardly be accepted as the amount which the leased property must earn and the lessee retain before any reduction of this grain rate will be lawful.

To justify the reduction petitioned for by the complainants, they offered to prove the relatively high cost of producing wheat in comparison with its market value, and a producer of successive large crops testified that the cost to the grower of wheat, ready for market, at the railway stations was about sixty cents a

bushel. This estimate is too high and extravagant. The average price realized at the railway depots for the three or four years next before the investigation of this complaint was forty-five cents a bushel. With a return so scant for the labor and expense of production the cost of transportation needs to be as moderate as may be consistent with justice to the carrier.

One stipulation of the contract between the Northern Pacific Company and the Union Pacific System provided for a division of business between them and requires the company or system which carries traffic assigned to the other to pay one half the freight charges to the party to which the traffic belonged and to retain the other one half for the transportation service rendered. This stipulation shows that the parties to it, the defendants, considered one half of the rate to be from time to time agreed upon as sufficient compensation for the transportation or movement of freights while the other half, nearly 12 cents of the rate in question, would be surplus or balance remaining after paying operating expenses or expense of transportation. In the light of this arrangement in connection with the other facts, some reduction is warranted in the Portland rate from the less distant and more accessible points of the group district.

The petitioners ask for a reduction in the Ritzville-Portland rate to 16½ cents, practically to one cent per ton per mile, which is thought to be lower than is now justifiable in view of the terminal and transfer charges, though these are light. In consideration of all the facts, it is believed that the reasonable rate on the hundred pounds of wheat in carloads from Ritzville, Washington, to Portland, Oregon, should not be more than twenty cents. A reduction will be ordered accordingly.

VIRGINIA SUPREME COURT OF APPEALS.

WESTERN UNION TELEGRAPH CO., *Plff. in Err.*,

v.

J. O. TYLER.

(.....Va.....)

1. A person to whom a telegram is addressed can maintain an action for a penalty on account of failure to deliver it promptly, under Va. Code, § 1292, expressly providing that the forfeiture shall be to him or to the person sending the despatch.
2. A state statute prescribing a penalty for failure to deliver a telegram, where the regulations of the company itself require the delivery, is not unconstitutional as a regulation of interstate commerce.

November 16, 1898.

IN ERROR to the Circuit Court for Alleghany County to review a judgment in favor of plaintiff in an action brought to recover the statutory penalty for failure to promptly transmit a telegraph message. *Affirmed.*

The facts are stated in the opinion.

Messrs. Stiles & Holladay for plaintiff in error.
Mr. Benjamin Haden for defendant in error.

Lewis, P., delivered the opinion of the court:

This was an action against the Western Union Telegraph Company to recover a statutory penalty of \$100 for the failure of the company to deliver as promptly as practicable a certain dispatch sent from Asheville, in the state of North Carolina, to the plaintiff, at Clifton Forge, in this state. Section 1292 of the Code, under which the action was brought, is as follows: "It shall be the duty of every telegraph or telephone company, upon the arrival of a dispatch at the point to which it is to be transmitted by said company, to deliver it promptly to the person to whom it is addressed, where the regulations of the company require such delivery, or to forward it promptly as directed, where the same is to be forwarded. For every failure to deliver or forward a dispatch as promptly as practicable the company shall forfeit one hundred dollars to the person sending the dispatch, or to the person to whom it was addressed." It is admitted that the dispatch in question was not delivered as promptly as practicable, but the company, nevertheless, denies the plaintiff's right to recover, on two grounds, viz: (1) Because the action, if maintainable at all, ought to have been in the name of the commonwealth; and (2) because section 1292 of the Code is repugnant to that clause of the Constitution of the United States which gives to Congress the power to regulate commerce among the several states.

As to the first point, little need be said. Section 712 of the Code provides that "where any statute imposes a fine, unless it be otherwise expressly provided, or would be inconsistent with the manifest intention of the general assembly, it shall be to the commonwealth," etc.; and by section 745 it is provided that "wherever the word 'fine' is used in this chapter it shall be construed to include a pecuniary forfeiture, penalty, and amercement." But these sections upon which the company relies have no application to a case like the present. Section 1292, which gives a right of action in a case of this sort, expressly provides that the forfeiture shall be "to the person sending the dispatch, or to the person to whom it was addressed;" and it would therefore be manifestly inconsistent with the intention of the legislature to hold that the commonwealth has any interest in the penalty sought to be recovered in the present case, or that the action is not properly in the name of the plaintiff.

The next question, then, is whether section 1292, so far as it relates to a case like the present, is unconstitutional. That the

power of Congress to regulate commerce among the states is unqualified and unlimited, is not disputed. It was so decided in the great case of *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23, and the subsequent decisions to the same effect are very numerous. It must also be conceded that telegraphic communication, like the transportation of passengers and merchandise, is commerce, and that such communication, when had between different states, is interstate commerce. In *Western U. Telegr. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, it was distinctly decided that a telephone company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods; that both companies are instruments of commerce; and that their business is commerce itself. See, also, *Western U. Telegr. Co. v. Pendleton*, 1 Inters. Com. Rep. 306, 122 U. S. 347, 30 L. ed. 1187; *Leloup v. Mobile*, 2 Inters. Com. Rep. 134, 127 U. S. 640, 32 L. ed. 311. Nor is it denied that those subjects of commerce which are national in their nature, admitting of only one uniform system or plan of regulation, such as the transportation of commodities or the transmission of messages between different states, are subject to the exclusive control of Congress, and consequently that any regulation thereof by state legislation, whether Congress has legislated on the subject or not, is void. *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *Gloucester Ferry Co. v. Pennsylvania*, 1 Inters. Com. Rep. 332, 114 U. S. 196, 29 L. ed. 158; *Robbins v. Shelby County Taring Dist.* 1 Inters. Com. Rep. 45, 120 U. S. 489, 30 L. ed. 694; *Leisy v. Hardin*, 3 Inters. Com. Rep. 36, 135 U. S. 100, 34 L. ed. 128; *Lehigh Valley R. Co. v. Pennsylvania*, 4 Inters. Com. Rep. 87, 145 U. S. 192, 36 L. ed. 672; *Western U. Telegr. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Leloup v. Mobile*, 2 Inters. Com. Rep. 134, 127 U. S. 640, 32 L. ed. 311.

These principles were acted on by this court in *Norfolk & W. R. Co. v. Com.*, 88 Va. 95, and we do not understand them to be controverted in the present case. But does the statute, the validity of which is here drawn in question, amount to a regulation of commerce? In *Western U. Telegr. Co. v. Pendleton*, 1 Inters. Com. Rep. 306, 122 U. S. 347, 30 L. ed. 1187, a statute of Indiana was held to be repugnant to the commerce clause of the Constitution, so far as it attempted to regulate the delivery of dispatches sent from that state into other states, because, as the

court said, conflicting legislation would inevitably follow with reference to telegraphic communications between different states, if each state was vested with power to control them beyond its own limits. But that is not the question arising in the present case, nor does the reasoning in that case apply to this. This is an action for the failure to deliver in this state a dispatch sent from another state and deliverable here, under a statute of this state. There is no question as to the extraterritorial operation of the statute, and it will be time enough to decide that question when it arises.

It has been argued with much earnestness that the statute amounts to a regulation of interstate commerce, but we are unable to come to that conclusion. If it can be said to affect commerce at all, it does so only remotely or incidentally. It prescribes no new rule, and imposes no additional duty, and, so far as the delivery of telegrams is concerned it simply prescribes a penalty for a failure to deliver where the regulations of the company itself require such delivery. That it would be competent, moreover, for the state to afford redress through her courts, according to the common law, for the negligent failure of a telegraph company to deliver a dispatch sent from another state, is unquestionable; and, if this may be done, it is equally competent for the state to seek by legislation, in advance, to prevent such violation of duty. We think the case is within the principle decided in *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819, namely, that "the legislation of a state, not directed against commerce, or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." This principle was applied and amplified in *Smith v. Alabama*, 1 Inters. Com. Rep. 804, 124 U. S. 465, 31 L. ed. 508; and again in *Nashville, C. & St. L. R. Co. v. Alabama*, 2 Inters. Com. Rep. 238, 128 U. S. 96, 32 L. ed. 352. In the *Smith* case, the question was whether a statute of Alabama making it unlawful for any locomotive engineer to drive or operate any train of cars without having been first examined and licensed was in contravention of the commercial power of Congress, so far as it applied to engineers employed on interstate trains, and it was held that it was not. After a full consideration of the case, the conclusion announced was (1) that the statute was not, in its nature, a regulation of commerce; (2) that it was properly an act of legislation within the reserved power of the state to regulate the relative rights and duties of persons within the state so as to secure safety of person and property; and (3) that, so far as it affected interstate commerce, it did so only indirectly, and not so as to burden or impede such commerce. In the course of the opinion, it was said, by way of illustration, that a common carrier, although engaged in interstate commerce, is liable according to the local laws of the par-

ticular state in which he may be guilty of any nonfeasance or misfeasance, as, for example, for his failure to deliver goods at the proper time and place, or for injuries to passengers, caused by his negligence, and that in neither case would it be a defense that the law giving the right of redress was void as being an unconstitutional regulation of commerce by the state. These views were repeated in the case in 2 Inters. Com. Rep. 238, 128 U. S. 96, 32 L. ed. 352, above cited, where a statute of Alabama requiring the examination of certain railway employes with respect to their powers of vision was sustained, and held not to be a regulation of commerce. The provisions of the statute like those of the statute upheld in the *Smith* case, were held to be but parts of that local law which governs the relation between carriers of passengers and merchandise, and the public who employ them, which, as respects interstate commerce, are not displaced until they come in conflict with an express enactment of Congress; and, after quoting from the opinion in the *Smith* case, it was added that what the state may punish or afford redress for, when done, it may seek, by proper precautions in advance, to prevent. In *Sherlock v. Alling*, *supra*, the main point was whether a state statute giving a right of action to the personal representative of the deceased, whose death was caused by the wrongful act or omission of another, could be constitutionally applied to the case of a loss of life by a collision between steamboats navigating the Ohio river, engaged in interstate commerce. The defendant's contention was that the statute enlarged the liabilities of parties for such torts, and, if applied to marine torts, would constitute a new burden on commerce. But this view was rejected, and the statute was held a valid addition to and amendment of the general law of the state, which did not, within the meaning of the Constitution place a burden on commerce, or amount to a regulation thereof; and, referring to previous decisions relied on by the defendant, it was said that the legislation adjudged invalid in those cases "created, in the way of tax, license, or condition, a direct burden on commerce, or in some way directly interfered with its freedom."

Tested by these principles, we are of opinion that section 1292 of the Code is not open to the objection that has been urged against it. It is not, in a legal sense, a burden upon, or a regulation of, commerce, nor does it conflict with any Act of Congress. It is simply, as was the legislation involved in the cases just mentioned, an amendment or enlargement of the local law, which is subject to modification by the legislature, and which regulates to the relative rights and duties of telegraph companies, and persons doing business with them, in this state. It is, of course, competent for Congress, in the exercise of its plenary power in the matter, to prescribe specific regulations touching foreign or interstate commerce, which regulations would supersede all conflicting local laws which, even indirectly, affect such commerce; but, until some such action is taken by Congress, we are obliged to hold

that section 1292 is a valid enactment. The following extract from the opinion in *Smith v. Alabama* is, *mutatis mutandis*, no less applicable to this case than to that. There it was said: "But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or, if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress, or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public

or to individuals. In other words, if the law of the particular state does not govern that relation, and prescribe the rights and duties which it implies, then there is, and can be, no law that does, until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which, until displaced, covers the subject." The result of these views is that the judgment complained of must be affirmed.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF OHIO.

Re CHARLES WORTHEN.

(See 8. C. 58 Fed. Rep. 467.)

A state statute positively prohibiting the sale of oleomargarine does not apply to original pack-

ages of the article brought from another state.

January 10, 1891.

PETITION for a writ of habeas corpus to procure the discharge of prisoner from the custody of the sheriff of Hamilton county, to which he had been committed for alleged violation of the Oleomargarine Act. *Petitioner discharged.*

The facts sufficiently appear in the opinion.

Mr. John W. Herron for petitioner.

Messrs. Matthews & Cleveland for respondent.

Sage, D. J., delivered the following opinion:

The respondent was convicted under an act of the legislature entitled "An act to prevent deception in the sale of dairy products, and to preserve the public health," passed March 7, 1890.

That act prohibits the manufacture or sale of oleomargarine unless it be manufactured and sold in separate and distinct form, and in such manner as will at once advise the consumer of its real character,—free from any coloring matter, or other ingredients which would cause it to look like butter, etc.

It appears from the testimony that the respondent, as the agent of Friedman & Swift, oleomargarine manufacturers at Chicago, is engaged, at the corner of Front and Main streets, in the city of Cincinnati, in disposing of original packages of oleomargarine, shipped from Chicago by his principals, and disposed of by him in the original packages.

The oleomargarine so shipped is composed of neutral lard, 50 per centum; oleo oil, 35 per centum; natural butter, 10 per centum; and cream and milk, 5 per centum; to which is added a sufficient quantity of salt and coloring matter (an article called "annotto"), which, according to the testimony, is precisely what is used in coloring creamery butter.

This oleomargarine is a compound having the appearance, and almost exactly the taste, of butter; so nearly so that they cannot be distinguished, or that they can be distinguished only upon a careful inspection; and it is an article not deleterious as food.

Now, as I look at the decision of the supreme court in the case of *Bowman v. Chicago & N. W. R. Co.*, 1 Inters. Com. Rep. 823, 125 U. S. 465, 31 L. ed. 700, there is scarcely a question left open for the consideration of this court.

The Ohio statute does not merely regulate or throw a guard about the sale of the pro-

duct shipped by the manufacturers to the respondent, and sold by him; but it positively prohibits the sale.

Counsel for respondent rely upon the following passage from the decision in *Leisy v. Hardin*, 8 Inters. Com. Rep. 46, 135 U. S. 122, 34 L. ed. 137.

"These decisions [with reference to the police power of the states] rest upon the undoubted right of the states of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government; but whenever the law of the state amounts essentially to a regulation of commerce with foreign nations or among the states, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity, or its disposition, before it has ceased to become an article of trade between one state and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore, void."

Near the close of the opinion in this case (135 U. S. 124, 34 L. ed. 138) the Chief Justice says:

"Up to that point of time [when the property would become mingled with the common property within the state] we hold that, in the absence of Congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or nonresident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."

That is, by way of illustration, if there should be an importation of dynamite, it could not, in defiance of the local law, be stored within the limits of the city of a state. The opinion continues:

"To concede to a state the power to exclude, directly or indirectly, articles so situated, without Congressional permission, is to concede to the majority of the people of the state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress; and its possession by the latter was considered essential to the more perfect Union which the Constitution was adopted to create." Now, by the Act of Congress of August, 1886, oleomargarine was undoubt-

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edly recognized as an article of commerce, and put under the control of a national law, regulating its sale; following it not only through the course of manufacture, and regulating that, but following it also into the hands of the wholesale dealers; requiring that it should be so branded and marked as to make it impossible to practice upon any one able to read any fraud with reference to its character; and following it further into the hands of the retail dealer, requiring him to take out a license under the authority of the United States, and to brand the packages and mark them so as to prevent the deception of purchasers as to the real character of the article.

It is clear to my mind that it is the duty of this court to assume that this Act will be enforced, and that the provisions which the legislative department have made to prevent fraud will be effective. The oleomargarine brought into the state in the original packages is within the protection of the Constitution of the United States, and it can be sold in the original packages, entirely independently of the provisions of the state statute, and subject only to the provisions of the national statute.

But the instant an original package is opened, and its contents exposed for sale at retail, they thereby, to adopt the language of the supreme court, "become mingled with the property of the state, and subject in every respect to its law."

It would be practically a nullification of the provisions of the Constitution of the United States to hold that the state, while it may not interfere with the importation within its limits of any article of commerce which it deems hurtful to its people, may, immediately upon its importation, throw its prohibition about it, and prevent its sale; and so, by defeating the object of the importation, effectually prevent the importation itself.

I do not say that the state statute is unconstitutional; on the contrary, I think that it is constitutional when applied to sales within the state of all oleomargarine there manufactured, and of the sale of broken packages of oleomargarine imported from other states or from foreign nations. I do not think that the federal constitution interferes in the least with the power of the state of Ohio to regulate or prohibit the manufacture or sale of oleomargarine in this state, or imported into this state, after once the original package has been broken; but the state law does not apply to, and cannot be enforced against, sales in the original packages of oleomargarine imported into the state.

My conclusion, therefore, is that the respondent has not been within the reach of the Ohio statute, and that it does not apply to the case made against him, and that he must be discharged.

SUPERIOR COURT OF BUFFALO, GENERAL TERM.

HOLLIS J. PARKS, *Appt.*,
v.
JACOB DOLD PACKING CO.

(See S. C. 8 Misc. 570.)

Feb. 2, 1894.

1. A contract of employment for the main purpose of getting cut freight rates and rebates from railroad companies, within the Interstate Commerce Act is void, and no recovery can be had for its breach under the provisions prohibiting special rates and rebates and making it a misdemeanor for the shipper or his agent to solicit or induce the violation of its provisions.
2. The court will take judicial notice of the geographical location of Kansas City and Wichita, and that transportation by railroad from these places is over lines outside the state of New York.
3. In determining whether a contract of employment to procure rebates from railroads included railroads within the operation of the Interstate Commerce Act, the conduct of the parties in obtaining rebates from roads outside the state may be resorted to.
4. The rule that the question of the illegality of a contract for breach of which an action is brought is not raised when not alleged in the answer does not apply when from plaintiff's own testimony the contract appears to be illegal.

A PPEAL from a judgment upon a decision directing a nonsuit and dismissing the complaint, and from an order denying a motion for a new trial, made on the minutes of the court. *Affirmed.*

Mr. M. Filmore Brown for appellant.
Mr. Sherman S. Rogers for respondent.

Hatch, J., delivered the opinion of the court:

This action is brought to recover damages for a breach of contract of hiring. The plaintiff was the only witness sworn, and his testimony tended to establish that he entered into a verbal contract with the defendant whereby he agreed to render service for the defendant for the period of one year; that he entered upon said employment January 18, 1892, and continued to work thereunder until the 15th of March, 1893, when, without fault on his part, he was discharged by defendant. The only question presented upon this appeal relates to the validity of the contract of employment, the court below having held it void. The defendant carries on an extensive business in packing and shipping meats, and the services required of plaintiff related to the transportation department. Using plaintiff's language, the material part of the contract is found to be this:

"He [Dold] said that the position that we would create would be the transportation department, something he had never had before. He explained to me what he wanted me to do. He wanted me to handle all railroad matters, and work rebates with the railroad companies, and save him freight money. He said that he had been robbed by the railroad companies for about thirty years. . . . I was to get three thousand dollars for one year. . . . I had entire charge of the transportation department,—a position

known as the 'general manager of the transportation department.' My work was to direct the routing of shipments, and working the different railroads to get the lowest possible rates, either openly or otherwise, and to save all the money in freights I possibly could, both in car lots and less than car lots."

On cross-examination plaintiff stated:

"My first talk with Mr. Dold . . . I told him in a casual way about my capacity to get freight rates below the tariff. I went to Mr. Dold's to handle the transportation department. That was to be my main business. The main feature of that business was getting freight rates properly adjusted, cutting them down low, get a lot of railroad companies, and get the best of them. . . . I was hired to take entire charge of the transportation department, whether it was below the tariff rate, to see that the cars came in promptly and that they went out promptly. Every railroad has a right to carry at schedule rates. I was to use my supposed ability to get special rates from the railroad companies. I knew what the law was on the subject. It has never been proved that it was a felony under the law to be getting cut rates. I knew to a certain extent that the statute made it a felony."

There is nothing left uncertain in the construction of this language or the contract or plaintiff's understanding of it, for he says its main feature was to cut freight rates, and get the best of railroad companies; and in its execution his testimony shows that he made

arrangements with various railroad companies for the shipment of freight; that the defendant paid full tariff rates to the roads, and the latter paid to plaintiff a rebate, which he turned over to defendant, which amounted during the year of his employment to the sum of \$5285.06. Plaintiff seems to have faithfully fulfilled his undertaking, stated at the beginning of his service,—that he would more than save his salary to his employer. It seems unfortunate for him that a somewhat stringent statute hampers the complete exercise of his abilities, and cuts off the pecuniary emoluments derived therefrom. The Interstate Commerce Act, so called, provides, among other things, that every common carrier subject to the provisions of the Act shall make, publish, and print a schedule of tariff charges for the transportation of freight and passengers, between the several states, which shall apply to all persons and corporations under similar conditions and circumstances. Section 2 of said Act provides:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." 1 U. S. Rev. Stat. Supp. 529.

It is argued that these provisions relate only to the common carrier, and not to the shipper; that at common law it was not against public policy to contract for shipment with rebate on freights, so it is now no offense for the shipper or his agent to induce the carrier to violate the law, in consequence of which the present contract is lawful in character and provides for meritorious service. The case relied upon to support this construction (*Root v. Long Island R. Co.*, 2 Inters. Com. Rep. 576, 4 L. R. A. 331, 114 N. Y. 300) discredits it, for in that case the rebates provided for had consideration in the use of a coal pocket and docks, constructed by plaintiff's assignor, and it was held, taking all the circumstances into consideration, a question of fact whether such rebates constituted an unjust discrimination against other individuals to the injury of their business. But the court says:

"Had this provision [for rebates] stood alone, unqualified by other provisions, without the circumstances under which it was executed, explaining the necessity thereof, we should be inclined to the opinion that it did provide for an unjust discrimination."

Whether the contract could be upheld at common law or not is of little consequence, for by section 10 of the Interstate Commerce 4 INTER 8.

Act it is made a misdemeanor for the shipper or his agent to solicit or induce the carrier by any means to violate the provisions of the act by cutting the established tariff rate. 1 U. S. Rev. Stat. Supp. 686, 687. Consequently, by its express terms, the Act is made to apply to to the plaintiff as though he were named in the prohibitive sections. Treating the Act as *malum prohibitum* solely, defendant is not aided, for, as to the forbidden acts, the parties are in *pari delicto*, and each are subject to the penalties of the statute. Under such circumstances there can exist no enforceable contract. *Tracy v. Talmage*, 14 N. Y. 183-190, 67 Am. Dec. 132; *Knowlton v. Congress & E. Spring Co.* 57 N. Y. 518. This contract is an entire one; no part is severable from the other. Its main object was to secure an unlawful preference in procuring freight reductions from established charges. This element was the one of value contemplated by the parties to it; and, as the service contemplated was illegal, and known by both parties to be so, the contract is equally so, and the law will not enforce it, or permit a recovery of damages based upon its violation. *Jackson v. Walker*, 5 Hill. 27; *Foley v. Speir*, 100 N. Y. 552-558; *Parsons, Cont.* (8th ed. 456).

It is further said that there is nothing in the contract showing that it was the intention of the parties to secure rebates from regular schedule tariff rates of railroads carrying freight outside the state of New York. The rule is recognized that it is the duty of the court to give to the contract an innocent interpretation, when possible. Here the evidence excludes the interpretation contended for. The contract was to work railroads by securing a less rate than the schedule charge. In its performance the plaintiff states that on March 5, 1892, he "arranged with the Clover Leaf road (the true name of the road is the Toledo, St. Louis & Kansas City road). They were to pay me four dollars for each single deck of hogs and six dollars for each double deck of hogs from Kansas City to Buffalo. On March 15, 1892, I arranged with the same road to pay me seven and one half cents per hundred pounds on dressed hogs in car lots from Wichita and Kansas City to Buffalo. That would vary from \$15 to \$20 a car." Kansas City and Wichita are large and universally known commercial centers in this country. The court will take judicial notice of their geographical location, and that transportation by railroad from these places is over lines outside the state of New York. *Hunter v. New York, O. & W. R. Co.* 6 L. R. A. 246, 116 N. Y. 615; *Lanfear v. Meestier*, 18 La. Ann. 479, 89 Am. Dec. 658, note 678, 679; *Pearce v. Langfit*, 101 Pa. 507, 47 Am. Rep. 737. *The Peterhoff*, Blatchf. Prize Cas. 521, 522. What was done by the parties under the contract may be resorted to for the purpose of aiding the interpretation; and the evidence in this case shows clearly that the railroads from which rebates were to be obtained were understood to embrace roads outside the state, and, as we have already seen, the contemplated reduction was to be less than the regular tariff

schedule. It is therefore brought within the prohibitive terms of the Interstate Commerce Act.

It is also contended that the answer does not allege that the contract is illegal, and therefore the question is not raised. But this rule does not apply when, from plaintiff's own testimony, the contract appears to be illegal. *Honegger v. Wettstein*, 94 N. Y. 260. It is quite apparent that the parties—

plaintiff, at least—knew the service to be rendered was in violation of the Interstate Commerce Act; that trouble would ensue if the details were known to Federal authorities,—an apprehension which the evidence discloses was well founded. Under such circumstances, a clear case is presented for denying the relief asked for.

The judgment and order appealed from are therefore affirmed, with costs.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania, for Use of Philadelphia County *et al.*, *Appt.*,
v.
George SCHOLLENBERGER.

(156 Pa. 201.)

1. That one having goods for sale is a nonresident manufacturer and sells his goods within the state through an agent does not, under the Federal Constitution, relieve him from the operation of the local police laws, if he keeps in the state a store containing a stock of goods for the inspection of customers from which he makes sales to actual customers.
2. An original package, trade in which is protected by the Federal Constitution, is such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce.
3. Showing that a package of material to be used as food was made, stamped, and branded in another state is not sufficient to show that it is an original package, trade in which is protected by the Federal Constitution, without showing further that it was in the form usually adopted in the trade for purposes of transportation.
4. The sale of a package of goods, entire and unbroken as imported from another state, will be protected as interstate commerce only when the form and size of the package is that usually adopted in the trade for purpose of transportation, and not when adopted with a view to unlawful intrastate retail trade.

Decided July 19, 1893.

A PPEAL by complainant from a judgment of the Court of Common Pleas No. 3 for Philadelphia County reversing a judgment of a magistrate's court in favor of plaintiff in an action brought to recover the statutory penalty for an alleged violation of the oleomargarine Act. *Reversed.*

The case was submitted upon an agreed statement of facts, which was as follows:

That the defendant is a resident and citizen of the state of Pennsylvania.

That the defendant is engaged in business at 219 Callowhill street, in the city of Philadelphia, Pa., as the agent of the Oakdale Manufacturing Company, whose principal office and place of business is in the city of Providence and state of Rhode Island; and was acting as such agent from the first day of June, 1891, and on the 30th day of November, 1891.

That the said defendant, on the 21st day of July, 1891, paid to the collector of internal revenue of the first district of Pennsylvania the

NOTE.—The above decision is a very notable one, making a new distinction or test as to original packages of commerce which is of very great importance. That the test adopted based on commercial usage is much less certain in its application than the test of the mere existence of an unbroken package as imported, does not imply that it is or is not the true one although certainty is much to be desired. But another consideration which may perhaps be regarded as more controlling is the question whether or not the shipper and importer of goods from one state into another to be sold in original packages in defiance of state law can be restricted by any custom of the trade as to the form and size of packages which shall be protected. Since the sale in any form or size of package is condemned by the state law and the parties to the business

must intend to do what the state law forbids, it may be questioned whether they have not the right if they are entitled to sell their goods in defiance of state law at all, to put the goods up in the form which will most facilitate their sales; or to put it in another form whether a package which can be readily sold directly to the consumer may not be an article of interstate commerce when transported from another state and sold unbroken. Whatever may be the final decision on this point by the Supreme Court of the United States, the Pennsylvania court has enlarged the law of interstate-commerce in a very important particular.

As to what constitutes original packages, see also *State v. Chapman* (S. Dak.) 10 L. R. A. 432, and *Keith v. State* (Ala.) 10 L. R. A. 430.

sum of four hundred and eighty dollars, as and for a special tax upon the business as agent for the Oakdale Manufacturing Company in oleomargarine, and obtained from said collector a writing in the words following: "Internal revenue store license to defendant as agent."

That on November 30, 1891, in the city of Philadelphia, at his said place of business as aforesaid, said defendant, acting as agent for the said Oakdale Manufacturing Company, sold and delivered to one John H. Berry, carrying on the business of a coffee house, at 606 Lombard street, in the city of Philadelphia, Pa., a package containing eighty pounds of oleomargarine for the sum of \$12.40, which said sum of \$12.40 was paid to the defendant as agent of the Oakdale Manufacturing Company on the said 30th day of November, 1891; which said package of oleomargarine was manufactured in the state of Rhode Island and shipped to their agent, the defendant, the said George Schollenberger, who sold and delivered the said package, unbroken, to the said John H. Berry, and which package was marked, branded, and stamped in the manner prescribed by the commissioner of internal revenue with the approval of the secretary of the treasury.

If, upon this statement of facts, the court is of the opinion that the defendant is liable for the penalty imposed by the act of assembly, entitled, "An Act for the Protection of the Public Health and to Prevent the Adulteration of Dairy Products and Fraud in the Sale thereof," approved May 21, 1885, then judgment to be entered in favor of the commonwealth and against the defendant in the sum of \$100 and costs of this suit; but if the court be of the opinion that for any reason the defendant is not so liable, then judgment be entered for the defendant.

It is hereby agreed by counsel for plaintiff and defendant in the above case, that for the purpose of this case, the word "oleomargarine," when used in the case stated, is intended to mean "an article designed to take the place of butter or cheese produced from pure and unadulterated milk, or cream from the same; and manufactured out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or cream from the same."

It is further agreed that the said package was sold as an article of food within the words of the Act of May 21, 1885.

Measrs. Luther S. Kauffman, Charles F. Warwick and Wayne MacVeagh, for appellant:

The Act of May 21, 1885, Pub. Laws, 22, is constitutional.

Powell v. Com. 114 Pa. 292, 60 Am. Rep. 350, 127 U. S. 678, 82 L. ed. 258.

The Act of May 21, 1885, is excepted from the general scope of the decision in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128; *Com. v. Zell*, 11 L. R. A. 602, 138 Pa. 628.

The Act of May 21, 1885, is a proper exercise of the police power of the state, and is not an interference with or regulation of interstate commerce.

Titusville v. Brennan, 14 L. R. A. 100, 3 Inters. Com. Rep. 785, 143 Pa. 642; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; 4 INTER S.

McAllister v. State, 72 Md. 390; *Pierce v. State*, 63 Md. 596; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623.

Mr. A. B. Roney, for appellee:

The state of Pennsylvania cannot prohibit the sale of an article manufactured in and imported from another state, and recognized by congress to be an article of interstate commerce, while the same is still in the hands of the importer in the original package.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 204, 6 L. ed. 72.

Interstate commerce is such commerce as the nation at large shall determine to be interstate.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 189, 6 L. ed. 68; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Mobile County v. Kimball*, 102 U. S. 697, 26 L. ed. 239; *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *Com. v. Gardner*, 7 L. R. A. 666, 133 Pa. 284; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 493, 31 L. ed. 709; *Thurlow v. Massachusetts*, 46 U. S. 5 How. 504, 12 L. ed. 256.

It is in the power of congress exclusively to regulate this commerce.

Brown v. Maryland, 25 U. S. 12 Wheat. 441, 6 L. ed. 686; *New York v. Miln*, 36 U. S. 11 Pet. 157, 9 L. ed. 669; *License Cases*, 46 U. S. 5 How. 599, 12 L. ed. 299; *Passenger Cases*, 48 U. S. 7 How. 283, 12 L. ed. 702; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 478, 31 L. ed. 704; *Welton v. Missouri*, *supra*; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 129, 21 L. ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 258.

If a law merely indirectly and remotely affects commerce the action of the state is valid if exercised under a valid state power.

Wilson v. Blackbird Creek Marsh Co. 27 U. S. 2 Pet. 245, 7 L. ed. 412; *Mobile County v. Kimball*, *supra*; *Withers v. Buckley*, 61 U. S. 20 How. 84, 20 L. ed. 816; *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 713, 18 L. ed. 96; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996; *Turner v. Maryland*, 107 U. S. 88, 27 L. ed. 870; *Morgan's L. & T. R. & SS. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623.

It is a regulation of commerce and void.

(a) If the state law acts in an unreasonable manner or unnecessarily interferes with commerce.

Foster v. New Orleans Port Wardens, 94 U. S. 246, 24 L. ed. 122; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Minnesota v. Barber*, 136 U. S. 813, 34 L. ed. 455; *Brimmer v. Rehman*, 138 U. S. 78, 34 L. ed. 862; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638.

(b) Or is a taxation of that commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158; *Robbins v. Shelby County*

Tax. Dist. 120 U. S. 489, 30 L. ed. 694; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Corson v. Maryland*, 120 U. S. 502, 30 L. ed. 699; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637.

(c) Or amounts to a discrimination.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; *Sayre v. Phillips*, 16 L. R. A. 49, 148 Pa. 482; *Re Kimmel*, 41 Fed. Rep. 775; *Spelman v. New Orleans*, 45 Fed. Rep. 3.

(d) Or is a prohibition of a traffic or intercourse recognized as interstate commerce.

Crutcher v. Kentucky, *supra*; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137; *Re McAllister*, 51 Fed. Rep. 282; *State v. Gooch*, 44 Fed. Rep. 276.

This exclusive power of congress begins when the journey to another state has actually begun.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715; *The Daniel Ball v. United States*, 77 U. S. 10 Wall. 557, 19 L. ed. 999.

It continues during the journey.

Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 194, 6 L. ed. 69.

While the articles are in the hands of the railroad or common carrier.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649.

In the hands of the consignee.

Brown v. Maryland, 25 U. S. 12 Wheat. 449, 6 L. ed. 689; *Bowman v. Chicago & N. W. R. Co.* *supra*; *Low v. Austin*, 80 U. S. 18 Wall. 29, 20 L. ed. 517; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128.

Until sale by the importer.

Brown v. Maryland, *supra*.

On breaking of the original package by the importer.

Ibid.; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

Unless congress has provided otherwise.

Wilkerson v. Rahrer, 140 U. S. 545, 35 L. ed. 572.

The decision of the lower court is supported by *Con. v. Paul*, 48 Phila. Leg. Int. 4; *State v. Gooch* and *Re McAllister*, *supra*.

Williams, J., delivered the opinion of the court:

This case belongs to an rapidly growing class, that has already become uncomfortably large and troublesome in this state. The profits to be derived from an unlawful traffic are much larger than those that flow from legitimate trade, provided the unlawful traffic may be pursued without serious interference from the officers of the law. Law-abiding citizens will not embark in a business that is forbidden by the laws of the state

in which they live. Timid men are afraid to do so. This kind of operation is left therefore to those who have no respect for law, no interest in the public welfare, and no fear of public opinion. When such men deliberately determine to put money in their pockets by engaging in a business which the state has declared to be injurious to the public morals, the public health, or the public peace, and has therefore forbidden altogether, or placed under strict police regulations, they are morally certain to seek immunity for themselves and their unlawful business by immediate flight to the sanctuary of the national constitution, and there laying hold on the horns of the altar of interstate commerce. The road to this refuge of lawbreakers is well beaten. There are signboards at every crossing on the route, and the intermediate stations for possible rest wear conspicuous signs of invitation. The travelers over it are generally foreigners to the state whose laws they trample upon, and include a motley assortment of traders. Beginning with the peripatetic swindlers whose worthless wares are transported in tin trunks, which they carry in their hands, and who hunt their victims in the secluded villages and along the country roads, with an instinct that rarely fails, and running up or down the scale of lawbreakers to the men whose commercial operations extend to the sale of oleomargarine by the pound, and of intoxicating drinks by the pint, there is no man in the procession who is not a conscious and deliberate law-breaker, and who does not set his possible profits from a forbidden business above his duty to society or the state that protects him. These men seek to pervert a rule of law that has a wide and a beneficial field of operation. They claim to be engaged in interstate commerce, and to be entitled to the protection of the general government, as against the police laws of the individual states, for that reason. In support of their claim they will assert that their "goods," whether consisting of oleomargarine, beer, whiskey, paste diamonds, pinchbeck watches, or the like, were made on the other side of the state line, and imported by or for them; or it may be they will claim to be the agents or factors of the makers, or to have received, and to be engaged in selling, "original packages" consisting of a pound of oleomargarine, or a pocket flask of whisky, put up expressly for their trade at the still or factory, just "over the line." The mischief done and attempted in this manner, under the guise of interstate commerce, is so great, so open, and so difficult to suppress or punish that in many states besides this it has become a matter of general and sincere regret that the interstate commerce clause was ever held applicable to trade in any article recognized throughout the civilized world as a proper subject for police regulation and control. We are embarrassed by the difficulties in the way of the enforcement of our police legislation made in good faith, for the protection of our citizens. The question involved in this case is therefore one of great practical importance. It is nothing less than whether the police power of the states survives at all, or has been ab-

sorbed and extinguished by the interstate commerce clause in the national constitution. We recognize the fact that this is a federal question. It has been the subject of many decisions by the Supreme Court of the United States, and was at one time thought to be well settled in favor of the existence and proper exercise of police powers by the several states. We entertain that opinion still, but the contrary view has been pressed upon us with so much earnestness in the argument that we feel constrained to examine briefly some of the positions taken by the appellant.

It is said the recent case of *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 123, justifies the contention that this state is powerless to interfere with the defendant's traffic. But *Leisy v. Hardin*, like all other cases, must be read in the light of its own facts. Leisy was a brewer, who made beer in the state of Illinois. Hardin was an officer of the state of Iowa, where the law forbade the sale, and the keeping for sale, of any form of intoxicating drink except for sacramental, medical, or mechanical purposes. Leisy shipped from his brewers in Illinois to his agent in Iowa about 300 casks and eleven cases of beer, sealed in the ordinary manner. These were sent there for sale, and were in the hands of Leisy's agent or employer in Iowa for that purpose. While the entire consignment of beer was yet in the possession of the maker or his agent, with seals unbroken, it was seized by Hardin, under the law of Iowa, and taken out of the possession of Leisy's agent. An action of replevin was then brought to recover the casks and cases so taken. Two questions were thus raised. First, Did Leisy own the packages taken from the possession of his agent? Second, If he was the owner, has he a right to have them in his possession in the state of Iowa? The first question was not controverted. He was the maker and owner of the packages seized. The second question was one of law, and was disposed of upon the interstate commerce clause. The goods being in original packages, with seals unbroken, no sales having been made therefrom, it was held that they were not liable to seizure under the police laws of the state into which they had been brought. This is the single question involved in that case, and beyond that it is not binding as a precedent upon the court that rendered the judgment, nor upon us. We shall not question the wisdom of that decision, nor abate one jot from its legal force, though we sincerely regret some of its consequences. Standing, therefore, squarely on the case of *Leisy v. Hardin*, let us proceed to an examination of the question presented on this record.

The defendant, Schollenberger, is a citizen and resident of this state. For at least two years he has been living under the protection of its laws, and is bound by all the obligations that such residence and protection impose. He is a merchant, with a store in the city of Philadelphia. He sells his goods to customers as other merchants sell their goods, from his stock in store open to their examination. The commodity, or one of the commodities, in which he deals is oleomargarine, for the sale of which at his store in Phila-

delphia he has obtained a license under the internal revenue laws of the United States during the last two years. He sells, not for shipment in original packages to other countries or other states, but to local customers, and in the case now before us, to an eating-house keeper near by, for consumption upon his table as an article of food. Now, our statute explicitly forbids the sale and keeping and the offering of oleomargarine for sale as an article of food. The identical acts forbidden by the law are thus seen to be the acts which he admits he is engaged in, and which he claims the right to do, notwithstanding his residence in, and the statutes of, the state. This right he claims to derive from the interstate commerce clause in two ways. The first of these rests on the nonresidence of the manufacturer. He asserts that the oleomargarine is made in another state. Because the manufacturer can lawfully made and sell under the laws of the state where the manufactory is located, he contends that the manufacturer can sell his own product anywhere, and for this purpose can establish stores for its sale all over this state, if he chooses to do so. As the manufacturer may do this in person, it is contended that he can do it by an agent, so that he could have as many stores, conducted by as many agents as there are towns in the commonwealth, and conduct the trade in them all, regardless of the police laws of the state. The second line along which he claims to derive immunity is the "original package" doctrine. He says he sells in the packages made up at the factory. He does not divide a roll, a pail, or tub of his "goods," but requires the purchaser to take the entire roll, pail, or tub made, filled, or shaped at the factory. We think neither of these positions should avail the defendant. We do not deny that a nonresident manufacturer may sell his goods, and ship them to a buyer in the usual trade packages employed in good faith by manufacturers, without being amenable to the police laws of this state therefor. He may bring them here, and hold them in bulk without danger. So much is fairly ruled in *Leisy v. Hardin*. He may sell them to the trade or for shipment to the states in the same unbroken trade packages, notwithstanding their unlawful character. This clearly results from the rule in *Leisy v. Hardin*. We might have held, had the question been one for us, that the object of the interstate law commerce clause was quite different from what it seems thought to be. We might have thought it intended to prevent the establishment of state custom-houses and taxation along state lines, and to make for the general purposes of legitimate trade all the states open to the manufacturers and merchants of the several states. But for this the states might have intercepted all goods reaching their borders, and weighed, valued, and taxed them before permitting them to proceed to their destination. The destructive effect upon commerce of such restrictions was clearly foreseen and wisely guarded against by our fathers. But the protection of the lives, the health, and morals of citizens was the chief of the duties of government left to the states when the Union was

formed. The common law rights and remedies are to be sought in the courts of the states. For this reason we would have held that the police regulations of the states stood on impregnable ground, and that, while no state had the right to tax or to burden interstate commerce, each state had the right to exclude from its territory such articles of food or drink as were injurious in their character and effect upon the health or the morals of the public. But, however this may be, it will not be denied that state commerce—that is, business conducted within the lines of a state—was left to state control. It was the intention of the United States to protect the citizens and the productions of one state against unjust discrimination by the other states, but it was and is the duty of the state to protect its citizens against each other.

If, then, the retail of oleomargarine at the defendant's store is to be regarded as in any sense his business, as it would seem to be from the form of the licenses attached to the case stated, and from all the facts, he is clearly liable as an individual to the penalty provided by the law which he has broken. Can the facts that the store is the store of the manufacturer, and that he is their agent, relieve him from liability? The sales are not made from the factory, nor under the right which the fact of making confers on the maker. On the contrary, the sales are made under a store license granted, not to an establishment located in another state, but to a store in this state. When a nonresident of Pennsylvania comes into the state to embark in business here, his situation is like that of any other resident, and his business done at his store is state, not interstate. It does not matter where he obtains his goods. Interstate commerce does not necessarily depend on the origin of goods; or, rather, all men who buy and sell foreign merchandise are not necessarily engaged in interstate commerce. If it was otherwise, all merchants would be superior to state laws, for all deal to some extent in goods made in other states and in other countries. It is not simply or mainly the origin of the goods, therefore, that is to be considered, but the nature of the business done. One who keeps a stock of goods in store for the inspection of customers, and sells from this stock to actual consumers, is a local dealer. His business is intrastate, not interstate. Our act of 1885, under which this case arises, is not a trade regulation. It is a police law. This court has so held repeatedly, and our view of it was expressly affirmed by the Supreme Court of the United States in *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, a case which turned upon that single question. It does not undertake to deal with an importer from another country or state, but with manufacturers, and dealers within the state. It prohibits the manufacture of oleomargarine within the limits of the state. It also prohibits the sale, the offer to sell, and the having in possession with intent to sell, the same "as an article of food." It lays its prohibition on those who are fairly subject to its jurisdiction, and on no others. We have, then, a valid police law, so declared by the highest tribunal in the land, which pro-

hibits the sale of oleomargarine as an article of food within the state. We have the proprietor of a store located and licensed here making sales of the prohibited article to customers for the prohibited purpose. It does not matter that the merchant makes his home in another state, or that he makes his sales by a clerk or agent, rather than in person. He is a local dealer, selling in violation of the local law, and liable to its penalty. If the residence of the dealer could affect the character of his trade, then our police laws, intended to protect our own people, would operate as a discrimination against our citizens, and in favor of citizens of other states, and would commit to those having no interests in common with us a most odious monopoly in every form or kind of traffic which our state should attempt to regulate or to suppress. Intrenched behind the interstate commerce clause so construed, citizens of other states could prey upon our people, trample upon our laws, and make gain out of a traffic forbidden to our citizens, only to be delivered up absolutely and unconditionally to them. It would require only that such citizen of another state should establish a local store in some of our towns or cities, or in all of them; conduct a local business, to meet a local demand; and, when called upon by the officers of the law, make reply that he made the goods in some other state, and, as a manufacturer, supplied himself, as a local dealer, with wares of a foreign origin. Neither the foreign origin of the goods sold, nor of the seller, nor both together, will convert a business that is local and intrastate into one that is general and interstate, within the meaning of the constitution of the United States.

But the defendant's second position is that, admitting the views now stated to be correct, he is, nevertheless, beyond the reach of the state law for another reason, viz. that his sales are made in original packages, and are therefore interstate commerce. We have examined the decisions of the supreme court of the United States for a definition of the term "original package." It does not seem, however, to have received, and perhaps at this time is not capable of, a precise definition, that may be applied to it in all cases. The idea for which it stands is, however, not difficult of apprehension or statement. The methods adopted by manufacturers and importers for packing and preparing goods for transportation by sea or land differ with the differences in the character, bulk, and material of the merchandise itself. The general purpose is to adopt that form and size of package best adapted to the safe and convenient transportation and delivery of the particular class of goods to be moved, because the convenience of the trade will be best subserved thereby. Such packages, put up with a view to the convenience and security of transportation and handling, in the regular course of trade, are the original packages of commerce. If we look at the meaning of the words "employed" we are brought to the same conclusion. "Original" means pertaining to the beginning or origin; the first or primitive form of a thing. "Package"

means a bundle or parcel made up of several smaller parcels, combined or bound together in one bale, box, crate, or other form of package. An "original package" is such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce. Such packages are not always made up by putting smaller packages or bundles together, but may include any form of receptacle that shall hold a fixed quantity; as a barrel of sugar or salt, a bag of coffee, a chest of tea, and the like. The package must not be divided or its unity destroyed. When it is received unbroken from the importer through the custom house, or from the manufacturer by the ordinary channels of transportation, it is within the protection of the interstate commerce doctrine, and the state may not subject it to vexatious delays, appraisement, taxation, or trade restriction. But it has never been held that the importer might subdivide his package, and dispose of its several parts in detail. On the contrary, in many cases the United States courts have held that, upon such subdivision or breaking of bulk, the original package ceased to be such; and the goods became mixed with, and indistinguishable from, the merchandise already within the state, and therefore subject to state laws. This assigns to each jurisdiction its proper powers. The general government protects the citizens of the several states in the movement of their commodities across state lines for the purpose of commerce. The state regulates the retail trade conducted within its own borders, and forbids the sale of such articles to its citizens as it finds to be injurious to them. We are asked in this case to go a step further, and hold that any package which a manufacturer may choose to put up and send to himself as a merchant, or to a customer, is necessarily an "original package," because it was put up by a manufacturer outside of the state. We cannot so hold.

This question was brought to our attention recently by the case of *Com. v. Zell*, 138 Pa. 615, 11 L. R. A. 602. In that case a distiller living, or at least making whiskey, just over the state line, established a store or an agency within the state. He put up his "goods" in bottles, ranging in capacity from one quart down to one half pint, and, packing them in unsealed barrels, sent them to the Pennsylvania store. When they reached the agent, the bottles were taken from the barrels, and arranged upon the shelves and in the windows of the store in the manner usual in that trade, and sold to customers. The seller was prosecuted for the sale of intoxicating liquors without a license, such as the laws of the state require. His defense was—the now common one—that he was engaged in interstate commerce. His position was that the bottles sold by him singly to customers had been filled and corked at the distillery, which was in another state, and that they were the "original packages" put up by the maker, and transported across the line to his store for sale. The contention was seriously

and earnestly made that any size or shape of jug or bottle which the distiller might desire to meet the needs of the retail sale of drink became, when filled and shipped by him across a state line, an "original package," within the meaning of that phrase as used by the United States courts in the interstate commerce cases. The character of the package appears to have been submitted to the jury, who convicted the defendant. The defendant appealed to this court, and we said, through Paxson, *Ch. J.*: "Whether a box or a barrel of beer can be separated and sold in single bottles as original packages will be formally decided when the question squarely arises. The jury evidently regarded it as a trick and an evasion of our statute." The judgment was accordingly affirmed. The question which it was not necessary to decide in *Com. v. Zell*, *supra*, is fairly involved in this case, so far as oleomargarine is concerned. The case stated concedes that the package was sold by this defendant for consumption, as "an article of food," but asserts that it was sold in the form in which the maker put it up at his factory. It is not said that it was an "original package" in express words, nor that it was in the form usually adopted in the trade for purposes of transportation. It is reasonable to infer that when the defendant was admitting the sale, and setting up his justification for a violation of the law, he would do this as strongly as the facts would sustain him, had he gone into the proof upon a trial before a jury. What the case stated does tell us is that the defendant sold at his store in Philadelphia, to one John H. Berry, the keeper of a coffee house at 606 Lombard street, Philadelphia, a package of oleomargarine, weighing eighty pounds, made and stamped and branded in Rhode Island, for use as an article of food. This is almost identical with the defense in *Com. v. Zell*, which was that the bottles sold by the defendant were put up and shipped in another state, and sold in the same form in which they were received. This does not go far enough. The defendant in this case, as in *Zell*'s case, was *prima facie* a lawbreaker. It was incumbent on him to show his right to violate the police laws of the state in which he lived or carried on his store affirmatively and clearly. It is not enough to hint or suggest the existence of such a right. It must be set up, and his ability to escape the penalty of the broken law depends on the sufficiency of the justification. The fact alleged as a justification is that the package sold was "made, stamped, and branded" in Rhode Island. To enable the defendant to stand on this statement, it is necessary for us to go with him to his legal conclusion, viz., whatever package is put up at a factory outside the state is an "original package," within the meaning of the interstate commerce doctrine. This we distinctly refuse to do. The United States courts have not so held as we understand the cases, and such a conclusion could not be sustained on principle, as the question presents itself to us. The consequences of such a holding are obvious. In this case the owners of the store in Philadelphia are the owners of the factory in another

state. As merchants they understand the needs of their retail trade, and the forms and sizes of rolls, tubs, or packages that will best suit the wants of their customers. As manufacturers they can put their product in packages of such size and shape as shall meet their own needs as merchants. They have both ends of the traffic in their hands, and may do, as they undoubtedly are in the habit of doing, whatever their profits as retailers require them to do as manufacturers. A jury would be justified in finding in such a case, as the jury found in Zelt's case, that the mode of putting up the packages was not adapted to meet the requirements of actual interstate commerce, but the requirements of an unlawful, intrastate, retail trade. In this case the facts are found for us as by the parties. We are to determine their legal effect. The defendant is found to have made sales of oleo-margarine as an article of food contrary to the provisions of our statute. It is also found that he made these sales for a nonresident employer. But the residence or business of the owner, standing alone, is wholly immaterial. Our law deals with the local trade, regardless of the nationality or residence of the trader. It is further found that the sales are

made in packages put up by the trader at his factory, and sent to his store in this city for sale. This, as we have said, does not amount to an assertion that the sales are made in the "original packages" of commerce. If it shows anything upon the subject, it shows that they are not so made. One who plants his feet squarely upon the police laws of this state, and defies its officers to suppress or to punish his unlawful trade, must show a clear legal right to take and maintain his position as a public enemy, or suffer the penalty of the broken law. To hold otherwise would make it impossible for the people of any state to protect themselves from evils that by common consent throughout the civilized world need to be restrained and removed by suitable legislation. It would also strike a blow of absolutely crushing weight at the existence of the police power in the several states, and render all attempts at its exercise ineffectual and useless.

The judgment of the court below is reversed, and judgment is now entered on the case stated in favor of the plaintiff for the sum of \$100, with the costs of suit. After judgment is properly entered, let the record be remitted for purposes of execution.

NEBRASKA SUPREME COURT.

ST. JOSEPH & GRAND ISLAND R. CO., *Plff. in Err.*,

v.

DE WITT W. PALMER.

- *1. The state courts have not lost their jurisdiction of the subject-matter of actions against carriers because of interstate shipments by reason of the fact that congress has legislated upon the subject.
2. A railroad company, in the carriage of goods, is subject to the liability of a common carrier,

and must answer for all losses not occasioned by the act of God or the public enemy, and cannot, in this state, by special contract, limit or relieve itself from this liability.

3. The fact that the contract was for the carriage of goods from a point in this state to a point in another state does not change the rule.

*Headnotes by IRVINE, C.

Decided November 22, 1893.

ERROR to the District Court for Adams County to review a judgment in favor of plaintiff in an action brought to recover the value of goods lost while in possession of defendant or a connecting carrier for transportation. *Affirmed.*

The facts are stated in the commissioner's opinion.

Messrs. John M. Thurston, W. R. Kelly and E. P. Smith, for plaintiff in error:

It is alleged that the bill of lading was not the contract, that plaintiff did not know of nor

consent to the terms thereof, that defendant's agent asked them to sign a receipt for the goods, and that they did so without reading it, supposing it to have been a receipt. That defendant's agents did not call their attention to the contents thereof, and that he "fraudulently concealed" from them the terms thereof; that the release clause was not called to their attention, and that the insertion thereof was a fraudulent attempt by defendant to limit the contract actually made.

There is absolutely no proof tending to support the allegation of fraudulent concealment,

NOTE.—The above decision seems to add a new point to the law of interstate commerce, in deciding that such commerce is subject to the law of the state as expressed in its constitution and statutes denying the right to limit the liability of carriers. These provisions seem to go somewhat beyond

the common law as held in most states and in the federal courts; but we understand the decision to be that federal statutes or decisions on this question cannot control even in the case of interstate shipments, especially in respect to the liability of a corporation of the state.

or of any act of omission or commission on the part of defendant's agent amounting to or tending to show fraud, or any other thing outside of a proper and fair conduct of the matter in hand.

It conclusively appears that plaintiff knew all about the uses and purposes of such documents, and that in his business he had become familiar with it. They were made out in duplicate in his presence, after he had twice applied for such documents, and after discussion of, at least, some of the conditions thereof, signed in duplicate and mutually delivered. He had ample time and opportunity to and did in fact examine them. After this the defendant entered upon the performance of the contract, and promptly and fully upon its part complied therewith. Under such circumstances plaintiff cannot now be heard to deny that he made it, or to offer as evidence of another contract the verbal negotiations of the parties which resulted in the written contract.

Delaney v. Linder, 22 Neb. 280; *Morrissey v. Schindler*, 18 Neb. 672; *Clarke v. Omaha & S. W. R. Co.* 5 Neb. 322; *Hamilton v. Thrall*, 7 Neb. 210; *Dodge v. Kiene*, 28 Neb. 216.

The facts in law estopping the plaintiff to deny the contract, the court should have enforced it.

Taylor v. Fox, 16 Mo. App. 527; *Mulligan v. Illinois Cent. R. Co.* 36 Iowa, 181, 14 Am. Rep. 514; *St. Louis, K. C. & N. R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 18; 2 Rorer, Railroads, p. 1319; Wheeler, Modern Law of Carriers, p. 22; 3 Wood, Railway Law, p. 1578, note; Hutchinson, Carr. § 241, p. 240; *Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 222, 2 Am. Rep. 391; *St. Louis, K. C. & N. R. Co. v. Cleary*, supra; *Hopkins v. St. Louis, I. M. & S. R. Co.* 29 Kan. 544; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 175, 23 L. ed. 872.

It not appearing that any fraud or imposition was practiced, or that any mistake intervened, the plaintiff must be conclusively presumed to have become acquainted with its contents, and if he did not do so the consequences of his folly and negligence must rest upon himself. Courts cannot undertake to relieve parties from the effects of such inattention and want of care. If once they should enter this doubtful domain, it is impossible to foresee to what lengths their interference might be pressed, or of what limits it would finally admit.

Mulligan v. Illinois Cent. R. Co. 36 Iowa, 188, 14 Am. Rep. 514; *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470; *Goetter v. Pickett*, 61 Ala. 387; *Dawson v. Burrus*, 73 Ala. 111; *Western R. Co. v. Harwell*, 91 Ala. 340.

If a bill of lading is delivered to the shipper at the time when the carrier receives the goods all prior negotiations are merged in the writing and the shipper is charged with notice of its contents. The writing becomes the sole evidence of the undertaking.

Barber v. Brace, 3 Conn. 9, 8 Am. Dec. 149; *O'Bryan v. Kenney*, 74 Mo. 125; *Hill v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 351, 29 Am. Rep. 163; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 73 N. Y. 90, 28 Am. Rep. 113; *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 422;

Kirkland v. Dinmore, 62 N. Y. 171, 20 Am. Rep. 475; *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 4 L. R. A. 244, 119 Ind. 359.

The legal effect of an instrument cannot be avoided by showing that it was signed in ignorance of its contents, when the person who signed it did not read it or if unable to read, did not ask to have it read, in the absence of some fraud or deceit or misrepresentation, having been practiced upon him.

Taylor v. Fleckenstein, 30 Fed. Rep. 99; *Wallace v. Chicago, St. P. M. & O. R. Co.* 67 Iowa, 547; *McKinney v. Herrick*, 66 Iowa, 414; *Gulisher v. Chicago, R. I. & P. R. Co.* 59 Iowa, 416; *Western R. Co. v. Harwell*, 91 Ala. 340, 45 Am. & Eng. R. R. Cas. 358; *Pacific Guano Co. v. Anglin*, 82 Ala. 492; *Cannon v. Lindsey*, 85 Ala. 198.

A party who signs a written contract without reading it, or causing it to be read to him, when there is an opportunity afforded him of doing so, is guilty of such negligence as will prevent him from escaping from the legal effect of the contract.

Keller v. Orr, 106 Ind. 406; *McCormack v. Molburg*, 43 Iowa, 561; *Nebeker v. Cutsinger*, 48 Ind. 486; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 118, 18 L. ed. 172; *Squire v. New York Cent. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Grace v. Adams*, 100 Mass. 505, 1 Am. Rep. 131, 97 Am. Dec. 117; *Steers v. Liverpool S. S. Co.* 57 N. Y. 1, 15 Am. Rep. 458; *Long v. New York Cent. R. Co.* 50 N. Y. 77; *Kirkland v. Dinmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Belyer v. Dinmore*, 51 N. Y. 166, 10 Am. Rep. 575; *McMillan v. Michigan S. & N. I. R. Co.* 16 Mich. 79, 93 Am. Dec. 208.

A carrier may by express contract limit his liability, provided the limitation is just and reasonable.

3 Wood, Railway Law, §§ 425, 1576. See also Hutchinson, Carr. §§ 222, 244 et seq.; and Wheeler's Modern Law of Carriers, p. 221.

A railroad company may limit its liability as a common carrier to the line of its own road by express contract.

Detroit & M. R. Co. v. Farmers & M. Bank, 20 Wis. 123; *Mulligan v. Illinois Cent. R. Co.* 36 Ill. 181, 14 Am. Rep. 514; *Jones v. Cincinnati, S. & M. R. Co.* 89 Ala. 376, 45 Am. & Eng. R. R. Cas. 321; *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 350, 16 Am. & Eng. R. R. Cas. 194; 3 Wood, Railway Law, 1572, and note; *Ortt v. Minneapolis & St. L. R. Co.* 36 Minn. 396; *Hunter v. Southern Pac. R. Co.* 76 Tex. 195; *Harris v. Grand Trunk R. Co.* 15 R. I. 371.

The service to be rendered was that of transporting the goods from Hastings, Nebraska, to Grants' Pass, Oregon. The contract was one relating to interstate business. The service itself, and the contract in relation thereto, were subject to the terms and conditions of the Act of Congress.

There is no reason why the supposed inhibition of the Nebraska constitution should now be applied to determine the rights of parties who have made a contract relating to the business of interstate commerce.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31.

The Constitution of the United States having given to the courts the power to regulate commerce, not only with foreign nations but among the several states, that power is necessarily exclusive when the subjects that are national in their character admit only of one uniform system or plan of regulation.

Robbins v. Shelby County Tax. Dist. 120 U. S. 492, 30 L. ed. 695, 1 Inters. Com. Rep. 45; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 811; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 81 L. ed. 700, 1 Inters. Com. Rep. 828; *Brimmer v. Rebman*, 3 Inters. Com. Rep. 485, 138 U. S. 78, 34 L. ed. 862; *Lyng v. Michigan*, 3 Inters. Com. Rep. 146, 135 U. S. 161, 34 L. ed. 150; *Leisy v. Hardin*, 3 Inters. Com. Rep. 36, 135 U. S. 100, 34 L. ed. 128.

No appearance for defendant in error, *Mr. John M. Ragan* having been of counsel in the lower court.

Irvine, C. filed the following opinion:

The plaintiff in error was a railroad company operating a line of railroad between St. Joseph, Mo., and Grand Island, Neb., and passing through the city of Hastings, Neb. In December, 1889, certain goods were loaded into a car at Hastings for shipment to Grant's Pass, Or. These goods consisted of furniture, wearing apparel, and household goods, belonging partly to one Pardee, and partly to one Hart, and of a stock of drugs and drug-store fixtures belonging to the defendant in error, Palmer. The goods were carried to Grand Island by the plaintiff in error, and there turned over to the Union Pacific Railway Company, on the line of whose road the car was wrecked, and no part of the goods was ever delivered at Grant's Pass. Pardee and Hart assigned their claim to Palmer, who brought suit in the district court of Adams county to recover damages for the loss of the goods. The petition of the plaintiff below, in addition to the foregoing facts, which are undisputed, pleads, among other things, that Palmer, Pardee, and Hart entered into a verbal contract with the defendant to transport said goods and property to Grant's Pass, and there safely deliver them in ten days, in consideration of the sum of \$200, and that after the goods were loaded into the car a paper was presented to Pardee for signature, and he signed it believing it to be a receipt, and in ignorance of certain clauses therein contained; that after the goods were turned over to the railroad company for shipment, and the freight of \$200 paid, the railroad company's agent stated to the owners that the \$200 might not be enough to pay the freight, and extorted from the owners a promise that, in case the freight should exceed \$200, they would pay the excess; that the paper referred to was not the contract of shipment, but that the contract was as first stated, and that the contents and limitations of the paper were fraudulently concealed from the owners of the goods. The paper referred to was in fact a bill of lading, and the clauses in regard to which fraud was alleged were two: The first was that the railroad company assumed no liability beyond the end of its own line; that is, at Grand Island, Neb. The other is as follows: "One

car emigrant outfit O. R. Rel'd val. of \$5. per cwt. in case of total loss S. L. & C."

The answer, so far as it is material, may be analyzed as follows: First. That the railroad was engaged in the business of interstate commerce, and that this was an interstate shipment, and not within the jurisdiction of the state courts. Second. That the bill of lading constituted the contract between the parties, that the first provision quoted exempted the defendant beyond the end of its own line, and that there was no fraud or concealment. Further, that the somewhat cabalistic letters and words quoted from the bill of lading meant, and were understood to mean, owner's risk released to the value of five dollars per hundred-weight in case of total loss, and that the shippers were to load and count the goods. Third. That the contract between the parties contemplated merely the shipment of an emigrant outfit, which was understood to mean household goods alone, and that the stock of drugs was fraudulently loaded into the car—the established rate on a car containing drugs being very much greater than the established rate on an emigrant outfit. Fourth. That, under the interstate commerce law, false representations as to the contents of the package, with the consent and connivance of the carrier or its agent, is constituted a misdemeanor, and bars the plaintiff from relief.

The evidence upon the part of the plaintiff tends to show that Pardee and Hart went to the agent of the company at Hastings, stating to him that they wished to ship their household goods and stock of drugs, and asked him for the rate to Grant's Pass upon the carload; that the agent informed them that the rate would be \$200, and that there would be nothing to pay at the other end of the line; that thereupon the goods were loaded upon a car furnished by the railroad company for that purpose; that, after the loading was complete, Pardee and Palmer went to the agent for the bill of lading; that the agent told them that, inasmuch as the drugs had been loaded upon the car, he was not sure that \$200 would pay the freight, but that he would mark upon the bill of lading a receipt for the \$200, to apply on the freight, and if there was more to pay it must be paid at the other end; that they consented to this because there was no other course left open to them; that the bill of lading was then handed to them, and Pardee signed it, none of the owners reading its conditions, or having his attention called thereto. Upon the part of the railroad company the testimony tends to show that, at the first interview, nothing was said about the stock of drugs, but that, when Pardee came for the bill of lading, the agent told him that he would not give him a clear bill of lading, for he had reason to believe that "there was other stuff in the car besides household goods," but would accept \$200, to be applied, the owners to pay the difference at the other end; that Palmer then handed him \$200, and Pardee signed the bill of lading in duplicate.

The case was submitted to the jury under long instructions, the general effect of which was to submit the question as to whether the

oral agreement pleaded, or the bill of lading, constituted the contract between the parties; further, to instruct the jury that under the laws of this state no limitations upon the liability of a common carrier could be imposed, except upon proof that such limitations had been called to the attention of the shipper, and by him expressly assented to, and submitted to the jury whether or not attention had been called to the limitations and assent obtained. There was a verdict for the plaintiff in the sum of \$5461.58.

1. The question of jurisdiction was first raised by demurrer to the petition, and then by answer. The theory of the railroad company in this regard seems to be that, the shipment being from one state to another, it became subject solely to the laws of the United States. If that were so, it would not oust the court of jurisdiction. It would only determine upon what principles of law the rights of the party would depend. The record shows that an attempt was made to remove the case to the federal court; that the court refused to order the removal. Nevertheless, it would appear that an order of removal must have been obtained from some source, for there is in the record an order of the federal court remanding the case to the district court of Adams county. These proceedings are a part of the law of the case and conclusively determine the question of jurisdiction in favor of the plaintiff.

2. The questions of law in regard to the transaction are discussed in the briefs under a number of heads relating to objections to the evidence, and to the instructions of the court. To state each in its order would consume much space, and a detailed consideration is unnecessary, for the reason that all these exceptions and assignments of error relate to a very few main questions. Great stress is laid upon the point that the bill of lading must be treated as the conclusive evidence of the contract between the parties, and that parol evidence was not admissible to show a prior verbal contract contrary to the terms of the bill of lading. In this connection it is also urged very strenuously that the court erred in submitting the question raised by this evidence to the jury; further, it is urged that the instructions to the court are conflicting; and, still further, that the limitations imposed by the bill of lading upon the carrier's liability are, upon principles of common law, valid obligations, and that they must be enforced, in the absence of actual misrepresentations or concealment, which, it is contended, the evidence does not establish. Numerous authorities are cited upon both sides upon these points. A single consideration disposes of all of these questions. Under the law of Nebraska, whatever the law may be elsewhere, it is beyond the power of a common carrier, by such provisions as appear in the bill of lading,—assuming it to be the contract of the parties,—to so limit its liability. In *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117, it is said: "The common law fixes the degree of care and diligence due from railroad companies as common carriers; and a failure to exercise this care and diligence is negligence, with-

out any legal distinction, as being gross or ordinary." That the better rule of law, sustained by the weight of authority, is that "it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty." This case arose before the Constitution of 1875 went into force. By article 11, section 4, of that Constitution, it is provided that "the liability of railroad corporations as common carriers shall never be limited." While the writer might, if the question were a new one, construe this provision as simply a restriction upon the legislature against the limitation of carriers' liabilities by law, and not as preventing such limitation by special contract, the question is no longer an open one, and has otherwise been determined. In *Missouri Pac. R. Co. v. Vandeventer*, 26 Neb. 222, 8 L. R. A. 129, by contract, the railroad company sought to relieve itself from liability for injury to livestock, unless notice in writing were given before the removal of the stock from its place of delivery. This provision of the constitution was there considered and discussed. The court, speaking through Judge Cobb, says: "So I conclude that the object and intent of the convention in proposing, and of electors in adopting, this provision of the constitution here referred to, was to put it out of the power of railroads, as common carriers, to limit their liability as such by special agreement with shippers, and thus remove from their officers and agents all temptation to effect such exemption from liability, and the loss and damage to property which might, of necessity, follow the release of their responsibility, and that of their agents, therefor. See *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117, a case which arose under the old constitution, but heard in this court under the new."

In addition to this constitutional provision, section 111, chap. 16, Comp. Stat., provides that "any railroad companies receiving freight for transportation shall be entitled to the same rights and be subject to the same liability as common carriers." This is a portion of the general incorporation act, under which the plaintiff in error derives its existence as a corporation. Comp. Stat., chap. 72, art. 1, § 5, provides: "No notice either express or implied shall be held to limit the liabilities of any railroad company as common carriers unless they shall make it appear that such limitation was actually brought to the knowledge of the opposite party and assented to by him or them in express terms before such limitation shall take effect." This section was discussed by the court in *Union Pac. R. Co. v. Marston*, 30 Neb. 241, and held to apply to just such a case as this, where the limitation was contained in a bill of lading which the shipper alleged was given after the making of an oral contract for shipment. Irrespective, then, of the question as to whether there was an oral contract, or whether such oral contract or the bill of lading constituted the final arrangement between the parties, the law of

this state is settled that a common carrier cannot, even by the terms of an express contract, relieve itself of its common-law liability. It is said that at common law the common carrier is not liable for loss, in the absence of special contract, beyond the point at which it delivers the goods to a connecting carrier. To this it should be added that the contract of the shipper was with the carrier first receiving the goods, and if such carrier undertook to deliver the goods at their destination, even though it contemplated doing so through intermediate carriers, it assumed a liability of such character for every part of the route. Many cases hold that receiving goods marked for a point beyond the end of the receiving carrier's route is evidence of a contract to deliver them as marked. In this case the bill of lading was executed in duplicate. In one of the copies the destination was left blank. In the other, the language was: "Received of Palmer and Pardee the following described package, in apparent good order, marked and consigned as noted below, contents and value unknown, to be transported to Grant's Pass, Or., and delivered at the railroad depot at that point." Both copies in writing show that the goods were consigned to Pardee at Grant's Pass, Or. The negotiations as to the freight were, according to the uncontradicted testimony, with a view to prepayment all the way through. Hastings was only twenty-four miles from Grand Island, where the car was delivered to the Union Pacific; and the \$200 received by the railroad company if not intended as a full prepayment of the freight to Oregon, was certainly intended to apply on the freight throughout the whole distance. There is no possible view of the evidence from which it could be inferred that the railroad company had only contracted to deliver the goods to the next carrier.

3. The plaintiff in error seeks to avoid the effect of these constitutional and statutory enactments and judicial construction by pleading and arguing the effect of the Act of Congress known as the "Interstate Commerce Law," and amendments thereto. The particular provision relied upon is from the Act of 1889, as follows: "Any person or any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representations of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or servant, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof, in any court of the United States of competent jurisdiction within the district within which such offense was committed, be subject, for each offense, to a fine of not exceeding \$5000 or imprisonment

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ment in the penitentiary for a term not exceeding two years or both in the discretion of the court." Conceding that the construction of such acts into misdemeanors should render the contract contrary to public policy, to such an extent as to deprive the shipper of his remedy against the carrier, the evidence wholly fails to make out a case within the section quoted. Whatever false billing there may have been was by the company itself, as all the evidence shows that the agent knew before the car was moved after loading that it contained articles other than household goods. Under the most favorable construction of the evidence on behalf of the railroad company, if there was any false representation as to the contents of the "package," its true contents were known before the railroad company took charge of the car, and an agreement was made for the payment of any additional freight by reason of the introduction of drugs into the car. We cannot see, therefore, how this section, conceding it to have the effect claimed for it by plaintiff in error, could affect the right of recovery. To give it such effect would be to declare that the section quoted absolutely protects a railroad company from liability in any case where the shipper uses general terms in describing the goods to the carrier or agent, and the agent paraphrases such language into a technical phrase, and such phrase does not correctly describe the goods, or where the carrier's agent, of his own volition, makes false statements of the character of the shipment. The section referred to was chiefly designed as a restriction upon the carrier. Its whole aim was to prevent false billing or false representations in order to conceal discriminations in favor of particular shippers. It was not intended, and should not be construed, as a means of relieving a carrier from liability because its own agents have committed an error.

But it is argued that, upon general grounds, the whole subject-matter of interstate transportation was by the constitution placed within the power of Congress, and that Congress, having enacted the Interstate Commerce Act, assumed such jurisdiction, and thereby nullified existing state laws; that not only the acts of Congress must be treated, upon these subjects, as the supreme law of the land, but that the decisions of the Federal court must be accepted as the final statements of the law, prevailing against state statutes and state decisions. Without discussing the question as to whether the Federal decisions are opposed to the constitutional and statutory provisions of this state, referred to, it is sufficient to say that we cannot accept the theory of the railroad company, as above outlined. It is admitted in the pleadings that the company is a corporation organized under the laws of the state of Nebraska. The time of this organization does not appear, but the statutory provisions date from the very earliest period of the state's history. The statute quoted above is a portion of the general incorporation act relating to railroads, the act under which this company derives its right to exist. To say that an Act of Congress—especially, one not, in express

terms, contrary to these provisions—shall be given the effect of nullifying them, would be to say that this state must cease to exercise its sovereign powers of creating corporations for railroad purposes, else it must content itself with creating such corporations absolutely untrammelled by conditions, or permit them to exist subject only to such conditions as the Congress of the United States may see fit to impose. While this state forms a constituent part of the Union, under its present constitution, this court should never yield its consent to such a doctrine. If such be the law, it must be declared by another tribunal; and, in case it should be so declared, the exercise by the state of its sovereign power of creating such corporations should, from every motive of self-preservation, cease.

4. In addition to the general verdict rendered by the jury, there was an attempt to have certain special findings returned. One of the errors assigned is the refusal of the court to mark upon the margin of the submission of those findings the word "given." If the submission of these findings amounted to an instruction, the objection would be purely technical, and the refusal of the court to use the word "given" could not operate to the prejudice of the plaintiff in error. Instead of marking the submission given, the court made a note as follows: "As I have said in the attached submission, I submit these special findings for you to pass upon; and, in the opinion of this court, it would be the grossest kind of error to attempt to control your discretion in passing on these special findings." There also appears to have been indorsed upon the questions submitted a quotation of that portion of the statutes whereby it is permitted to the jury, in their discretion, to return a general or special verdict. Of the special questions submitted, the first related to the value of the goods at Hastings, and was answered. The second related to the value of the goods at Grant's Pass, Or., at the time when they should have been received there. In answer to this, the

jury stated, "We do not know." The other questions related to the freight rates under different circumstances. All these questions were answered, "We do not know." By the instructions, the jury was told that if it should find for the plaintiff the verdict should be for the market value of the goods at Grant's Pass, at the time they should have been there delivered, together with interest. The second question submitted was material to the case. The others were entirely immaterial, and the discharge of the jury without answering them was in no way prejudicial. It is urged, however, that, when the jury answered that they did not know the market value of the goods at Grant's Pass, they, in effect, stated that they were unable to fix the measure of damages, and that the general verdict could not, therefore, have been founded on the evidence, and in obedience to the instructions. But, under the evidence given as to the value of the goods at Grant's Pass, no verdict less than that returned could be sustained. There is evidence tending to show that the value of the goods at Hastings was less than the value marked upon an inventory offered in evidence, and one witness testified that the goods were worth no more at San Francisco than at Hastings, but there is nothing to show that he even had any knowledge of the value at San Francisco. The only competent evidence of the value of the goods at Grant's Pass, Or., fixes it at more than \$7000; so that the verdict rendered could not have been affected by any findings based upon the evidence in answer to the special question submitted.

Some of the instructions do not state the law correctly. Some of them are apparently conflicting, but, in any view of the evidence, for the reasons already stated, no verdict different in character, or less in amount, could be sustained.

The judgment is therefore affirmed.

Ryan, C., concurs. **Ragan, C.**, took no part in the consideration or decision of this case.

UNITED STATES SUPREME COURT.

THE MERCHANTS COTTON PRESS & STORAGE COMPANY, *Plff. in Err.*,
v.
THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL.

THE NATIONAL FIRE INSURANCE COMPANY, OF CONNECTICUT, *Plff. in Err.*, v. THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL. THE MUTUAL FIRE INSURANCE COMPANY OF NEW YORK, *Plff. in Err.*, v. THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL. THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, *Plff. in Err.*, v. THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL. THE FIRE ASSOCIATION OF NEW YORK, *Plff. in Err.*, THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL. THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, of England, *Plff. in Err.*, v. THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL. THE ROYAL INSURANCE COMPANY OF ENGLAND, *Plff. in Err.*, v. THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL.

(See S. C. Reporter's ed. 388-389.)

1. In a suit in equity in the nature of a creditor's bill brought by insurance companies against a
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railroad company and other companies who are made parties in aid of the relief asked against

- that company, if the suit is in fact a single cause of action against the railroad company with incidental relief against the other companies the railroad company is an indispensable party to the litigation, and there is no separable controversy between the other defendants which will allow a part of them to remove the cause from the state court to a Federal court.
2. The voluntary joinder of the parties has the same effect for purposes of jurisdiction as if they had been compelled to unite.
 3. The right of removal must be determined by the pleadings at the time the petition is filed.
 4. In order to justify a removal of a cause from a state court to the U. S. circuit court, on the ground of a separable controversy, between citizens of different states, the whole subject-

matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit.

5. The right to take steps for the removal of a cause to the circuit court of the United States, on the ground of a separable controversy, is confined to the parties actually interested in such controversy.
6. There is nothing in the interstate commerce law which vitiates bills of lading, or which, by reason of an allowance of a rebate to the agents of the owners or consignees of goods, if actually made, would invalidate the contract of affreightment or exempt a railroad company from liability on its bills of lading.

[Nos. 807, 808, 809, 810, 811, 812, 813.]

Submitted Jan. 8, 1894. Decided Jan. 22, 1894.

IN ERROR to the Supreme Court of the State of Tennessee, to review a judgment of that court, affirming a decree of the Chancery Court of Shelby County, of the State of Tennessee, upon the merits, and sustaining the decision of the Chancery Court, denying the petition of several of the plaintiffs in error to remove the cause to the Circuit Court of the United States for the Western District of Tennessee, and holding that certain rebates allowed on cotton shipped on a railroad did not invalidate the bills of lading thereof, in a suit brought by The Insurance Company of North America, of Philadelphia, *et al.*, against The Merchants' Cotton Press & Storage Company, the Cairo, Vincennes & Chicago Line of Illinois *et al.*, defendants, for the relief sought for in the complaint and to charge the railroad company with the loss sustained by shippers and that certain insurances might be collected for the benefit of complainants, etc. On motion to dismiss or affirm. These seven causes were submitted together and present the same Federal questions. *Affirmed.*

The facts are stated in the opinion.

Messrs. S. P. Walker, C. W. Metcalf, Luke E. Wright and T. B. Turley, for plaintiffs in error:

The motion to affirm should not be entertained for the reason that, though it is nominally coupled with a motion to dismiss, such motion to dismiss is colorable only, and manifestly made for the purpose of bringing on the motion to affirm.

Whitney v. Cook, 99 U. S. 607 (25: 446).

The record presented a case for removal to the Federal court, under the Act of Congress in that regard. It showed a separable controversy between citizens of different states, which could be determined without the presence of any of the other parties to the record.

Knapp v. Troy & B. R. Co. 87 U. S. 20 Wall. 117 (22: 328); *Barney v. Latham*, 103 U. S. 206 (26: 514); *Hyde v. Ruble*, 104 U. S. 407 (26: 823); *Harter Twp. v. Kernochan*, 103 U. S. 562 (26: 411); *Kanouse v. Martin*, 55 U. S. 15 How. 198 (14: 660); *Meyer v. Delaware R. Const. Co.* 100 U. S. 457 (25: 593); *Ayers v. Chicago*, 101 U. S. 184 (25: 838); *Shainwald v. Lewis*, 108 U. S. 158 (27: 691); *Ayres v. Wiswall*, 112 U. S. 187 4 INTER S.

(28: 698); *Ayers v. Watson*, 113 U. S. 594 (28: 1098); *Crumpp v. Thurber*, 115 U. S. 56 (29: 328); *Insurance Co. of N. A. v. Delaware Mut. Ins. Co.* 50 Fed. Rep. 248.

The record establishing that the contracts of affreightment between the C. V. & C. Line and Jones Bros. & Co. were made in violation of the Interstate Commerce Law—such violation making the whole contract illegal under the terms of the statute—no recovery should have been allowed on the bills of lading issued by the C. V. & C. Line to Jones Bros. & Co., and the case of the complainant marine companies depending upon the establishment of the liability of the carriers must therefore fail so far as concerns those bills of lading.

Clarke v. Providence, 1 L. R. A. 725, 16 R. I. 387, 27 Am. & Eng. Corp. Cas. 8; *Petrol Guano Co. v. Jarnette*, 25 Fed. Rep. 675; *Dent v. Ferguson*, 132 U. S. 50 (33: 242); *Hannay v. Eve*, 7 U. S. 3 Cranch, 242 (2: 427); *Gibbs v. Consolidated Gas Co.* 130 U. S. 896 (32: 979); *Miller v. Ammon*, 145 U. S. 421 (36: 759); *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 398 (36: 748).

Messrs. John M. Butler, Holmes Cummins and William H. Carroll, for defendants in error:

The denial of the right of removal presents no Federal question.

Sloan Land & C. Co. v. Frank, 148 U. S. 611 (37: 580); *Porter v. Sabín*, 149 U. S. 479 (37: 818).

Denial of the right of transfer raises a Federal question re-examinable upon the assignment of error of the other petitioning defendants.

The domicils of these corporations are not shown by the records.

Jackson v. Ashton, 33 U. S. 8 Pet. 148 (8: 898).

The jurisdiction of the circuit court of the United States depends either upon the existence of a Federal question, or the diverse citizenship of the parties to a suit, where the matter in dispute exceeds the sum of \$2000 exclusive of interests and costs.

Ayers v. McAuley, 149 U. S. 619 (37: 872).

Where the whole controversy is between citizens of different states, all the parties on one

side of that controversy must be citizens of different states from all the parties on the other side.

Strawbridge v. Curtiss, 7 U. S. 8 Cranch, 267 (2: 435); *Smith v. Lyon*, 133 U. S. 818 (83: 636); *Meyer v. Delaware R. Const. Co.* 100 U. S. 457 (25: 593); *Central R. Co. of N. J. v. Mills*, 118 U. S. 256 (28: 951); *Smith v. Akers* ("Akers v. Akers"), 117 U. S. 197 (29: 888); *Susquehanna & W. V. R. & Coal Co. v. Blatchford*, 78 U. S. 11 Wall. 172 (20: 179).

And when in any suit recognizable in the circuit court of the United States, there is a separable controversy, by the settled construction of the third clause of section 2 of the Act of the 8d of March, 1887, as corrected by the Act of the 18th of August, 1888, the whole subject-matter of the separable suit must be capable of being finally determined as between the parties thereto, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit.

Hyde v. Ruble, 104 U. S. 407 (26: 833); *Corbin v. Van Brunt*, 105 U. S. 576 (26: 1176); *Fraser v. Jennison*, 108 U. S. 191 (28: 181); *Winchester v. Loud*, 108 U. S. 130 (27: 677); *Shainwald v. Lewis*, 108 U. S. 158 (27: 691); *Ayres v. Wiswall*, 112 U. S. 187 (28: 693); *Fidelity Ins. T. & S. D. Co. v. Huntington*, 117 U. S. 280 (29: 898); *Graves v. Corbin*, 132 U. S. 571 (33: 462); *Brown v. Trousdale*, 138 U. S. 389 (34: 987).

The matter in dispute in such distinct and separable controversies must exceed the sum of \$2000 exclusive of interest and costs, and the requisite diverse citizenship must exist before the suit can be transferred upon the petition for removal into the circuit court of the United States by one or more of the defendants actually interested therein.

Ex parte Pennsylvania Co. 137 U. S. 455 (34: 740); *Torrence v. Shedd*, 144 U. S. 527 (36: 528).

It is indispensable, before the state court is required to surrender its jurisdiction of this suit, that the petitioners, or one of them, file in that court a removal petition and give the required security.

Pittsburg, C. & St. L. R. Co. v. Ramsey, 89 U. S. 22 Wall. 328 (22: 824).

If such petition be filed, and it fails to show the citizenship of the parties, it is defective.

Orchore v. Ohio & M. R. Co. 131 U. S. 240 (33: 144).

The jurisdiction of the circuit court of the United States over this suit rests and depends upon the statement made in the petition for its transfer into that court, and verified by the oath of the petitioner.

Virginia v. Paul, 148 U. S. 123 (37: 392); *Ex parte Virginia* ("Virginia v. Rives"), 100 U. S. 813 (25: 667); *Graves v. Corbin*, 132 U. S. 571 (33: 462).

A real and not a fictitious Federal question, is essential to the jurisdiction of this court to re-examine the judgment of the supreme court of Tennessee.

Hamblin v. Western Land Co. 147 U. S. 531 (37: 267).

For the purpose of determining whether a controversy is separable the allegations in the bill must be taken as true, and the combination

charged between these defendants viewed in that light does not present a separable controversy.

East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240 (30: 382); *Central R. Co. of N. J. v. Mills*, 113 U. S. 249 (28: 949).

The test of a right claimed must be determined by the case made by the pleadings at the time the petition is filed; and the test of the sufficiency of the petition is the averments in it.

Graves v. Corbin, 132 U. S. 585 (33: 467).

The bill does not aver facts tending to show any separable controversy between the petitioners or either of them, and any of the other parties to the suit. On the contrary, the bill is an indivisible cause of action as to the petitioners.

Peninsular Iron Co. v. Stone, 121 U. S. 631 (30: 1020); *Bank of Rome v. Haselton*, 15 Lea, 216; *California Ins. Co. v. Union Compress Co.* 133 U. S. 401 (33: 735); *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527 (23: 868); *London & N. W. R. Co. v. Glyn*, 1 El. & El. 652; *Hutchinson, Carriers*, § 412 (2d ed.) § 429.

The National Insurance Company filed no petition for the removal of any controversy to be found in the cross-bill of the Phenix Insurance Company.

Rand v. Walker, 117 U. S. 345 (29: 909).

To reach the indebtedness due by the National Insurance Company to these two carriers, or either of them, they are indispensable parties defendant.

United States v. Howland, 17 U. S. 4 Wheat. 108 (4: 526).

And, however this suit be classified, the National Insurance Company is a defendant as garnishee.

Ogilvie v. Knox Ins. Co. 59 U. S. 18 How. 577 (15: 490); *Lewis v. Woodfolk*, 2 Baxt. 25; *Peak v. Buck*, 3 Baxt. 71; *Cook v. Whitney*, 3 Woods, 715; *Weeks v. Billings*, 55 N. H. 371; *Dewey v. West Fairmount Gas Coal Co.* 123 U. S. 333 (31: 181); *Bacon v. Rives*, 106 U. S. 99 (27: 69).

The controversy is an incidental one, and not within the removal acts.

First Nat. Bank of Alexandria v. Turnbull, 83 U. S. 16 Wall. 190 (21: 296); *Barrow v. Hunton*, 99 U. S. 80 (25: 407).

A court of equity will not decree between defendants when neither pleadings nor proof show any controversy or adverse interest between them.

Graham v. La Crosse & M. R. Co. 70 U. S. 3 Wall. 712 (18: 251); *Veach v. Rice*, 131 U. S. 293 (33: 163).

Mr. Justice Jackson delivered the opinion of the court:

The writ of error in each of these seven causes (which were submitted together) presents the same Federal questions, which are, first, whether the supreme court of Tennessee erred in sustaining the action of the chancery court of Shelby county of that state, denying the petition of several of the plaintiffs in error to remove the cause to the Circuit Court of the United States for the Western District of Tennessee; and, secondly, in holding that certain alleged special rates, rebates, or draw-

backs, allowed by Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo, Vincennes & Chicago Railroad Company, through L. L. Fellows, their agent at Memphis, to Jones Brothers & Company, of that place, on cotton shipped over that line to various points in the east, were not in violation of the interstate commerce acts regulating commerce between states of the Union, and did not render the bills of lading issued by the railroad for cotton transported or to be transported so illegal as to invalidate the same and prevent any recovery thereon against the carrier.

The questions thus presented grew out of the following state of facts: On November 17, 1887, about 14,000 bales of cotton in the West Navy Yard Compress of the Merchants' Cotton Press & Storage Company (hereafter called the compress company) were destroyed by fire. The value of the cotton was about the sum of \$700,000. Of the total number of bales thus destroyed about 9608 bales were covered by bills of lading issued by various transportation companies to the owners or consignees of the cotton. The bills of lading issued by the Cairo, Vincennes & Chicago Railroad Company (hereafter called the railroad company) covered 5087 bales of the cotton destroyed, valued at \$245,733.46.

In May, 1887, a contract had been entered into between the railroad company and its receivers, Anthony J. Thomas, and Charles E. Tracy, on the one side, and the compress company on the other, by the terms of which the railroad company and its receivers agreed to give to the compress company all cotton to compress that the railroad company might have to transport out of Memphis in a compressed condition. The compress company, on its part, agreed to properly compress all such cotton, and also to insure the same for the benefit of the railroad company, or owners, for a certain compensation to be paid weekly, which was intended to cover both the service for compressing the cotton and the insurance to be taken out thereon, in good and solvent companies by the compress company. This insurance was to cover any loss while the cotton was under the control of the compress company and until delivered to the railroad company. The contract further provided that the railroad company and its receivers constituted the compress company its agent to receive all cotton intended for transportation over the railroad company's line, and to sign receipts therefor, on the production of which, bills of lading would be issued by the railroad company. This contract was to continue in force until August 31, 1896.

Under and in pursuance of this contract cotton was delivered to the compress company, by the owners or their agents, for transportation over the line of the railroad company from Memphis to points east to the extent of 5087 bales, for which dray tickets or receipts were given by the compress company, and on the production of which the agent of the railroad company issued bills of lading to the several and respective owners or consignees of such cotton.

The railroad company had an all rail line from Memphis, and also a partly water and partly rail line, the water line extending from

Memphis to Cairo, Illinois, at which point the railroad company's rail line commenced and extended by means of its connection eastward. The compress company had a similar arrangement for insuring cotton with other transportation lines, and in pursuance of its undertaking with the carriers it took out insurance on the cotton deposited with it for compression before being transported, aggregating the sum of \$301,750, in forty-four different fire insurance companies, corporations of various states of the Union and of foreign kingdoms. The amount of this insurance fell far short of the value of the cotton deposited with it for compression and which was destroyed by the fire. In all these policies of insurance taken out under and in pursuance of its contract with the carriers, the compress company was named as the assured, but in the body of each of the policies it was set forth and stated that the insurance on the cotton was for the benefit of the railroads, transportation lines, or owners. The insurance was to attach on receipt of the cotton by the compress company, and to terminate when the same was removed for transportation.

The various owners or consignees of the 5087 bales of cotton covered by the bills of lading of the railroad company, with one or two exceptions, insured their interests in their respective lots of cotton in what is called in the litigation marine insurance companies.

There were \$301,750 of insurance thus taken out by the compress company for the benefit of the carriers, and at the same time there was a large amount of insurance taken out by the owners or consignees in the marine insurance companies on the bills of lading issued by the railroad company to the several owners of the cotton.

Soon after the destruction of the cotton various suits were commenced in the state courts by the owners of the cotton destroyed, and the rights of the parties were to some extent settled and adjusted in the cases of the *Lancaster Mills v. Merchants Cotton Press & S. Co.* 89 Tenn. 62, and *Deming v. Merchants Cotton Press & S. Co.* 13 L. R. A. 518, 90 Tenn. 306, 358.

In this last case the supreme court of Tennessee held that the marine insurance companies—most, if not all of whom, had paid the policies issued by them covering the losses of the owners or the consignees of the cotton—were entitled to be subrogated to the rights of such owners or consignees, as against the railroad company under its various bills of lading, if that company was liable on such bills of lading. The supreme court further declared in that case that the compress company held the insurance in the forty-four fire insurance companies taken out by it for the benefit and indemnity of the railroad company or companies which had issued bills of lading on the cotton destroyed, and that to the extent of its proper share or proportion of such fire insurance the railroad company was entitled to have the same collected for its protection and indemnity; but in respect to the liability of the railroad company upon its bills of lading to these marine insurance companies, the court could make no decree, or render any judgment, for the reason that the railroad company was not a party to that cause. It, however, declared

the rights of the marine insurance companies and the liability of the compress company, and of the fire insurance companies, and left the former companies to their remedy by way of subrogation against the railroad company upon its bills of lading to be settled and determined by some new proceeding; and it was ordered that \$210,224.37 of the fire insurance fund be reserved for the indemnity of the railroad company, if that line should be sued and its liability to the marine insurance companies should be established.

Accordingly, on August 7, 1891, after the decision of the supreme court of the state had been rendered in *Deming v. Merchants Cotton Press & S. Co.* 13 L. R. A. 518, 90 Tenn. 306, the Insurance Company of North America, of Philadelphia, a corporation by the laws of the state of Pennsylvania; the Atlantic Mutual Insurance Company, a corporation by the laws of the state of New York; the Providence Washington Insurance Company, a corporation by the laws of the state of Rhode Island, on behalf of themselves and all other marine insurance companies standing in like position, who had paid their insurance to the owners of the cotton, filed their bill in the chancery court of Shelby county, Tennessee, against the Delaware Mutual Safety Insurance Company, a corporation by the laws of the state of Pennsylvania; the Marine Insurance Company, Limited, of London, resident of the United Kingdom of Great Britain and Ireland; the Phenix Insurance Company, a corporation by the laws of the state of New York; R. H. Deming and James H. Foster, partners as R. H. Deming & Co., residents of the state of Rhode Island; The British & Foreign Marine Insurance Company, Limited, of Liverpool, England, resident of the United Kingdom of Great Britain and Ireland; the Cairo, Vincennes & Chicago Line of Illinois; Anthony J. Thomas and Charles E. Tracy, as receiver thereof, citizens of New York; the Merchants' Cotton Press & Storage Company, a corporation of Tennessee; S. R. Montgomery, Napoleon Hill, and Thomas H. Allen, Jr., as trustees, citizens of Tennessee, together with six other alien marine insurance companies, and William Watson and E. R. Wood, aliens; and forty-four fire insurance companies of West Virginia, Pennsylvania, New York, Illinois, Louisiana, Wisconsin, Alabama, Connecticut, Ohio, Texas, Indiana, and of the United Kingdom of Great Britain and Ireland.

The bill, in the nature of a creditor's bill, after reciting the facts already presented, set out the various lots of cotton which the complainants and the other marine insurance companies had insured for the owners or consignees thereof, and which were covered by the bills of lading of the railroad company, which insurance they had paid to the owners upon the destruction of the cotton, and further alleged the contract between the compress company and the railroad company, and that the former was to keep the cotton insured for the benefit of the railroad company. The bill then proceeded to charge that, having paid the owners the insurance on the cotton destroyed, the complainants were entitled to be subrogated to the rights of such owners against the railroad company on its bills of lading, and to have the

rights of the railroad company enforced against the compress company, and the various fire insurance policies which the latter company had taken out on the cotton for the benefit of the railroad company.

The bill stated that the compress company held the fire insurance as trustee or agent for the railroad company; that the railroad company, being liable to the owners of the cotton, to whom it had issued bills of lading for the cotton while in the possession of the compress company, and the marine insurance companies having paid the owners for the loss thereof, were entitled to be substituted to the position of the owners of the cotton as against the railroad company, and as against the compress company, and the fire insurance companies, which had issued policies to the compress company for the benefit of the railroad company.

It was further set out in the bill that after the loss occurred the compress company wrongfully assumed to deal with the fire insurance fund by applying a portion thereof, amounting to \$52,472.26, for the use of such owners of the cotton as had dray tickets from the compress company, and to whom no bills of lading had been issued, and who had no other insurance; and that each defendant fire insurance company had paid on its respective policies to the compress company about 15½ per cent of the amount of its insurance.

It was claimed in the bill that the compress company wrongfully assumed to thus deal with the fire insurance fund, and in disregard or violation of the decision of the supreme court of the state, which had held that the fire insurance collected should be held for the benefit of the transportation lines which had issued bills of lading for the cotton covered therein.

The bill further alleged that the compress company was neglecting its duty to collect the fund, and it and the fire insurance companies were confederating to prevent and avoid the payments by the fire insurance companies of their policies on the cotton represented by the railroad company's bills of lading.

The bill sought to reach and subject, not only the fire insurance taken out by the compress company for the benefit of the railroad company, but also a share or interest of the railroad company in and to certain real estate which the compress company had conveyed after the fire to Napoleon Hill, S. R. Montgomery, and T. H. Allen, Jr., to secure to the persons in contractual relations with it the payment of the contingent liability of the compress company to any or all of them by reason of the failure to fully insure the cotton for which the carriers were liable.

It also claimed that of the \$52,472.26 collected by the compress company and misappropriated to other losses, the sum of \$4394.12 of these collections should have gone to the railroad company on account of cotton covered by its bills of lading. The compress company was sought to be held liable for this amount.

It was further claimed that several of the fire insurance policies were lost by reason of the compress company not collecting the same, and that others were not taken out in good and solvent companies, and for those lost the com-

press company was sought to be made liable in favor of the railroad company.

Among various marine insurance companies which were named as defendants, as standing in like position with the complainants, was the Phenix Insurance Company, a corporation by the laws of the state of New York, which had policies outstanding in favor of the owners of 3600 bales of cotton, of the value of \$179,108. The Phenix Insurance Company, together with Deming & Company, on August 12, 1891, filed their answer and cross-bill against the same defendants, setting out that it had paid the loss on that cotton, and claimed the same rights as were sought to be asserted in the bill of the complainants.

On August 7, 1891, the railroad company and Anthony J. Thomas and Charles E. Tracy, receivers thereof, together with the Delaware Mutual Safety Insurance Company, filed their answer and cross-bill in the case against the compress company and the fire insurance companies, which admitted the liability of the railroad company to the Delaware Mutual Safety Insurance Company to the extent of 500 bales, for which it had issued bills of lading; but denied generally its liability to the marine insurance companies on the bills of lading which it had issued.

The prayer of the original bill was that the questions arising upon the matters and things connected with the loss of the cotton, the insurance thereon, both fire and marine, together with the bills of lading issued by the railroad company to the owners of the cotton which was to be transported by it, and the liabilities of the railroad company on its bills of lading, and of the compress company, might be settled and adjusted, and that the rights of all parties interested therein might be determined in behalf of the complainants and such marine insurance companies as might choose to come in and become parties to the cause; that the railroad company might be declared liable to them, respectively, for the losses in each lot of cotton covered by its bills of lading; that the compress company should be declared as holding the fire insurance policies as indemnity to the railroad company for the benefit of the complainants and other marine insurance companies standing in like position, and that such insurance might be collected for their benefit; "that attachment issue and be levied upon the interest of the Cairo, Vincennes & Chicago Line in the trust fund held by the Merchants' Cotton Press & Storage Company, and by garnishing the defendant fire insurance companies to answer and state what, if anything, they owe upon their respective policies applicable to the liability of the Cairo, Vincennes & Chicago Line, if liability shall be declared herein, or by any court with the parties requisite to the validity of the judgment before such court."

The bill further prayed for publication as to non-resident defendants, "and that upon a final hearing of this cause this court will decree that the C. V. & C. Line is liable to the holders, and through the holders to the plaintiffs, for the value of each of the lots of cotton covered by the plaintiffs' policies and the bills of lading of the C. V. & C. Line, and will apply the insurance effected by the Merchants' Cotton Press & Storage Company uncollected, ren-

dering proper decrees therefor against the Merchants' Cotton Press & Storage Company and the defendant fire insurance companies in exoneration of that liability, giving the proportionate share to the plaintiffs severally, and to such of the defendants as stand in relation to the cotton as the plaintiffs do; that the court will enforce the trust in the Senatobia street shed for the benefit of the plaintiffs and others, to the end that the plaintiffs, and others similarly situated as the plaintiffs, may be fully paid the value of the aforesaid cotton covered under their respective policies of insurance, and distribute the residue, if any there be, to the holders of the certificates issued by the compress company, some of which are held by defendants Napoleon Hill and S. R. Montgomery, who are called upon to produce a specimen of them; and that the said Hill is asked to furnish a list of the holders of such certificates, that they may be parties thereto, they belonging to a numerous class, and their names unknown to the plaintiffs. And the plaintiffs pray for such other relief, general and special, as may be consistent with the facts of the case."

The theory of the bill was that the railroad company and its receivers were liable to the holders of its bills of lading for the value of the cotton burned, and which was covered by them; that the marine insurance companies which had insured the cotton and paid the losses thereon to the owners or consignees thereof, were entitled to be subrogated to the rights of such owners as against the carrier; that the railroad company, through its agent, (the compress company) was entitled to recover against the fire insurance companies under the policies they had issued to the compress company, as its agent, and for its benefit, and that the complainants, and those standing in like position, were entitled to reach the fire insurance fund through the rights of the railroad company, for whose benefit such fire insurance was taken out by the compress company.

On September 5, 1891, the defendants, the Royal Insurance Company, the Continental Insurance Company, the Fire Association, the Home Insurance Company of Louisiana, the Liverpool, London & Globe Insurance Company, and the National Fire Insurance Company presented their petition for removal of the cause from the chancery court of Shelby county to the United States Circuit Court for the Western District of Tennessee. That petition was defective and was not acted upon. Thereafter, on November 21, 1891, the same defendants filed their joint amended petition for the removal of the cause, and, after setting out the nature and character of the original and cross-bills, and the steps taken in the cause up to date, and the relief sought by the original and cross-bills proceeded as follows:

"Petitioners state and show that the Merchants' Cotton Press & Storage Company is a citizen of the state of Tennessee; that the C. V. & C. line is a citizen of the state of Illinois, and that the petitioners are citizens and subjects of foreign states or of states other than the state of Tennessee or Illinois, the said Royal Insurance Company and the said London, Liverpool & Globe Insurance Companies

being citizens and subjects of Great Britain, and the said Continental Insurance Company and said Fire Association being citizens of New York, the said Home Insurance Company being a citizen of Louisiana, and the said National Fire Insurance Company being a citizen of the state of Connecticut, and that the controversy is wholly between citizens of different states or between citizens of one or more of the several states and foreign citizens and subjects, and that the same can be fully determined as between them.

The Merchants' Cotton Press & Storage Company is the assured in the policies issued by said fire insurance companies, and the sole question, so far as concerns said fire insurance companies, is whether said Merchants' Cotton Press & Storage Company, a defendant upon the record, can recover against said fire insurance companies on their respective policies as set out in the bill of complaint in behalf of the plaintiffs and others in like situation or in behalf of the C. V. & C. Line.

"Petitioners further state and show that the amount in the controversy as between the said plaintiffs and each of the petitioners exceeds the sum of two thousand dollars, exclusive of the interest and cost."

The necessary bond was tendered with the petition. The chancery court denied the application for removal, and the cause then proceeded in that court to a final decree, which granted substantially the relief sought for in the bill, and from that decree certain of the defendants appealed to the supreme court of the state of Tennessee. That court affirmed the decree below upon the merits, and sustained the action of the chancery court in denying the application for removal, on the ground that the real controversy in the cause was between the marine insurance companies and the railroad company and its receivers; that the object of the controversy was to charge the railroad company with the loss sustained by shippers and paid by the marine insurance companies, and incidentally to collect from the fire insurance companies such decree as might be obtained against the railroad company and its receivers, to the extent that the railroad company was a beneficiary in the fire policies taken out by the compress company.

The supreme court of the state further held that the fire insurance companies occupied substantially the position of garnishees, and that their indebtedness upon their respective policies might be reached and held subject to such final decree as complainants might obtain against the railroad company, and that the fire insurance companies had no separable controversy in the sense of the judiciary acts which entitled them, or either of them, to remove the cause from the state court to the Circuit Court of the United States for the Western District of Tennessee.

The court further held that if the complainants, and the other marine insurance companies standing in like situation with them, should fail to establish liability against the railroad company, that no controversy would remain as to the other defendants, as the marine insurance companies had no right of action against any of the fire insurance companies, except as incidental to their litigation with the carrier;

that the fire insurance companies were made parties only in aid of the relief which was asked, and that no relief could be granted against them unless the marine insurance companies obtained a judgment against the railroad company. So that the latter was an indispensable party to the litigation, and the suit was in fact a single cause of action against the carrier, with incidental relief against the compress company and the fire insurance companies, and was not removable by the latter companies under the principles laid down in *St. Louis & S. F. R. Co. v. Wilson*, 114 U. S. 62 [29: 677]; *Crumph v. Thurber*, 115 U. S. 56, 61 [29: 328, 329]; *Fidelity Ins. T. & S. D. Co. v. Huntington*, 117 U. S. 280, 282 [29: 898, 899].

In this conclusion of the supreme court of the state of Tennessee we fully concur. The case made by the bill and the relief sought thereunder in behalf of complainants, and those standing in like situation with them, clearly did not present any separable controversy. The plaintiffs in error, who were the petitioners for removal, put their right of removal mainly upon the ground that the case made by the original and cross-bills was virtually a suit by the compress company against the fire insurance companies; that as the compress company was a citizen of Tennessee, and each of said petitioning fire companies was a citizen of another state, or an alien, the latter had a right to remove the cause. This, we think, is a clear misapprehension of the scope of the bill. It admits of no question that the fire insurance policies taken out by the compress company under its contract with the railroad company were, as expressed on the face of the policies, for the benefit of the carrier, and were intended for its protection and indemnity. The compress company had, therefore, no personal interest whatever in the fire insurance policies as against the railroad company by virtue of the contract between the railroad company and the compress company, and by the terms of the fire insurance policies the railroad company was the beneficiary under those policies to the extent necessary to indemnify it against liability for losses incurred directly to itself, or through its liability on its bills of lading. The railroad company had such an insurable interest in the cotton, and was, to that extent, the owner of the insurance standing in the name of the compress company, or held in trust for it. This is settled by *California Ins. Co. v. Union Compress Co.* 133 U. S. 387, 423 [33: 780, 740].

The compress company, aside from the claims which were sought to be asserted against it personally, as trustee of the fire insurance fund, which was sought to be reached to the extent of the railroad company's interest therein, was a necessary and indispensable party to the suit, under the authority of *Thayer v. Life Assn. of America*, 112 U. S. 717 [28: 864], and *Wilson v. Onwego Twp.* ante, p. 70.

It admits of no question that the primary liability, or the right to reach the fire insurance fund, had also to be worked out in favor of the complainants, and other marine insurance companies, through the liability of the railroad company upon its bills of lading. The suit could not have proceeded a step without the

presence of the railroad company, and certainly it presents no separable controversy as between the compress company and the several fire insurance companies.

It is further suggested, as to the right of removal, that each of the marine insurance companies had a distinct and separate cause of action against each of the fire insurance companies on their respective policies. This is a misapprehension, for the marine insurance companies had no right of action against the fire insurance companies. Their cause of action was against the railroad company under its bills of lading issued to the owners of the cotton, who were the assured in the marine companies, and whose loss had been paid by those companies. The right of those companies was directly against the railroad company, by way of subrogation, and to enforce its liability under its bills of lading. They could not have proceeded directly against the fire companies without the presence of the railroad company. The latter was an indispensable party to the relief sought, for it was through only this alleged liability that the fire insurance fund could be reached and subjected to the indemnity of the marine insurance companies. If each of these marine insurance companies had filed a separate bill for the same relief sought by their joint suit there could have still been no right of removal on the part of the fire insurance companies on the ground of a separable controversy, even if the fire insurance companies were not garnishees, as held by the supreme court of Tennessee, for the reason that the railroad company and the compress company would both have been indispensable parties, and could not have been arranged on the same side with the complainants, inasmuch as the liabilities of the railroad company to the marine insurance company was the primary question to be determined. *Louisville & N. R. Co. v. Ide*, 114 U. S. 52 [29: 63]; *Pirie v. Tredt*, 115 U. S. 41 [29: 331].

The complainants had a right to join in enforcing the common liability of the railroad company upon its bills of lading, and, in the language of Chief Justice Marshall, in *New Orleans v. Winter*, 14 U. S. 1 Wheat. 91 [4:44], "having elected to sue jointly the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite." This ruling has been approved in *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 633 [30:1020, 1021].

In the present case, as in *Peninsular Iron Co. v. Stone*, the rights of each of the complainants and of other marine insurance companies occupying the same position, depend, as against the petitioners for removal, on the alleged right of the marine companies to hold the railroad company liable, by way of subrogation, upon its bills of lading, and, as an incident to that liability, to collect the fire insurance fund to the extent of the railroad company's share therein. "Although, as between themselves, they have separate and distinct interests, they joined in a suit to enforce an obligation which is common to all; . . . and while all the complainants need not have joined in enforcing it, they have done so, and this, under the rule, in *New Orleans v. Winter*, 14 U. S. 1 Wheat. 91

[4:44], controls the jurisdiction." The voluntary joinder of the parties has the same effect for purposes of jurisdiction as if they had been compelled to unite.

The right of removal must be determined by the pleadings at the time the petition is filed (*Graves v. Corbin*, 132 U. S. 585 [33: 467]) and testing the application made in the present case by this rule, we had no dispute or controversy set forth in the bill or in the petition for removal between the compress company and the fire insurance companies. On the contrary, these defendants are charged with confederating together for the purpose of relieving the fire insurance companies from liability on their policies.

The bill seeks to charge the railroad company, and then to reach and subject its equitable rights and interests in the fire insurance fund, taken out by the compress company for its benefit. There is not in the bill or in the cross-bills any suggestion or intimation that there is any controversy or dispute between the railroad company and the compress company; or between the compress company and the fire insurance companies. Under such circumstances there is manifestly no separable controversy made by the pleadings, such as entitles the fire companies, or either of them, to remove the cause. There is, in fact, no controversy "which can be fully determined as between them," and as stated by this court in *Torrence v. Shedd*, 144 U. S. 527, 530 [36:528, 531], "by the settled construction of this section (referring to separable controversies) the whole subject-matter of the suit must be capable of being finally determined as between them (the parties seeking removal) and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit."

It may be, under the Judiciary Act of March 3, 1887 (and 1888) as under the Act of March 3, 1875, that the court may disregard the particular position of the parties as complainants or defendants, assigned to them by the pleader, for the purpose of determining the right of removal (*Harter Twp. v. Kernochan*, 108 U. S. 562 [26: 411]) and the matter in dispute may be ascertained by arranging the parties to the suit on opposite sides of the dispute, and if by such an arrangement it appears that those on one side are all citizens of different states from those on the other, the suit may be removed. *Meyer v. Delaware R. Const. Co. (Removal Cases)* 100 U. S. 457 [25: 593]; *Ayers v. Chicago*, 101 U. S. 184 [25: 838].

The plaintiffs in error in the present cases seek to sustain the right of removal by the application of this rule; but it will not avail them, for if the parties are arranged on opposite sides of the primary and controlling matter in dispute, we shall have the three complainants, together with the Phenix Insurance Company, a corporation of the state of New York; the Union Marine Insurance Company, Limited, of London, England; the British & Foreign Insurance Company of Liverpool, England, and the Standard Marine Insurance Company, Limited, of England, on one side, and the railroad company, the compress com-

pany, and the fire insurance companies, together with the other defendants, as parties on the other side.

Now, as thus arranged, we have two alien corporations on the side of the complainants, and two alien fire insurance companies (the London, Liverpool & Globe Insurance Company, and the Royal Insurance Company) on the side of the defendants. Under such position, the alien petitioners would not be entitled to removal; besides it is settled by *King v. Cornell*, 106 U. S. 395 [27: 60] that subdivision two of section 639 of the Revised Statutes was repealed by the Act of 1875, so that an alien sued with a citizen had no right of removal, and this subdivision two of that section was not restored by the Act of March 3, 1887; hence, an alien, in the position of the alien petitioners, in the present case, would have no right to remove the cause on the ground of a separable controversy.

Again, the parties being arranged, as above, according to the matter in dispute, we have the Phenix Insurance Company of New York in the position of plaintiff, with the Mutual Fire Insurance Company of New York (No. 809) the Continental Insurance Company (No. 810) and the Fire Association (No. 811) corporations of the same state, applying for the removal. It is too clear to require the citation of authorities that in this position of the New York corporations, those occupying the position of defendants had no right of removal.

It is further shown by the pleadings that the Phenix Insurance Company in its cross-bill made a defendant of the Newport News & Mississippi Valley Company, a corporation organized under the laws of Connecticut, which was a carrier from Memphis to points east, and had a contract with the compress company like that of the Cairo, Vincennes & Chicago Railroad Company, to insure cotton to be carried over its line, under which arrangement it had issued bills of lading to various parties insured by the Phenix Insurance Company; and that company, after payment of the losses by its cross-bill, sought the same relief against the Newport News & Mississippi Valley Company which was sought against the Cairo, Vincennes & Chicago Railroad Company. So that to the cross-bill of the Phenix Company there were two Connecticut defendants, viz, the National Fire Insurance Company (No. 808) and the Newport News & Mississippi Valley Company, and the relief sought made both of those corporations necessary and indispensable parties. The Connecticut corporations could not in this situation of the parties, if no other objection existed, be entitled to remove the cause.

In respect to the two other plaintiffs in error, the Merchants' Cotton Press & Storage Company (No. 807) and the Mutual Fire Insurance Company (No. 809) it appears that neither of these parties made application to remove the cause from the chancery court of Shelby county. So that neither of them is in position to assign error as to the action of the court in denying the other parties the right of removal. In *Rand v. Walker*, 117 U. S. 340, 345 [29: 907, 909], it was held that the right to take steps for the removal of a cause to the circuit court of the United States, on the

ground of a separable controversy, was confined to the parties actually interested in such controversy. In that case the court said on this subject: "That neither of the parties to the controversy, if it be separable, a question which we do not decide, have petitioned for removal, and the right to remove a suit on the ground of a separable controversy is, by the statute, confined to the parties actually interested in such controversy."

It is, therefore, we think, clear that whether the cause be looked at as a whole, or whether it be considered under any adjustment or arrangement of the parties on opposite sides of the matter in dispute, there was no right of removal on the part of the several plaintiffs in error, or either of them.

The remaining assignment of error based upon the alleged allowance by the local agent of the railroad company of special rates, rebates, or drawbacks to Jones Brothers & Company which, it is claimed, rendered the bills of lading issued by the railroad company to the owners of consignees of the cotton void, so that the marine insurance companies, who had paid the losses, could have no right upon such bills of lading against the railroad company, or the fire insurance companies, needs but little consideration. The supreme court of the state disposed of this question as follows: "This fact of special rate and rebate is denied and it is a matter of controversy and conflict of evidence, and it is also insisted in answer to this by plaintiffs that the interstate commerce law does not apply for the reason that the evidence disproves any 'common contract' over the river and rail rate. We are of opinion, however, and rest our decision upon the ground that if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent. The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it, which requires a construction that would excuse a carrier from all liability when it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract for rebate would be void, and could not be enforced; but we think the shipper could nevertheless recover for loss of his freight through the carrier's and insurer's negligence. No different construction has yet been put upon the interstate commerce law so far as we are advised, and we decline to give it any other." We concur in the correctness of this conclusion of the state supreme court.

Jones Bros. & Company were either the agents of the owners or consignees of the cotton, or the sellers thereof to eastern consignees, and the rebates or drawbacks which they claimed to have been allowed, if allowed at all, according to the testimony of one of the members of the firm, was a private benefit which the firm secured, and, so far as appears, with

out the knowledge or consent of the owners or consignees of the cotton. Under such circumstances, if such rebates were paid or allowed to the firm by the agent of the railroad company, it is difficult to understand upon what principle such an allowance would vitiate or render void the bills of lading which the railroad company issued to the owners of the cotton. It is still more difficult to understand how the compress company, or the fire insurance companies, could avail themselves of the arrangement, even regarding it as illegal, between the agent of the railroad company and Jones Brothers & Company. They were not parties to it, and they were not affected by it in any way, shape, or form.

There is nothing in the interstate commerce law which vitiates bills of lading, or which, by reason of such allowance to Jones Brothers & Company, if actually made, would invalidate the contract of affreightment or exempt

the railroad company from liability on its bills of lading.

The principles laid down in *Interstate Commerce Com. v. Baltimore & O. R. Co.* 145 U. S. 268 [36: 699] 4 Inters. Com. Rep. 92, fall far short of establishing that the alleged allowance of rebate to Jones Brothers & Company would render the railroad company's bills of lading invalid and defeat the right of the marine insurance companies, who had paid the losses, to subrogation against the railroad company on bills of lading issued to the owners or consignees of the cotton, who are not shown to have known of, or consented to, the railroad company's agent giving such rebates.

We are, therefore, of opinion that the Federal questions presented by the assignments of error were not well taken and are not sustained, and that the judgment of the supreme court of the state of Tennessee in all of the causes must be affirmed.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF GEORGIA.

GEORGIA PACKING CO. *et al.* v. Mayor and Council of MACON.

(.....Fed. Rep.....)

1. A license tax of \$500 per annum imposed on every person selling in a city any meat which is not from animals of his own raising, unless he rents a stall in a public market, while the rent of such stall is \$150 per year and the market regulations are so restricted and burdensome as to preclude the reasonable conduct of a wholesale business there, is unconstitutional in respect to wholesale dealers in meat brought from other states, by reason of the necessarily resulting discrimination against them, although the

ordinances on the subject on their face purport to apply to vendors irrespective of the places from which it comes,—especially where neither sales nor inspection of meat are restricted to the market, and the regulations are clearly made for the purpose of revenue and not merely to prevent the sale of uninspected meat.

2. The enforcement of city ordinances which attempt an unconstitutional interference with interstate commerce may be restrained by injunction from a Federal court.

Decided August 2, 1893.

SUIT to enjoin defendants from enforcing against complainants the provisions of a city ordinance regulating the sale of dressed meats. *Judgment in favor of complainants.*

Statement by **Speer, J.:**

The complainants are wholesale and retail butchers in the city of Macon, in this district. They supply meats to the people of Macon and the surrounding country, dealing exclusively in dressed meats. They do not slaughter. Five sixths of the meats they furnish their customers are cattle reared in western states, killed and dressed there, and shipped in refrigerating cars to Macon. These are of a better quality than the meats obtained in the country contiguous to Macon, and the complainants state for that reason would naturally be regarded with more favor by the public, if the complainants had the

equal protection of the laws; but complainants insist that this is not the case, for that the mayor and council of the city of Macon are depriving them of the equal protection of the laws, and of due process of law, and of the right they have to conduct their business conformably to law. The gravamen of the complaint is that on the second day of June, 1888, certain market regulations were enacted for Macon; market hours were prescribed, as follows: In winter from daylight until ten o'clock. In summer from 3 A. M. to 9 A. M. By the municipal law, winter begins October 1, and summer, April 1; but on Saturdays the market house is open from 3 o'clock P. M. to 8 o'clock P. M. in winter, and 9 o'clock in summer. These regulations further provide that it is unlawful to sell or offer for sale any meats on the streets or elsewhere in the city of Macon during said market hours, and heavy penalties are prescribed for a violation of this rule. Stalls are rented in the market, but none for a sum less than \$150 per annum, but although a butcher may rent a stall, yet his business is

NOTE.—The opinion in the above case very fully presents the subject of license taxes as affecting interstate commerce in meat, and illustrates it by a striking instance of an unlawful attempt to restrict such trade.

practically destroyed for the ordinance provides that no person shall be permitted to buy more at the market than is necessary for the use of his or her family, except during the last hour of the market hours, and further that no person shall sell, or contract to sell, to any one, any article of produce or meat which is to be delivered after market hours, outside of the market building. Not only, therefore, is complainants' business cut off elsewhere during the market hours, but even as renters of stalls they claim they are so hindered and limited as to prevent them from selling meats in any considerable amount to those who are willing to buy. It is further provided by the market ordinances that all persons, not renting a stall at the market for the sale of meat, and who shall sell any kind of meat on the streets of the city of Macon, at any time during the day or night, shall pay a license tax of \$500 per annum, said license to be paid in advance; provided, this section shall not apply to farmers bringing into the city for the purpose of sale the flesh of any animal raised by themselves after market hours. By this last clause we may safely presume it is meant that it shall not apply to farmers bringing into the city for the purpose of sale, after market hours, the flesh of any animal raised by themselves.

It is further provided that after the expiration of market hours every person having any product or article for sale shall remove the same from the market place. On account of this last provision, the complainants complain that they are forced to haul their meats to and from the market at great trouble, expense, and annoyance. That on account of the restrictions and hindrances above mentioned, although the market hours constitute the principal portion of the day when the people have ordinarily been accustomed to make their purchases of meat, yet the sales at the market do not constitute one half of the sales at retail made after market hours at the complainants' respective places of business elsewhere in the town, so that a large part of their capital and time are wasted during market hours. That the ordinance further provides "that a license shall be imposed on butchers or others who have no stall in the market and who shall sell from any shop or wagon (other than nonresidents selling meats of their own raising); and no license shall be issued for less than five hundred dollars." This, it is alleged, is a discrimination in favor of the producers, of meat raised in the country tributary to Macon, and against meat producers who make their products in the western markets, and ship them for sale to Georgia.

The license tax, exclusive of the market ordinance, for the year 1893 upon wholesale dealers in meat, selling to the trade only, is \$25.

Complainants aver that the wholesale meat trade in Macon handles western meats only. There is not enough meat produced in the country around Macon to create a wholesale business, and the tax operates to put a burden upon interstate commerce and to give an undue advantage to dealers in meats raised near Macon. If the complainants should not rent

a stall in the market house under these ordinances, they must pay a license of \$500, even though they sell only after the market hours are over, while farmers from the surrounding country may retain meats brought into the city without any license whatever. The market ordinance, undertaking to prevent the sale of meat on the streets of the city of Macon outside of market hours expressly recognizes such sales. It is not, therefore, an ordinance intended to prevent the selling of meats on any particular street or in any particular locality. Nor does it provide for the inspection of meats elsewhere than at the market, and in point of fact the officials of the city have at no time undertaken to inspect meats elsewhere than in the market house. It is, then, not an ordinance, made for the protection of health, or for the inspection of meats, or for compelling the sale of meats in a particular locality, which might be done under the exercise of the police power; but that under the guise of police regulation, it is an ordinance wholly for the collection of a revenue. That as such it is in violation of the constitution of the state of Georgia and of the United States, in that it prescribes a cheaper license tax for those who sell in the market and at their regular place of business, than for those who sell at their regular place of business, and no tax at all for farmers selling in the city after market hours, while handlers of western meats, not stall holders, must pay a tax of \$500 to sell in the city after market hours. The constitution of the state of Georgia provides that "all taxation shall be uniform upon the same class of subjects." The Constitution of the United States provides that "the citizens of the different states shall be entitled to the equal protection of the laws."

One of the complainants, W. L. Henry, has already been arrested for offering wholesome western meats for sale at his place of business and selling during market hours, and was tried before the recorder of the mayor and council of the city of Macon, on the charge that he had sold meat at his said place of business during the aforesaid market hours, and was fined \$25 and costs. This was appealed to the supreme court of the state which court held that the ordinance was valid. The mayor and council of the city of Macon threaten to continue to arrest and fine complainants every time they undertake to sell, or offer for sale, during market hours, any meats, at their said places of business.

Complainants further aver that they will each be damaged in very large amounts, exceeding the sum or value of \$2000, exclusive of costs.

The bill prays that the court will grant a writ of injunction perpetually enjoining and restraining the defendants, their clerks, attorneys, agents, servants, and employees from enforcing or endeavoring to enforce against complainants any penalty provided in said ordinances for selling or offering for sale any of said meats at their respective places of business or elsewhere in the city of Macon, otherwise than at said market house, or from selling their meats at any time during said market hours; and be further enjoined from

collecting or attempting to collect the license fee fixed by said ordinances for the sale of meats elsewhere than in said market house; and further from interfering with complainants for selling at any time during market hours such meats as they may have to offer for sale, to all persons who may there desire to buy, and that said market ordinances may be decreed to be unconstitutional and void. They ask for a provisional injunction *pendente lite*.

The mayor and council of the city of Macon demur to the bill for want of jurisdiction in this court upon the ground that all the parties are citizens of the state of Georgia, and further, because it does not appear that a question is raised depending upon the violation of any part of the Constitution of the United States; and they answer that they have the right to regulate the selling of meat in the city of Macon, and to confine the sales thereof to the market house in said city during market hours. They further answer that they have the right to fix a license for the sale of meats and other articles in said city. They deny that the effect of the licenses so fixed by them in any way violates the Constitution or the statutes of the United States.

No preliminary injunction was granted, and the facts not being in dispute, the court has taken under advisement the matters presented by the bill, the answer, and the demurrer.

Mr. Marion Erwin for complainants.

Mr. R. W. Patterson for defendants.

Speer, J., delivered the following opinion:

It will be observed from the averments of the bill that there is no attempt to prohibit the sales of meats elsewhere than in the market house of the city. The ordinances in question, therefore, are not directed towards the avoidance of the green grocers and butcher shops. It cannot, we think, be denied that it is within the power of the city to fix one or more localities for the sale of meat. This may be done to facilitate inspection but since by permission of the city a very large amount of the meat is sold at the butcher shops, and places of business, elsewhere than in the market, it is evident that the prohibition of sales during market hours at such places is not intended to prevent sales of uninspected meat. It is true it appears, in point of fact, that the city authorities do not inspect meats except at the market house, yet the ordinance authorizes them so to do. After providing that "no person shall sell any article not wholesome for food," it provides that "the clerk and inspector shall seize any such article he may find in the market and cause it to be destroyed, and the offender shall be punished, etc." The meaning of the word "market" in this sense cannot be market house, but in its broadest sense relates to and embraces all articles of food offered for purchase or sale in the city. The city law, therefore, expressly authorizes the maintenance of butcher shops at any place in the city, and further provides for the inspection of meats at such places. It cannot then be

satisfactorily argued that these regulations are made, either to compel the concentration of the meat business at the market house or to facilitate the inspection of meats. If in order to facilitate inspection, the ordinance had expressly forbidden the sales of meats in the city, elsewhere than at the market house, it might not have been difficult to sustain its constitutionality, even though it might have gravely interfered with interstate commerce. Such an ordinance would seem to be within the legitimate police powers of the city. *Slaughter House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Butchers Union, S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585. But the ordinance not being of this character, the argument in its support based upon that theory must logically fail. *Vide* opinion of *Mr. Justice Harlan in Minnesota v. Barber*, 136 U. S. 329, 84 L. ed. 461, 8 Inters. Com. Rep. 185. *Vide also Spellman v. New Orleans*, 45 Fed. Rep. 3; *Ex parte Kieffer*, 40 Fed. Rep. 399.

It is not disputed that the business conducted by the complainants is almost entirely that of selling meats raised in the western states. These meats are transported to Macon and stored and offered for sale by means of refrigerating apparatus. Complainants thus engaged must in obedience to the ordinance rent a stall in the market and pay \$150 therefor. They must, if engaged as wholesale dealers, also pay a license tax of \$25 for the privilege of carrying on their business. From these burdens, one who deals in meats produced in the surrounding country is wholly exempt. Not only is this true, but in the most important hours for that purpose, during the day, the complainants are denied the right of making sales of any amount, for the reason that their places of business elsewhere than in the market house must be closed, and in the market house they are permitted to sell to any one person no more than enough for consumption in one day, while this is true, the producers of meat in this state may sell before and after market hours any amount they please, without the imposition of any tax or license charge whatever. It cannot be denied that the effect of this discrimination operates severely against the sale of meat produced in other states, and whatever may be the power of the city government to discriminate between the producers of meat in the surrounding country, and those who sell the same meat in the city, they have no power to make a regulation which operates in favor of home products and against the production of other states, and such regulations are in contravention of the Constitution of the United States. Nor does it matter how such regulations are denominated or how they are expressed. In the case of *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347, it was declared by the Supreme Court that a license tax, required for the sale of goods is in effect a tax upon the goods themselves; and further that the statute of Missouri which required the payment of a license tax from persons who deal in the sale of goods, wares, and merchandise, which are not the growth, produce, or manufacture of the state, by going from place to place to sell

the same in the state and requires no such license tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the state, is in conflict with the power vested in congress to regulate commerce with foreign nations and among the several states. They hold further that this power protects property, "which is transported as an article of commerce from foreign countries, or among the states, from hostile or interfering state legislation until it has mingled with or become a part of the general property of the country, and protects it even after it has entered a state from any burdens imposed by reason of its foreign origin." The decision itself was pronounced by that venerable and illustrious jurist, *Mr. Justice Field*, who for years has devoted his undoubted genius to an unswerving defense of what he has deemed to be the rights of the states against encroachments of the national authority. It will not be denied he declares that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. "It was regulated," says *Chief Justice Marshall*, in delivering the opinion in *Brown v. Maryland*, "by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress indeed, possessed the power of making treaties; but the inability of the federal government to enforce them became so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control of this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." 25 U. S. 12 Wheat. 446, 6 L. ed. 688. He continues: "The power of the state to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one state and injurious to the interests of other states and countries, which existed previous to the adoption of the constitution,

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might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states." What a state may not do, it may not authorize a city to do. *Mr. Justice Miller* in his luminous and valuable lectures on the Constitution, upon exhaustive consideration of authority expresses the same conclusions. *Miller, Const. §§ 9, 438-478.*

In the case of *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, the Supreme Court passed on this state of facts: The state of Virginia had enacted a statute which provided that all flour brought into the state and offered for sale therein shall be reviewed, and have the Virginia inspection marked thereon, and imposing a penalty for offering such flour for sale without such review or inspection. The court held this to be repugnant to the commerce clause of the constitution, because it is a discriminating law, requiring the inspection of flour brought from other states when it is not required for flour manufactured in Virginia.

In the case of *Brimmer v. Robman*, 188 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, *Mr. Justice Harlan*, delivering the opinion of the court, remarked: "Undoubtedly a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the constitution upon congress, or infringe on those granted and secured by that instrument. But it may not under the guise of exerting its police powers enact inspection laws and make discriminations against the products and industries of some states in favor of the products and industries of its own or other states. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right under the constitution to compete in the markets of Virginia upon terms of equality with the owners of like meats from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any regulation which, in terms or by its necessary operation denies this equality in the markets of the state is, when applied to the people and the products or industries of other states, a direct burden upon commerce among the states and therefore void." Of this case we may say, in the language of *Justice Bradley*: "The decision in the case is so directly apposite to the present that it is unnecessary to prolong the discussion or to cite further authorities." *Voight v. Wright, supra.*

It is clearly evident that the local regulations of the city of Macon, imposing a tax of \$500, or \$150 and other restrictions on the selling of western meats and nothing of the kind on the sale by producers of their own meats raised in this state, by its necessary operation, denies to the former equality in the markets of his state and is a direct burden upon the commerce among the states and is therefore void. See also *Hannibal & St. J. R. Co. v. Huseen*, 95 U. S. 465, 24 L. ed. 527. The language of the ordinance is: "All persons not renting a stall at the market for the sale of meat, and who shall sell any kind of

meat on the streets of the city of Macon at any time during the day or night, shall pay a license tax of \$500 per annum, such license to be paid in advance: Provided this section shall not supply to farmers bringing into the city for the purpose of sale the flesh of any animal raised by themselves after market hours," and the Tax Ordinance of 1893, as follows: "Be it ordained by the mayor and council of the city of Macon and it is hereby ordained by authority of the same, that the following licenses and special taxes shall be levied and collected in the city of Macon for the year 1893: Butchers and others who have no stall in the market and who shall sell from shop or wagon, other than nonresidents selling meats of their own raising, and no license shall issue for less than five hundred dollars." It is true, the tax ordinance excepts from its verbal operation "nonresidents selling meats of their own raising," but since it is evident that only persons who can avail themselves of this privilege are nonresidents who live in the immediate vicinity of Macon, it effectually excludes meat producers from all the other states.

Nor is this conclusion to be avoided merely because this enactment purports to apply alike to the vendors of meat in this state as well as to meats produced in other states, for "the burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute." *Brimmer v. Rebman*, *supra*.

The case of *Osborne v. Mobile*, 88 U. S. 16 Wall. 479, 21 L. ed. 470, which seems to hold a contrary doctrine, has been overruled in later decisions. See *Leloup v. Mobile*, 127

U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 184; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 363, 2 Inters. Com. Rep. 241; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649.

It follows also that the wholesale tax for the business of meat selling within the city of Macon is void, the evidence showing that this business depends entirely upon the sale of western meats, there being no pretense of imposing a tax on home-made meats sold in bulk.

For the foregoing reasons the defendants must be enjoined from collecting these taxes. Because their regulations are also unconstitutional as imposing an unlawful restriction upon commerce between the states, they must be restrained from enforcing or endeavoring to enforce the penalties provided in the ordinances for selling or offering for sale their meats at their regular places of business, or elsewhere in the city of Macon, otherwise than at the market house, and from selling their meats at any time during market hours, as prohibited in said ordinances, and from collecting or attempting to collect from complainants the license fee fixed by such ordinances, for the sale of meats elsewhere than in the market house; and must be further enjoined from preventing the complainants, who have rented stalls at the market house, from selling at the market house as much of their meats as they may have the opportunity to sell to any and all persons who may there desire to buy. That in so far as the said market ordinances are intended to support these restrictions they are unconstitutional and void.

Let the demurrer be overruled, and the answer be declared insufficient.

INTERSTATE COMMERCE COMMISSION.

RHODE ISLAND EGG & BUTTER COMPANY, THE W. W. WHIPPLE COMPANY,
GEORGE M. GRIFFIN,

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, MICHIGAN
CENTRAL RAILROAD COMPANY, NEW YORK CENTRAL & HUDSON RIVER RAILROAD
COMPANY, BOSTON & ALBANY RAILROAD COMPANY, NEW YORK, NEW HAVEN &
HARTFORD RAILROAD COMPANY.

1. A shipper should not be subjected to unnecessary restrictions as to the kind of case or package he shall use.
2. A rate which may be reasonable when applied to the transportation of egg cases as a disconnected service may be unreasonable if the carriage of returned cases at favorable rates is in fact a special service, the discontinuance of which would unduly burden the business of shipping eggs to points of sale.
3. Upon complaint of unreasonable classification and rating on returned empty egg cases from Providence, R. I. to Chicago, Ill., Burlington, Ia., and other western points, *Held*, that the evidence presented is insufficient to enable the Commission to determine the

question. *Held*, further, that the defendants and other carriers concerned should be allowed time to consider whether shippers generally are not unduly prejudiced by the increased rating complained of and take or refrain from taking action accordingly, and if the carriers fail to take satisfactory action, that the complainants and any other interested shipper or consignee should have leave, after a specified time, to ask to have the case re-opened; and thereupon such other direction be given as will serve to bring in necessary parties defendant, by amended or supplemental complaint or otherwise, as may appear to be required.

Complaint filed August 11, 1893.—Answers filed, September 19, to October 3, 1893.—Heard at Providence, R. I., February 8, 1894.—Memorandum filed May 26 1894.

Mr. Stephen A. Cooke, for complainants.

Mr. C. E. Gill, for New York Cent. & H. R. R. Co. and Michigan Cent. R. Co.

Mr. Frank Loomis, for N. Y. C. & H. R. R. Co.

Mr. Geo. C. Greene, for Lake Shore & M. S. R. Co.

Mr. Samuel Hoar, for Boston & A. R. Co.

MEMORANDUM.

By the Commission :

The controversy in this case relates to rates on empty egg cases from Providence, Rhode Island, to points west of Chicago, where eggs are gathered up and shipped in such cases to Providence. Broadly, the question involved in the specific complaint extends to rates on empty cases between eastern points generally and egg producing points west of Chicago.

It is alleged in the complaint :

1. That each of the three complainants is engaged at Providence, Rhode Island, in the purchase and sale of eggs as well as other commodities and is receiving continuously from points west of Chicago large quantities of eggs throughout the year in boxes or cases, which in the course of their business they have occasion to return empty to points west of Chicago to be refilled and used again in the transportation of eggs.

2. That the defendants above named are common carriers engaged in the transportation of continuous shipments of property between Providence, in the state of Rhode Island and Chicago, in the state of Illinois, over continuous lines or routes formed by the connection of their respective railroads, according to common arrangement between them for continuous carriage and shipment, and are subject to the provisions of the Act to Regulate Commerce.

3. That defendants and other carriers operating railroads east of Chicago and the Mississippi river and north of the Ohio and Potomac rivers did on or about the 2d day of January, 1893, establish and put into effect a classification of freight articles, known as Official Classification No. 11, wherein "Egg Carriers or Cases, new or old," are denominated as articles of the first class. That said classification superseded and canceled the classification of freight articles adopted and put into effect by said defendants and other carriers on or about April 1, 1892, and called and known as Official Classification No. 10, and wherein "Egg Carriers or Cases new," were denominated as articles of the first class, and "Egg Carriers or Cases old,"

were denominated as articles of the third class. That rates of charge established, filed and published by said defendant and other carriers for the continuous shipment of articles enumerated in said first and third classes of the Official Classification from Providence, Rhode Island, to Chicago, Illinois, for several years have been and now are 82 cents per hundred pounds for first class articles, and 55 cents per hundred pounds for third class articles.

4. That by reason of the aforesaid change in classification whereby "Egg Carriers or Cases old," were transferred from the third class in said official classification No. 10 to the first class in said official classification No. 11, the rate of charge for the continuous shipment of egg cases returned to consignors of eggs at Chicago and points westerly thereof, by complainants and other consignees of eggs at Providence, has been made and is unjust and unreasonable and in violation of the provisions of the Act to Regulate Commerce.

5. That said change in the classification of returned egg cases constitutes unjust discrimination against complainants and others, and further violates the provisions of said Act to Regulate Commerce in that a greater charge is exacted by said carriers from complainants and others than they charge or receive from other persons for like service rendered in the transportation of like kind of traffic; and as one among other instances thereof appearing from an inspection of said classification, complainants cite and set forth that while "Egg Carriers or Cases, new or old" are by said Official Classification No. 11 now in the first class, "Crates, N. O. S., new, empty" were placed in the first class of said Official Classification No. 10, and "Crates N. O. S., old, empty," were placed in the third class of said Official Classification No. 10, and that said two kinds of crates are classed in like manner in said Official Classification No. 11, no change of classification having been made in regard thereto.

6. That said change in classification of returned empty egg cases subjects complainants

and other dealers in eggs and the traffic in eggs generally to undue and unreasonable prejudice and disadvantage in violation of the provisions of said Act to Regulate Commerce.

7. That by way of specification under the foregoing allegations complainants show that the distinction between new and old egg carriers or cases for transportation purposes is that the term "new" applies only to those which have not been used in egg transportation, while the phrase "old carriers or cases" applies principally, if not exclusively, to those having contained eggs transported by defendants and other carriers and returned by their lines to the original consignors. That it is only just and reasonable to charge a less sum for returning the empty package to be refilled and reconsigned than is in force for new packages not before used for carrying purposes, that this principle has been generally recognized by carriers, and an exception in the matter of egg cases is wrongfully discriminating and unduly prejudicial to dealers in eggs. That the basis for demanding lower charges for returned, or old, empty egg packages than for new packages lies in the fact that the return of the old package at a reasonable charge for the service is incidental and necessary to the continued profitable shipments of eggs by the same consignor and the purchase thereof by his consignees, the return of the empty package being practically a part of and connected with the shipment of the package when full. That many of the cars going west from eastern points are specially constructed dairy freight cars which have brought dairy products east at high rates and go back empty, and they can be and are profitably utilized by the carriers for the carriage of return empty egg cases. That the present classification and rating of old egg cases are actually much greater than the classification of the more valuable and very fragile article which they are designed to protect in the course of transportation, the cases being in the first class while eggs are in the second class and take a lower rate. That the increase in rate on returned empty egg cases caused by the said change of classification is so great as to practically destroy their value at Atlantic seaboard points.

8. That while this complaint is specifically directed only against the defendants above named, and for convenience the shipments of returned egg cases is described as being from Providence to Chicago, complainants state that many of their said shipments are to western points other than Chicago and the transportation is by other lines than those composed of the roads of the defendants herein. Therefore, to avoid multiplicity of actions, it is suggested to the Commission that

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notice of the pendency of this proceeding be given to the several carriers, not defendants herein, who are parties to and have adopted said Official Classification No. 11, by service of a copy of this petition upon C. E. Gill, Chairman of the Official Classification Committee whose office is at No. 143 Liberty Street, New York, N. Y., together with an order granting leave to said other carriers to come in as parties and be heard in this proceeding the same as if complaint had been made specifically against said carriers as to the carriage of returned egg cases to points reached by their several roads or lines.

The complainants pray for an order against the defendants and other carriers to whom leave may be granted to intervene herein to cease and desist from such violations of the Act to Regulate Commerce, and to change the classification of "Egg Carriers or Cases" which have been used from the first to the fourth class of said official classification, and to return or repay the complainants so much of the amounts paid by them since the said Official Classification No. 11 was put in force for the transportation of returned "Egg Cases or Carriers" as represent the increased rate upon such as they have forwarded to western points, and for general relief.

Upon the filing of said complaint an order was issued as follows:

It appearing upon an inspection of the petition in this proceeding that the questions raised are such that carriers not named as defendants have an interest therein, that is to say: The New York & New England Railroad Company, the Fitchburg Railroad Company, the Boston & Maine Railroad Company, the Central Vermont Railroad Company, the Grand Trunk Railway Company of Canada, the Chicago & Grand Trunk Railway Company, the New York Central & Hudson River Railroad Company as Lessee of the West Shore Railroad, the Delaware & Hudson Canal Company, and the New York, Lake Erie & Western Railroad Company:

It is Ordered, That each of said carriers be furnished with a copy of said petition and of this order, and that they have leave to intervene as parties by filing notice of desire to do so within twenty days from this date, in which case they will receive notice of hearing and may appear and be heard thereon if they desire.

And it is further Ordered, That any other common carrier upon whose line shipments of freight are carried under the classification of freight articles denominated "The Official Classification" may apply for a copy of said petition and file notice of intervention with the same effect as if specifically mentioned herein; and that a copy of said petition and of this order be also sent to C. E. Gill.

Chairman of the Official Classification Committee, No. 43 Liberty Street, New York, N. Y.

Thereupon, the New York, New Haven & Hartford Railroad Company, one of said defendants made answer, admitting that the statements in the first and second paragraphs of the complaint are substantially correct; the same also as to the third paragraph, except in so far as the rates from Providence, Rhode Island to Chicago, Illinois, are stated to be 82 cents first class and 55 cents third class, and claim they should be stated as 75 cents and 50 cents respectively. As for the fourth article, it admits the changes in classification as stated, but denies that as a result of such change any unjust or unreasonable rate had been established in violation of the Act to Regulate Commerce. This defendant further insists that its share of the through rate is barely sufficient to cover cost of service, and that in the matter of changes in classification it has taken no part other than to accept its proportion under agreed divisions on such freight; that even under the revised classification now in effect the rate is not excessive and that it would be unwilling to continue to handle such traffic on any reduced basis of earnings; that egg cases are more valuable and more fragile than ordinary freights and would therefore justify a higher rating in the classification. It submits that the transportation of cases filled with eggs at second class rates is much more profitable than the transportation of empty cases at first class. This defendant further insists that the transportation of egg cases, new or old, has nothing to do with the question of whether they have been once before transported filled or not; that its tariffs have been arranged to enable it to secure a reasonable income for the service it performs. It denies any participation in any unjust or unreasonable rate as to this traffic or any undue or unreasonable preference or any discrimination.

Answers were also filed by the Lake Shore & Michigan Southern Railway Company, the New York Central & Hudson River Railroad Company, and the Boston & Albany Railroad Company. No other answers were filed. All the answers filed raised substantially the same issues as above set forth as to the New York, New Haven & Hartford Railroad Company.

Facts and Conclusions.

There is no evidence in support of complainants' allegation of unjust discrimination in rates as between egg cases and similar articles of freight, *e. g.* crates. The sole question is whether the change in classification on January 2, 1893, whereby "Egg Carriers or Cases, old" were raised from third

to first class, results in unreasonable charges for the transportation of such carriers or cases when returned to shippers of eggs. The complainants' case rests mainly upon the assertion that the first class rates now in force on egg cases are so high as to prohibit their shipment from Providence to Burlington, Ia., complainants' principal gathering station, and other western points, and that in the hands of the eastern consignee the cases are practically valueless. The change in classification was adopted and put in force by the various lines operating throughout the territory east of the Mississippi and north of the Ohio and Potomac rivers, and it affected the business of egg shippers and dealers generally throughout that section of the country. With the exception of the one now under consideration, no complaint directed against his change in the rating of old or returned egg cases has been filed. Eggs are picked up at producing stations, massed in considerable quantities at gathering or storing stations, and shipped for sale to dealers at market points. These dealers, who are generally commission merchants, naturally prefer not to assume the burden of collecting and returning to shippers the cases used for bringing the eggs to the point of sale. A very large proportion of the shippers have also come to regard the practice of returning the cases as one which should not be followed, if without too great additional expense, it can be avoided. While the testimony does not clearly set forth the reasons which have impelled shippers to join the commission men in this desire, we infer therefrom that the keeping of eggs for considerable periods by the method of "cold storage," which has become very common, has greatly influenced them in this regard, and that many producers and shippers prefer, as a matter of convenience, to send eggs in a "gift case," if such a case, satisfactory to the carriers, can be obtained by them at a cost considerably reduced from that of a more durable returnable case.

By Circular No. 1379, issued February 15, 1892, by the Joint Committee of Carriers having the Official Classification in charge, the following change in the classification applying to the transportation of eggs was notified to take effect April 1, 1892:

"Eggs, in patent cases or carriers, O. R. B. as follows: Cases to be of hard wood of the following dimensions: Covers, sides and bottom, three eighths of an inch in thickness. Partitions, one half inch in thickness. Cleats or cover, one inch in thickness, and one and three eighths inches wide. No. 1 fillers to be used. Excelsior, cut straw or hay to be used in top and bottom of cases. Second class."

"Eggs, in patent cases or carriers:

"If in cases or carriers of material of less dimensions than as above provided, or if differently packed, O. R. B. First Class."

It seems that this circular displeased both the commission men and the shippers; the commission men, because it gave lower rates on eggs packed in a returnable case of the material and dimensions prescribed, thus compelling a return to the practice of using such a package, called a No. 1 case by the trade, which had been largely abandoned by shipping in cheaper free or No. 2 cases; the shippers, because it compelled many of them to purchase a stock of new cases, practically prohibited the use of gift cases, and subjected them to very considerable loss because contracts had already been made by the majority of the shippers for such cases as they intended to use. Protests against the new rule were made by the Philadelphia Produce Exchange, the Boston Fruit and Produce Exchange, a very large number of New York Receivers and Dealers in Eggs, the Ohio and Indiana Butter, Egg and Poultry Association, and the Nebraska Butter and Egg Association. These protests assumed that the proposed change was made in order to prevent the eggs from being damaged in transit and save the carriers from the annoyance of innumerable claims for loss. It was strongly asserted in the protests that the gift, or No. 2 case, is a safe package, and that instances of carelessness on the part of such shippers in permitting freight handlers to do the loading, or in using second-hand No. 2 cases, should not be allowed to bring about a rule prejudicial to careful shippers. The New York dealers recommended the right to use barrels; also a few changes in the dimensions of the case prescribed in the circular as taking second class rates when filled with eggs, and an amendment of the second provision in the circular so as to make it read:

"Eggs in patent cases or carriers:

"If in cases or carriers of material of less dimensions than as above provided, or if differently packed, or if in old or second hand cases of any dimensions, or if in old barrels, O. R. B. First class."

The Philadelphia dealers claimed that the case prescribed in the circular would be too costly to be given free with eggs sold, and the Boston Exchange agreed with them that such a case would have to be returned to shippers. The Ohio and Indiana Association said, "We submit that the transportation companies should, as in their own interest, aid and assist the shippers in carlots, and not as in their contemplated action discriminate against such shippers who are of necessity compelled by the demands of their trade to use the No. 2 (gift) case. They recom-

mended the exemption of a case made of elm, ash, oak, beech, sycamore, gum or cotton wood, and also proposed some changes in the prescribed thickness of the wood in different parts of the case.

The Nebraska Association protested against being forced to use returnable cases, but nevertheless asserted that a good No. 1 case, even though second-hand, should not be discriminated against, and claimed that a shipper "should have the right to use, without favor in classification of freights, any size case as best suits his purpose, provided such case is in good order at the time used."

In the claim just quoted, the Nebraska shippers state a principle which as a general rule, shippers are entitled to insist that carriers shall observe, and we are inclined to think that it should govern in this case. A shipper should not be subjected to unnecessary restrictions as to the kind of case or package he shall use.

After Official Classification No. 10 was issued, but before April 1, 1892, the date on which it took effect, the Classification Committee, by Supplement No. 1 to said Classification No. 10, dated March 8, 1892, cancelled the circular or advance notice of February 15, 1892, thus leaving the classification of eggs as it stood in Classification No. 9, namely, eggs in patent carriers or cases, O. R. B. second class. The circular or advance notice was therefore never put in force, and in this respect the classification has not since been changed. Although the circular against which so many shippers and dealers protested purported to state the classification of eggs, it dealt in reality with the case in which eggs should be shipped. As stated in the protests, and also asserted by the defense in this proceeding, if it had gone into effect the result would have been a general return to the practice of sending back egg cases to gathering points or to producers, and their being re-employed for shipping purposes. If the changes recommended by the New York dealers had been adopted by the carriers, the use of the returnable case would have been as certainly prohibited, even though the classification of returned or old cases had remained at third class, for eggs packed in second-hand or re-used cases would have been charged first class while eggs in the regulation case would have taken second class rates. This difference in a case holding, say 30 dozen eggs, and sent over any considerable distance would exceed the value of the case. The carriers receded from their intention to prescribe the kind of case which should be used, thus leaving the shippers free to exercise their choice, provided only that the case be safe for the purpose of carriage, but they increased the classification of old or used

cases to first class. They did right in thus refraining from prescribing the use of particular cases in egg shipments, for such action would have worked hardship upon shippers who had an interest in sending eggs in the No. 2 or gift package. It would have been a favor in classification to the returnable case. They also did right in not adopting the recommendation of the New York dealers that all eggs sent in second-hand or old cases should pay first instead of second class rates. It would have been a favor in classification to the gift case and have resulted in prohibiting the return of any kind of egg case.

Thus far the carriers seem to have strictly followed the principle stated by the Nebraska Shipping Association that a shipper "should have the right to use, without favor in classification of freight, any size case as best suits his purpose, provided such case is in good order at the time used."

But while the carriers placed no restriction upon the kind of cases to be used in shipping eggs, they, seemingly impressed by the protests against the general use of the returnable case, increased the rating of old or returnable cases from third to first class in Official Classification No. 11, in effect January 2, 1893, and have since continued such increased rating in force in Classifications Nos. 12 and 13. We say seemingly impressed by the protests, because the circular or advance notice above discussed would, as before shown, have had the effect of bringing the returnable case again into general use, while the ultimate action of the carriers was to restore the old classification as to eggs and the cases containing them, and to increase the rating on returned cases. The increase in rates on returned cases was, the defendants say, not only to bring in greater revenue, but also because the lower third class rates tended to encourage the use of unsafe second-hand cases and subject the carriers to many claims for damage. The evidence indicates that some shippers, when they found it advantageous under rates in force, used the No. 2 or gift case as a returnable case, and that eggs shipped the second or third time in such cases were more liable to be damaged in transit. We agree with the complainant that, as a general proposition, carriers are under no obligation to receive freight improperly packed or in otherwise unsafe condition; but upon the point that eggs are invariably carried at owners' risk of breakage, we think that if the carriers choose to disregard such condition of owners' risk and invariably pay claims for breakage upon presentation, as appears to be the fact in this case, that the shippers thereby benefited are in no position to find fault with the practice of carriers in disregarding the rule. On the

other hand, the propriety of retaining the condition of owners' risk of breakage in the classification might, upon such showing, if complained against by a shipper of the same commodity whose breakage claim had been refused, be open to serious question. We also think it doubtful whether carriers are justified in making all egg shippers using returnable cases pay higher rates on returned cases because some careless consignors make a practice of shipping eggs in insecure packages. Whether carriers can properly give weight to such consideration in fixing the rates on returnable egg cases may depend somewhat upon the methods pursued by shippers and consignees in forwarding and receiving eggs. We infer from the protests and some of the other evidence in the case that many, if not most, carload shippers of eggs do their own loading and that their consignees do their own unloading. If, through being relieved of this expense and being put to no additional cost of inspection, the carrier makes a corresponding allowance in the rate for carrying the eggs, this may possibly afford some justification for a rate on returnable cases which, while not subjecting the egg trade to unreasonable disadvantage, will serve to discourage the use of cases not in good repair. But under such circumstances the line of right is difficult to determine, and in this case the question is complicated somewhat by the uncontradicted testimony of a witness for the complainants to the effect that they, using returned cases as often as practicable, hardly ever had a claim on shipments in full carloads. Whether damage to egg shipments can properly be considered by the carriers in fixing rates on returned cases is not determinable from the showing now before us in this proceeding.

The main question for determination is whether, in view of all the facts, the present rating on old or returned cases from Providence to Western points is unreasonable. Its proper solution, however, may depend upon whether the return of egg cases is or is not a service incidental to, and connected with, the transportation of eggs. A rate which may be reasonable when applied to the transportation of egg cases as a disconnected service may be unreasonable if the carriage of returned cases at favorable rates is in fact a special service, the discontinuance of which would unduly burden the business of shipping eggs to points of sale. Before further considering this point it will be necessary to recite the additional facts in this case.

Although the evidence shows that the complainants' principal gathering and shipping point is Burlington, Ia., and that they ship eggs from that point and other places west of Chicago to Providence and return cases

thereto in dairy line cars, which would otherwise go westward from points east of Albany without loading, their complaint is directed against the classification of old egg cases generally and rates resulting therefrom to Chicago and other points west. They do not attack the adjustment of rates to different points under the classification, but the classification itself.

West bound class rates from Boston, Providence, New York and other eastern seaboard points to Chicago are the same: 75, 65, 50, 35, 30 and 25 cents on classes one to six, respectively. Burlington, Ia., on the west bank of the Mississippi river, takes rates from the same points which are 122 per cent of Chicago rates, plus an arbitrary or bridge charge of 5 cents on the first three classes, and 4, 3 and 2 cents on the 4th, 5th and 6th classes, respectively. These class rates from these same points to Burlington are: 97, 84, 66, 47, 40 and 33 cents.

The National Despatch Fast Freight Line, operating over the Central Vermont and Grand Trunk Systems and connections west, has in force certain differentials which result in lower class rates on west bound business. These differentials are in cents per hundred lbs.:

Classes	1	2	3	4	5	6
From Boston or Providence	10	8	6	4	4	3
" New York	15	12	9	6	5	4

Thus while the first class rate by the defendant and other trunk lines from Providence to Chicago is 75 cents and to Burlington 97 cents, the National Despatch line rate is 65 cents to Chicago and 87 cents to Burlington.

The third class rates formerly in force on old egg cases from Providence to Chicago was 50 cents by the direct lines and 44 cents by the National Despatch, and to Burlington it was 66 cents over the direct lines and 80 cents *via* the National Despatch. The change in the classification which took place on January 2, 1893, increased these class rates from Providence to Chicago and Burlington to the present rates of 75 and 97 cents, respectively, by the shorter lines, and to 65 and 87 cents by the National Despatch. But by Special Interstate Freight Tariff No. 126, effective November 25, 1893, the roads comprising the National Despatch Line established a special rate on returned empty egg cases from Providence to Burlington, Ia., of 54 cents per 100 lbs., 6 cents less than the old third class rate by that line, and a reduction from the National Despatch first class rate of 33 cents per 100 lbs. This special rate from Providence to Burlington, complainants' principal shipping point, was put in force about two months subsequent to the filing of 4 INTER 8.

this complaint by the Providence dealers against the New York, New Haven & Hartford and other roads leading west, and on March 3, 1894, about one month after the hearing of testimony in this case, the Central Vermont and other roads composing the National Despatch Line withdrew this special rate of 54 cents, and this action had the effect of restoring the regular National Despatch class rate of 87 cents on returned egg cases by this route from Providence to Burlington which had been in force from January 2, 1893, to November 25, 1893.

As before stated, complainants return their cases in dairy line cars which come east loaded with butter, eggs and other like produce. The evidence indicates that from points east of Albany many of these cars would otherwise return westward without loading. On account of the differential, and also the special rate which was in effect, the complainants have largely patronized the National Despatch Line. They receive 7 or 8 carloads of eggs a week, each carload containing from four to five hundred cases, and the accumulation of empty egg cases at Providence and vicinity is therefore considerable. The complainants do their own gathering at Burlington and therefore are shippers therefrom as well as consignees at Providence. It is understood that they load and unload the cars with filled and empty egg cases, and that this is done without any expense to the carriers. These cases cost complainants at Burlington from 15 to 17 cents each. Complainants estimate their cost of cartage, etc., to be about 3 cents per case, but how they arrive at this figure is not shown. In view of the fact that the same team and labor employed to load, unload and cart full cases can be, and probably is, utilized in unloading, loading and carting empty cases, with but little additional time involved, it may be that this estimate of complainants is placed too high.

The cases are carried under an estimated weight of 10 lbs., and complainants generally load the car full. A carload of 500 cases yields the defendant carriers a revenue per car of \$48.50, or 9.7 cents per case from Providence to Burlington; but the defendants do not concede that the usual carload of returned packages contains more than 400 cases. The revenue on a car of 500 cases by the National Despatch amounts to \$43.50, or 8.7 cents per case. Under the third class rate of 66 cents by the defendant roads the carriers received \$33.00 per car, or 6.6 cents per case, and the National Despatch obtained at its regular third class 60 cent rate \$30.00 per car, or 6 cents per case, and under its special rate of 54 cents, \$27.00 per car, or 5.4 cents per case.

The Chicago 75 cent first class rate on a carload of 500 cases gives a revenue of \$37.50, or 7.5 cents per case, and the National Despatch differential rate of 65 cents amounts to \$32.50 per car, or 6.5 cents per case. Under the old 50 cent third class rate to Chicago, the carload brought \$25.00, or 5 cents per case to the carriers, and by the National Despatch differential it amounted to \$22.00, or 4.4 cents per case.

Thus, under the change from third to first class rates on January 2, 1893, the defendant and other trunk line carriers increased their revenue per car of 500 cases from Providence to Burlington \$15.50, and the National Despatch line increased their carload compensation between the same points \$13.50; but by the special rate of November 25, 1893, they made a reduction of \$16.50 per car, or \$3.00 per car less than they received prior to January 2, 1893, and the difference between the carload rate by the National Despatch and by the defendant and other trunk line carriers from November 25, 1893, to March 3, 1894, was \$21.50. It was testified for complainants at the hearing that since the increase of January 2, 1893, they had not returned half the number of cases which they did when third class rates were in effect; but we are not informed why this should have been so during the time the National Despatch special rate of 54 cents to Burlington was in effect.

About one half of complainants' cases are made of hard wood, and we assume that they are more durable and somewhat more expensive than the case commonly called the gift case. Complainants' cases and the returnable cases now in general use by other shippers are considerably lighter than those formerly known as "heavy returnable cases," which weighed about 25 lbs. each. The number of times a returnable case can be used depends upon the treatment it receives. It may be available for but one journey; it may serve for half a dozen and even a greater number of egg shipments. While the present rate of 9.7 cents per case over the defendant lines from Providence to Burlington, added to complainants' estimated cost of cartage, etc., of 3 cents per case, still leaves them a margin of from 2.8 to 4.3 cents less than the cost of one of their new cases (and using the case for about five shipments would practically make up the cost of such a case, and this margin would be increased by shipments under the National Despatch differential, which is 10 cents per hundred less) this does not take into account the cost of new fillers or the percentage of cases damaged in transit or lost in the course of complainants' distributing trade with towns in the eastern states. The value of gift cases at Burlington

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is not shown, and it is probable that complainants also compare the cost of such a case with their cost of cartage and transportation from Providence to Burlington.

It is evident that the foregoing summary of facts does not enable us to determine whether the return of egg cases from Providence to Burlington should be viewed in the light of a special service, incidental and necessary to the shipment of eggs in the contrary direction, and it follows that the lack of evidence necessary to the solution of this preliminary question prevents us from coming to a definite conclusion concerning the propriety of the classification challenged in the complaint.

The action of the National Despatch Line carriers in establishing, after this complaint was brought, a special rate which was still lower than the old third class rating by that line is rather strong indication that the return of egg cases from Providence to Burlington is to be viewed in the light of a special service connected with the eastward transportation of eggs, and casts some doubt upon the reasonableness of the first class rating of old egg cases. Furthermore, their action in cancelling such special rate subsequent to the hearing in this case is calculated to create a presumption of arbitrary and unwarranted action, either on their part as to such rate, or, if the special rate was proper, on the part of all the carriers in increasing the classification in January, 1893. But the National Despatch Line carriers are not parties to this proceeding. These carriers and all others interested were, it is true, given leave at the commencement of this case to intervene and be heard, but instead of intervening the Central Vermont and the other National Despatch carriers practically conceded the justice of the complaint by putting in a special rate of 54 cents. Such action, so far as the traffic by that route is concerned, warrants a belief in the excessive character of the higher rating which is not overcome by the fact that, for reasons not disclosed, they withdrew the special rate before the making of this report. But, as before stated, the National Despatch Line carriers are not actual defendants herein, and their conduct during the pendency of this proceeding, while significant upon the general question of reasonableness, should not be held to conclude carriers over other lines who are parties hereto.

In consideration of the use of both gift and returnable cases in egg shipments, the action of the carriers in attempting to prescribe a particular case for egg shipments in the proposed circular of February 15, 1892, which would have brought about the general use of returnable egg cases, and then not only re-

ceding from this position, but going further in the contrary direction by raising the rating on old or returned cases, the successive increase in the classification of old cases from fourth to third class and then from third to first class, the concession and withdrawal of very favorable rates during the pendency of this controversy by carriers not actually parties hereto, the very limited range which the testimony has taken, and the desirability of having the proper classification of returned egg cases definitely determined, we think that time should be allowed to the defendants and the other carriers concerned to consider whether shippers generally who use returned cases are not unduly prejudiced by the increase to first class rates and take or refrain from taking action accordingly, and that from and after the first day of July, next, the complainants and any other interested shipper or consignee may, if the carriers fail to take satisfactory action, ask to have the case reopened; and thereupon such further direction will be given as will serve to bring in necessary parties defendant by amended or supplemental complaint or otherwise as may appear to be required, and it is so ordered.

Our inclination to treat the case in this way is strengthened somewhat by the fact, not hereinbefore mentioned, that by exceptions filed to Classification No. 11, and also to that which is now in force, shippers lo-

ally over the road of the defendant, the New York, New Haven & Hartford Railroad Company, have been and are able to return cases at fourth class rates. We find among our files a telegram from the General Freight Agent of this company in relation to this exception sheet, which states: "We return egg carriers and cases at fourth class from original consignee to original shipper between our own stations where we get full local tariff or practically so, but we do not do so where we receive a small proportion of some through rate from a western line." We refrain from commenting at this time upon this very material concession to local shipments beyond saying that the explanation in the telegram referred to does not convince us that the difference in the rating of through and local shipments on returned egg cases is just.

While from the imperfect view of the situation which has been afforded we are unable to arrive at a definite conclusion concerning the reasonableness and justice of the classification complained of, there are some significant circumstances which impress us with a present belief that the increase from a third to a first class rating may have been too great an advance. We therefore recommend the carriers to give the question prompt and earnest consideration during the period allowed therefor.

H. W. BEHLMER

THE MEMPHIS & CHARLESTON RAILROAD COMPANY; THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY; THE GEORGIA RAILROAD & BANKING COMPANY; THE SOUTH CAROLINA RAILWAY COMPANY; HENRY FINK and CHARLES M. MCGHEE, as Receivers of THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY and THE MEMPHIS & CHARLESTON RAILROAD COMPANY; DANIEL H. CHAMBERLIN, as Receiver of THE SOUTH CAROLINA RAILWAY COMPANY; THE CENTRAL RAILROAD & BANKING CO. OF GEORGIA, and THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, as Lessees of THE GEORGIA RAILROAD; and H. M. COMER, as Receiver of THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA.

1. The competition of markets or the competition of carrying lines subject to regulation under the Act to Regulate Commerce does not justify carriers in making greater short haul or lower long haul charges over the same line in the same direction (the shorter being included within the longer distance) in the absence of an order of relief issued by the Commission upon application therefor and after investigation.
2. When a carrier on complaint under the fourth section avers substantial dissimilarity in circumstances and conditions as justifying its greater charge for a shorter haul, it is concluded by its pleading and must affirmatively show that the circumstances and conditions of which it is entitled to judge in the first instance are in fact substantially dissimilar; but upon an application for re-

- lief under the fourth section proviso the carrier is not limited by such a rule of evidence, and may present to the Commission every material reason for an order in its favor.
3. The construction of the fourth section of the Act to Regulate Commerce as laid down in *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 8 Inters. Com. Rep. 682, 41 C. C. Rep. 744, and *Ga. R. R. Co. v. Clyde SS. Co.* 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324, followed in *Chattanooga Board of Trade v. East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 218, 5 I. C. C. Rep. 546, explained in *Gerke Brew. Co. v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 267, 5 I. C. C. Rep. 596, and sustained in *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.* (not yet reported), reaffirmed.
4. Defendants ordered to cease and desist

from making higher aggregate charges on hay, and other commodities carried under similar circumstances and conditions, over their connected roads from Memphis, Tenn., to Summerville, S. C., than they charge for carrying said commodities for the longer

distance from Memphis over said connecting line through Summerville to Charleston, S. C., without prejudice to defendants' right to apply to the Commission for relief under the proviso clause of the fourth section.

Decided June 27, 1894.

THE fourth section of the Act to Regulate Commerce.

Mr. Claudian B. Northrop, for Complainant.

Mr. W. A. Henderson, for East Tenn. V. & Ga. R. Co. and Memphis & C. R. Co. and Receivers.

Messrs. Brawley & Barnwell, for South Carolina R. Co. and Receiver.

Messrs. Ed. Baxter and Jos. B. Cumming, for Louisville & N. R. Co. and Central R. & Bkg. Co. of Ga. as Lessees of Georgia Railroad.

REPORT AND OPINION OF THE COMMISSION.

Yeomans, Commissioner:

The complainant alleges on behalf of himself and other merchants and residents of Summerville, S. C., that the defendants charge an unreasonable and excessive rate of 28 cents per 100 lbs. on hay in carload lots from Memphis, to Summerville; that said rate of 28 cents is 9 cents per 100 lbs. greater than the defendants charge and receive for transporting hay in carloads from Memphis through Summerville to Charleston, S. C., and that such greater charge constitutes a violation of the long and short haul clause of the statute; that said rate of 28 cents to Summerville is equal to the rate of 19 cents in force on hay in carloads from Memphis through Summerville to Charleston plus the local rate of 9 cents per 100 lbs. charged over the South Carolina Railway for carrying hay from Charleston back to Summerville, and that said 9 cent local rate which complainant is forced to pay in addition to the through Charleston rate in order to get hay transported by defendants from Memphis to Summerville is also unreasonable and excessive. The shipment of two carloads of hay from Memphis to Summerville in August, 1892, upon which complainant was compelled to pay the 28 cent rate is specified in the complaint. The complainant also alleges generally that the defendants engaged in transportation from Memphis to Charleston are subject to the Act to Regulate Commerce; that all of the roads involved in this proceeding are members of the Southern Railway & Steamship Association, and that the discrimination and excessive rates against Summerville exist not only on hay but on all articles of interstate commerce coming to that place to the detriment and disadvantage

of the town and the business of its merchants. The complaint prays that defendants be ordered to cease and desist from further violating the law as therein alleged and from all similar violations, and for such other and further order as the Commission may deem necessary in the premises.

The joint answer of the receivers of the East Tennessee, Virginia & Georgia Railway Company and the Memphis & Charleston Railroad Company admits that they are subject to the Act to Regulate Commerce and that the shipment of hay took place as specified in the complaint, but they do not admit that the rates set forth in the complaint constitute any violation of the law, and demand proof of the same.

The joint answer of the lessees of the Georgia Railroad and the answer of the receiver of the South Carolina Railway Company are substantially the same. These answers while admitting the rates to be as stated in the complaint and that the shipment specified in the complaint was made over the defendant roads, deny that said rates are in violation of the Act to Regulate Commerce. In relation to complainants allegation of violation of the fourth section these answers contain the following specific averments:

"1. The Georgia Railroad Company and the other carriers complained against have no joint through tariff from Memphis to Summerville and, therefore, they have no 'line' in the sense of said section from Memphis to Summerville, on which said section can operate."

"2. The transportation of two car loads of hay from Memphis to Summerville is not done under substantially similar circumstances and

conditions as the transportation of like property from Memphis to Charleston;"

"For (first) Summerville is a local station on the South Carolina Railway. It is not on any water route, and enterprise and capital have not constructed more than one railroad to it. It has not, therefore, the advantage of competition of carriers. The one railroad, on which it is located, viz: The South Carolina Railway Company, is not compelled by competition to choose between a reasonable rate and a rate which is much below what would be reasonable. On the other hand, at Charleston there exists competition with numerous all rail routes between Memphis and Charleston. Respondents here mention eight of these all rail routes between Memphis and Charleston, to wit:

"Memphis & Charleston Railroad; East Tennessee, Virginia & Georgia Railroad, Savannah, Florida & Western Railway and Charleston & Savannah Railway:

"Memphis & Charleston; Western & Atlantic; Central Railroad & Banking Company of Georgia; Port Royal & Augusta, and Charleston & Savannah:

"Memphis & Charleston; Western & Atlantic; East Tennessee, Virginia & Georgia or Central Railroad & Banking Company of Georgia; Seaboard Air Line; Clinton, Newberry & Laurens, and the Atlantic Coast Line:

"Kansas City, Memphis & Birmingham; Central Railroad & Banking Company of Georgia; Port Royal & Augusta, and Charleston & Savannah:

"Kansas City, Memphis & Birmingham; Georgia Pacific; Richmond & Danville, and Atlantic Coast Line:

"Kansas City, Memphis & Birmingham; Louisville & Nashville; Alabama Midland; Savannah, Florida & Western, and Charleston & Savannah:

"Louisville & Nashville; Nashville, Chattanooga & St. Louis; Western & Atlantic; Georgia Railroad, and South Carolina Railway:

"Louisville & Nashville; Nashville, Chattanooga & St. Louis; Western & Atlantic; Seaboard Air Line, and Atlantic Coast Line—or Port Royal & Western Carolina; Port Royal & Augusta, and Charleston & Savannah Railroads."

"Besides these eight enumerated all rail routes there are others, which could be designated. These lines are not only potential but are actual competitors with these respondents and their co-defendants, for business from Memphis to Charleston."

"(Second) Charleston is a port on the Atlantic coast, accessible and easily reached from the ports of Baltimore, Philadelphia, New York, Boston and other eastern ports, from which hay is shipped by water. If the rail lines from Memphis to Charleston charged

rates to Charleston as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be brought from Memphis to Charleston, but Charleston would be supplied with hay from North Atlantic ports—and the railroads would lose the hay business and Memphis would lose a hay market."

"(Third) The rates on Western produce to Charleston and other coast cities, such as Savannah, Port Royal and Brunswick, are made with a view to actual, existing water competition. Western produce, such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia or Baltimore, over continuous water routes *via* the lakes and canal, or over combined rail and water routes."

"The all rail lines, seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates approximate those which are offered by the continuous water route, or by the combined rail and water routes. The all rail routes make their rates as much higher as the difference in service will permit, and those rates are correspondingly adjusted from all western points, such as Evansville, Cairo, St. Louis, Memphis, etc. At present the all rail rates from Chicago to Charleston on hay, for instance, is 38¢ per 100 lbs.; from St. Louis, 28¢; from Louisville, Evansville and Cairo 23¢ and from Memphis, 19¢—the route through Memphis offering facilities for the transportation of hay, grain and western products generally, from the states of Missouri, Kansas, Nebraska, etc."

"The rate from Memphis to Charleston on hay is, therefore, forced upon the defendant lines by actual, existing water competition, and by other competition beyond the control of defendant."

"The controlling element in said competition is the lake, canal and ocean transportation between Chicago and Charleston; or the Lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Baltimore, Philadelphia or New York, thence by ocean to Charleston."

"(Fourth) As above stated, the Georgia Railroad Company and other carriers complained against have no joint through tariffs from Memphis to Summerville. They do have joint through tariffs from Memphis to Charleston, and the joint through rate from Memphis to Charleston on hay is 19¢ per 100 lbs."

If it shall appear in this case that the defendants violate the long and short haul clause of the law by keeping the higher rate to Summerville in force, it will be unnecessary to consider in this report whether the rate to Sum-

merville is in violation of other provisions of the law. In that event the prohibition in the fourth section will afford all the reduction demanded in the complaint.

Facts and Conclusions.

Transportation from Memphis to Charleston via the connecting and continuous line formed by the defendants' railroads passes through Summerville, a point on the South Carolina road 21 miles west of Charleston, which road is also the delivering carrier for traffic over this line to Charleston. Their rate in force for the carriage of hay in full carloads from Memphis to Summerville, is 28 cents per hundred pounds, and this rate is equal to a combination of the 19 cent rate to Charleston plus a 9 cent local of the South Carolina road back to Summerville. Shipments from Memphis to either Charleston or Summerville are carried through over this line of connecting roads under through bills of lading.

The defendants make a joint tariff rate on hay to Charleston from Memphis, and unless they show substantial dissimilarity in circumstances and conditions under which the transportation to Charleston and Summerville is conducted, they are prohibited by the fourth section of the law from making any greater charge for the shorter distance to Summerville than that which they have in force for carrying over the same line in the same direction for the longer distance to Charleston.

The defendants claim that substantial dissimilarity in such circumstances and conditions is created by:

1. The competition of various markets for the trade of Charleston, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston by all water lines or by all rail or part rail and part water routes.

2. The competition of rail lines between Memphis and Charleston.

The construction of the fourth section of the Act as laid down in the case of *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 682, 4 I. C. C. Rep. 744, and in *Ga. R. R. Co. v. Clyde SS. Co.* 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 824,—followed and explained in *Gerke Brew. Co. v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 267, 5 I. C. C. Rep. 596—and also reaffirmed by the Commission in *Chattanooga Board of Trade v. East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 213, 5 I. C. C. Rep. 546, has been passed upon by the Federal courts in the proceeding brought by this Commission against the Cincinnati, New Orleans & Texas Pacific Railway Company and others to enforce its order in the first above mentioned case (*James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.*). The decision of the United States Circuit Court for the Northern District of Georgia reviewed the 4 INTER S.

construction of the fourth section by the Commission, and declared that construction to be altogether unsound. *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 832, 56 Fed. Rep. 925. But the Commission took an appeal to the Circuit Court of Appeals for the Fifth Judicial Circuit, and that court has recently rendered a decision annulling and reversing the decision of the circuit court, and remanding the case with instruction to enforce the long and short haul order of the Commission in that case. *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.* Circuit Court of Appeals. (Not yet reported.)

This decision of the circuit court of appeals amounts to an affirmance of the Commission's construction of the meaning of the fourth section as laid down in the cases above mentioned, and under that construction the complaint in this case must be sustained. There is no showing in this proceeding of competition by lines not subject to the Act to Regulate Commerce for the carriage of hay from Memphis to Charleston, and the fact that there may be competition for such traffic by lines which are subject to the Act, or that hay may be carried to Charleston by various rail and water or part rail and part water routes from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the fourth section upon their own motion. Such considerations may constitute reasons for applying to the Commission for relief under the proviso clause of that section, but for reasons stated in our decisions of the cases above cited they do not justify carriers in departing from the rule of the fourth section without such a relieving order. Water competition, to justify lower long haul rates, must exist between the point of shipment and the longer distance point of destination. *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co. supra.* One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it. *Chattanooga Board of Trade v. East Tennessee, V. & G. R. Co. supra.* The competition of markets or the competition of carrying lines subject to regulation under the Act to Regulate Commerce does not justify carriers in making greater short haul or lower long haul charges over the same line without an order issued by the Commission on application therefor and after investigation. *Ga. R. R. Co. v. Clyde SS. Co.* 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 824, and *Gerke Brew. Co. v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 267, 5 I. C. C. Rep. 596.

The following rule of practice was laid

down by us in the Georgia Railroad Commission cases: "When a carrier on complaint under the fourth section avers substantial dissimilarity in circumstances and conditions as justifying its greater charge for shorter hauls, it is concluded by its pleading and must affirmatively show that the circumstances and conditions of which it is entitled to judge in the first instance are in fact substantially dissimilar; but upon an application for relief under the fourth section proviso the carrier is not limited by such a rule of evidence, and may present to the Commission every material reason for an order in its favor."

Because Charleston is an important seaport and railroad centre and hay may be and is carried there from various points, is not sufficient reason for a departure from this rule. The just interests of the carriers are fully protected by the proviso clause of the fourth section. The defendants are under no obligation to compete at low rates for the carriage of hay from Memphis to Charleston. They ought not to engage in such competition if the rates obtainable are not remunerative. If they are remunerative the defendants cannot, in the face of the prohibition of the fourth section, and the provision in that section for the issuance of relieving orders, assume to say that such rates though profitable on Charleston traffic are insufficient for the transportation of

carload quantities to a shorter distance point on the same line and in the same direction. That is a question which Congress, by enacting the proviso or saving clause in the fourth section, made it the duty of this Commission to determine. The very reason why the proviso was added to the section was to enable carriers to obtain relief from hardship in special cases if, upon application for relief, they make it appear that hardship actually exists.

Neither of the defendants having applied for relief under the proviso to the fourth section, order will be entered directing them to cease and desist, on or before July 15, 1894, from charging or collecting any greater sum in the aggregate for the transportation from Memphis to Summerville of hay, or other commodities carried by them under circumstances and conditions similar to those appearing in this case, than they do for such transportation for the longer distance to Charleston, but without prejudice to the right of said defendants to apply for relief under the fourth section of the Act to Regulate Commerce. The filing of an application for relief by the defendants or either of them before the time above specified, will, if it refers to transportation over this line to Charleston, operate as a stay upon this order during the pendency of proceedings on such application.

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ALANSON S. PAGE, CADWELL B. BENSON and CHARLES TREMAIN, Complainants,
 v.
 THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, THE
 NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, THE MICHIGAN CENTRAL
 RAILROAD COMPANY, Defendants.

1. Where it appears that a complainant has invoked the aid of the law for the purpose of securing what he, with the acquiescence of the carrier, had previously obtained in apparent contravention of the law, such acquiescing carrier will not be held entitled to plead violations of the law by complainant in bar of a decision on the merits, nor will the individual interests of the complainant be taken into consideration; but the Commission will examine the evidence and make such report thereon as, under the provisions of the law, the rights of other shippers and the public generally may require. If, independently of any action or interest of complainants, the conduct of defendants with reference to the transportation which is the subject of the proceeding is shown by the evidence to be unlawful, it is the duty of the Commission to execute and enforce the statutory provisions applicable thereto.
2. Upon consideration of the great reduction which has taken place in the value of window shades, the arbitrary increase of shade classification by the carriers during the progress of this proceeding, and all the other facts and circumstances herein which pertain to the rights of shade shippers and consignees generally, and of purchasers of that article of household necessity, *Held*, That the classification of window shades as first class in the Official Classification has become unjust, and that the legal duty of defendants to so classify traffic and fix charges thereon that the burdens of transportation are reasonably and justly distributed among the articles they carry, requires them to reduce their classification of window shades to the class which, under the Official Classification, is now applied to "window hollandes and shade cloth, plain, uncut and undecorated."

Complaint filed March 3, 1893.—Answers filed March 24 to April 11, 1893.—Depositions filed May 24, 1893.—Heard May 25, 1893.—Briefs filed June 7, to September 8, 1893.—Decided March 23, 1894.

UNJUST classification of window shades.

Mr. John D. Kernan, for Complainants.

Mr. Frank Loomis, for New York Central & Hudson River Railroad Company; Messrs. Henry Russel and Ashley Pond, for Michigan Central Railroad Company; Mr. C. E. Gill, for Delaware, Lackawanna & Western Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

Veasey, Commissioner.

In the complaint it is averred that the complainants are copartners doing business at Minetto, New York, under the copartnership name of the Minetto Shade Cloth Company, and are engaged in the manufacture, sale and shipment of the articles hereinafter mentioned;

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that the defendants have been and are railroad corporations engaged as common carriers in the transportation of property, by the lines of the defendant, the Lackawanna Company, between Minetto and New York city, and together between Minetto and Chicago and other western points, under some common

control, management or arrangement for continuous carriage between the points aforesaid, so that each of the defendants constitutes a part or portion of the same through and continuous line of transportation, and are respectively within the provisions of the Act to Regulate Commerce; that the articles in respect of which the complaint is made consist of window shades; that since April 4, 1887, the defendants, in violation of said Act, have been and are guilty of unjust discrimination in that they have been and are in the habit of classifying the articles, manufactured and delivered to them for transportation by the complainants, in a classification which is unjust, unreasonable, and relatively higher than the classification of other similar kinds of property and merchandise in the elements of value, risk, compactness and cost of service; that as a result of such unjust and relatively higher classification they have been and are in the habit of charging other persons rates much lower for like and contemporaneous service, under substantially similar circumstances and conditions, by reason of the unjustly discriminating lower classification made by the defendants of the goods and merchandise so transported for such other persons; and the complainants specify the wrongs thus in general terms charged, and further allege that, by reason thereof, defendants have made and given, and do make and give undue and unreasonable preferences and advantages to some persons, firms, companies and corporations in transportation over their respective lines, and have subjected and do subject complainants thereby to undue and unreasonable prejudice and disadvantage; that the classification complained of is that which places window shades N. O. S. boxed, any quantity, in the first class; and window shades plain, undecorated, mounted on rollers, boxed, any quantity, in the second class; and that to be free from unjust discrimination all window shades should be in the third class for less than carloads and in the fourth class for carloads; and the complainants make appropriate prayer for relief.

The defendants respectively answer the complaint, but finally put their defense in their brief and argument upon two grounds: (1) That the complainants, by intentional and persistent misdescription of their shipments, and by violation of the law in so doing, preclude themselves from applying to the Commission and asking the exercise of its jurisdiction upon the merits of the controversy. (2) That the classification complained of is not unjust and in violation of the statute.

Facts.

1. The complainants are co-partners, doing business at Minetto, New York, under the firm name and style of "The Minetto Shade Cloth

Company," and are engaged in the manufacture and sale of shade cloth and of window shades, decorated and undecorated, and the shipment thereof to New York city, and to Chicago and other western points. Their establishment is located about one half a mile from the railroad track at Minetto, a point about four miles southeast of Oswego, N. Y. The cars for the shipment of complainants' goods are brought up from Syracuse in the local freight train, switched to the siding and left there to be loaded. The complainants haul their goods to the cars. Their teamsters give the shipping slips to a tallyman employed by the Lackawanna road who tallies the goods and aids the teamsters in loading the cars. These slips or receipts are made out in duplicate by the complainants, and after the freight has been checked into the cars, they are signed by the agent of the defendant, the Lackawanna Company. The original is returned to the complainants and from the duplicate, kept by the railroad company, the way bill is made. The initial road does not weigh the property described in the receipts, nor does it make any examination to see if the package contains what is set forth in the receipts; but it is the duty of its agents to understand the classification of freight shipped and to bill the goods so shipped accordingly. Trains made up in Oswego pick up these cars and haul them to Syracuse or New York city.

The establishment of the complainants covers two or three acres. During the spring and summer months they employ about two hundred and fifty persons, which number is increased in the busier seasons of fall and winter to about four hundred.

The complainants have been in business since 1879. Prior to 1886, they manufactured window shading and shade cloth used for window shades, and sold it entirely by the yard or by the piece. Their goods were known as the Minetto window shading, and were shipped by the complainants as window hollands. In 1886, the complainants commenced decorating the cloth by machinery, cutting it up into shades, placing them on the market, and shipping them in pairs. Prior to that time the decoration had all been done by hand. The complainants began making and selling mounted shades, ready for hanging, in the fall of 1887. This was then a new article commercially. They continued to ship the incomplete shades for about a year after this; then the trade began calling for the completed article, and their shipments of shades in packages or cases grew rapidly, so that the total volume of their consignments now amounts to something like four hundred carloads a year. It does not appear, however, that a majority of the complainants' shipments are in carload lots. Some indication of the proportion of carload

to less than carload quantities shipped by them is given in tables hereinafter set forth; also the different sizes of packages and cases which they use.

Prior to 1886, when shade manufacture was conducted entirely by hand, and the stamping or decoration was done by wood block printing, the value of the cheapest grade was about seventy-five cents a pair, while the higher grades ranged from five to seven dollars a pair. The commercial value of machine decorated shades, mounted and ready to put up, is from twenty-five cents to seventy-five cents a pair. The old hand decorated shade was not mounted. The complainants admit that lowering the classification, as here asked for, would not be likely to increase the number or the tonnage of their shipments. They do not prepay freight charges nor do they make allowance therefor in settling with their customers.

2. Up to January 24, 1893, the complainants described all their shipments of shades simply as "window hollands," except when they shipped shades in pairs; in that case the shipment was, in continuation of the old practice, billed by them as window shades; and the complainants still bill window shades under that name when they ship them in pairs, but the number of such shipments is very small.

The carriers have established inspection bureaus located at junctions or transfer stations within the territory covered by the "Official Classification." The revising clerk at a transfer station gives the way bill to an inspector, who thereupon examines the contents of a car to see whether they differ in description, either in character or weight, from that mentioned in the way bill. When there is no difference he marks the way bill "O. K." But if there is a difference, the inspector notes the fact on the way bill and hands it over to the revising clerk who makes the necessary corrections in the way bill. The expense bill of the delivering carrier shows the increase of weight or correction of classification, and the consignee pays the additional charges. When necessary, the inspector opens the packages in order to make an examination of their contents, and also re-weighs some or all the packages if he has reason to believe that the weight has been underbilled. It appears from a statement put in evidence and covering the period from September 1, 1892, to February 28, 1893, that about ninety per cent of the complainants' shipments were described by them as "window hollands," a little over nine per cent as "mounted window hollands," and less than one per cent as "window shades." Another exhibit in testimony shows that very many shipments by complainants were described as window hollands, when in fact they consisted of window shades. If the complainants' shipments billed as window hollands and given third class rating

had been billed as window shades, they would have taken first class rates.

On January 24, 1893, the agent of the Lackawanna Company, under instruction from the Assistant General Freight Agent of that company, requested the complainants to discontinue the practice of billing window shades as window hollands. The complainants assured him that the request would be complied with. After that time their shipments of shades were described as "plain mounted" or as "decorated" hollands, a pencil being used to write it on a printed shipping slip over or through the words "window hollands," the words "plain mounted" or "decorated." But a considerable number of shipping slips, or tickets, were put in evidence showing that this pencil notation had been omitted by complainants' employés, after the date above mentioned; and the weights of some of these shipments were underbilled. The complainants claim that these misdescriptions were the result of oversight. For two days, in the month of May, 1893, the 12th and 13th, the complainants' shipping clerk did, as instructed by complainant Benson, describe all shade shipments as "shades." This was after the taking of depositions had been commenced in New York city. This instruction was then countermanded by the complainants, and the description of the shades as hollands was resumed. The complainants did not conceal their method of billing shades as window hollands.

3. The complainants appear to have relied for justification of their course upon the following grounds: The old practice of shipping under the title of shades only when the shades were sent in pairs; the statements made to them in 1887 by the agent of the receiving road, and in 1888 by a representative of the "Merchants' Despatch," a fast freight line operated over the New York Central System, that the billing of shades as window hollands would not be improper; and the fact that under the provisions of the classification goods specified simply as "window hollands," without any specification as to their being plain, uncut and undecorated, would take first class rates, if the receiving road insisted upon billing exactly in accordance with the terms of the classification, and, therefore, even if the meaning of the classification contended for by the defendants should be correct, that there was no misdescription upon which the roads could base a charge of fraudulent billing. The defendants' principal witness (Mr. Gill) also testified that a shipment billed simply as window hollands should, under the classification, take first class rates.

When the Lackawanna agent stated to complainants in 1887, that the billing of window shades as hollands would not be incorrect, he also said that if any change should become ne-

cessary the complainants would be advised. In 1890, the agent of that road notified the complainants verbally that some inspectors of the railroads in the west said that they (the complainants) were not complying with the classification, but the complainants declare that they did not understand this to be "advice" that a change in their methods was necessary. Complainants' practice of shipping shades as hollands has also been the subject of conversations held at different times prior to 1893 between one or more of the complainants and representatives of the carriers in New York. It appears from the testimony of complainants' shipping clerk (Snively) that an order for window shades would not be understood to call for window hollands, nor would an order for the latter commodity be taken to require the shipment of any window shades. Window shades, window hollands and shade cloth are not synonymous terms. The first is well known as an article used in house furnishing; the other terms are applied to material used in the manufacture of shades. There is no ambiguity in the classification of these articles. As will appear by the statement of the classification hereinafter contained, a shipper desiring to ascertain rates in force on window hollands or shade cloth would have no difficulty in determining from the classification in force that window hollands and shade cloth, if plain, uncut and undecorated, take third-class rates, and that if otherwise, they are subject to first class charges. So with window shades: if plain and unmounted they would, under Classification No. 11, be in the second class; otherwise in the first class. Complainants have described their shipments of window shades as window hollands for the evident purpose of thereby obtaining lower rates than could lawfully have been charged if the proper description had been given; and, except when corrections were made by the carriers' inspection bureaus, this purpose was accomplished by the acceptance of such shipments as window hollands by the receiving road and the improper billing thereof by the local agent at third class instead of first class rates. It is indicated by the evidence that representatives of the carriers had knowledge of complainants' practice of billing shades as hollands, and the practice finally resulted in the remonstrance on the part of the carriers on January 24, 1893. There is no showing that the carriers have taken steps to prosecute the complainants or any person in their employ for false billing or false report of weights under section 10 of the Act to Regulate Commerce.

4. The defendants are common carriers engaged in the transportation by continuous carriage and shipment of passengers and property between Minnetto and New York city, and Minnetto and Chicago and other western points.

The road of the Lackawanna Company connects Minnetto with New York city, passing through the states of New York, Pennsylvania and New Jersey; the Lackawanna takes on the freight at Minnetto, and carries New York city freight direct to that point. Freight destined west of Buffalo is carried by it to Syracuse, N. Y., thirty-one miles southeast of Minnetto, where it is delivered to the New York Central Company, which takes it to East Buffalo, N. Y., and from there it is transported by the Michigan Central to Chicago and other points. The "Official Classification" is in use on the defendant lines, and these carriers have established and published schedules of rates for the transportation of property described in said classification.

5. The classification made by the "Official Classification" Committee, of which the defendant carriers are members, on window shades and plain uncut shade cloth, prior to 1891, was as follows: window shades, first class; shade cloth, third class. In 1891, the complainants asked the "Official Classification" Committee for the classification which they petition for in this case, to wit: window shades, L. C. L., third class; C. L., fourth class. The request was refused. But the committee did then adopt the classification of those articles, which continued in effect until January 1, 1894, viz: window shades, boxed, N. O. S., first class L. C. L. and C. L.; window shades, plain, undecorated, mounted on rollers, boxed, second class, L. C. L. and C. L.; window hollands and shade cloth, plain, uncut and undecorated, third class, L. C. L. and C. L. Official Classification No. 11, which was in effect at the time this proceeding was instituted, classified the goods involved in this case as follows:

Dry goods, N. O. S. in bales,	L. C. L.	C. L.
O. R. C., or in boxes	1	

Dry goods, as follows: Any of the following named articles (and remnants thereof) made wholly of cotton, when specific name of articles and name of shipper are plainly marked on outside of packages and stated in shipping receipts and bill of lading (marking or describing packages as containing "Cotton Piece Goods" will not be sufficient), viz.: Awning Stripes, Calicoes (64 square and under, only); Canton or Cotton Flannels, plain or dyed (not figured); Canvas; Cheese Cloth; Corset Jeans; Cottonades; Cotton Warp; Cotton Yarn; Crash (Cotton); Domestic Checks; Stripes (Hickory Shirting Stripes) and Cheviots (plain or napped on one side); Cotton Duck; Denims; Drills; Domestic Gingham; Glazed Cambrics;

Osnaburgs; Sheetings, bleached and brown; Tickings; *Window Hollands and Shade Cloth, plain, uncut and undecorated*; in bales O. R. C., or in boxes 8

All Dry Goods, except the articles above specifically named, will be classed as "Dry Goods, N. O. S.," unless the above conditions are complied with. Any package containing articles of more than one class will be charged at the tariff rate for the highest classed article contained therein.

Window Shades, N. O. S., boxed 1

Window Shades, plain, undecorated, mounted on rollers, boxed 2

By Official Classification No. 12, effective January 1st, 1894, the second-class rating for plain mounted shades was abolished, and all window shades were again placed in the first-class.

The following table shows the classification changes that have taken place in window shades, shade cloth, and window hollands since April 1st, 1887:

Changes in Official Classifications.

COMMODITY:	Number of Classification.	DATE OF CHANGE.	Class.
Window shades	1	Apr. 1, '87.	1 Discontinued under this description in Classification No. 8.
Window shades N.O.S., boxed.	8	Feb. 2, '91.	1 Discontinued under this description in No. 12.

COMMODITY:	Number of Classification.	DATE OF CHANGE.	Class.
Window shades plain, undecorated, mounted on rollers, boxed.....	8	Feb. 2, '91.	2 Discontinued under this description in No. 12.
Window shades boxed.....	12	Jan. 1, '94.	1
Shade cloth, boxed.....	1	Apr. 1, '87.	1 Discontinued under this description in No. 4.
Shade cloth, N.O.S., boxed.....	4	Aug. 15, '88.	1 Discontinued under this description in No. 5.
Shade cloth, uncut and undecorated.....	5	Feb. 18, '89.	8 Still the same under No. 12.
Window hollands and shade cloth, plain, uncut, and undecorated.....	8	Feb. 2, '91.	8 Still the same under No. 12.

The following class rates are in effect:

Between Minnetto and Chicago,—						
Class	1	2	3	4	5	6
Rates	60	52	40	28	24	20 (Oswego rate.)
Between Minnetto and New York city,—						
Class	1	2	3	4	5	6
Rates	85	80	25	18	15	12 (Oswego rate.)
Between New York City and Chicago,—						
Class	1	2	3	4	5	6
Rates	75	65	50	35	30	25

(These rates between New York and Chicago were also in effect on April 1, 1887.)

6. The classification and the comparative bulk, weight and value of a number of articles known as dry goods are shown in the following table:

Article.	Size of Case or Bale.	Weight.	Con- tents.	Value, Case or Bale.	Cubic Feet in Case.	Weight per Cubic Foot.	Value per Cubic Foot.	Classi- fication.
<i>Cotton</i>		<i>Pounds</i>	<i>Yards</i>	<i>Dollars</i>		<i>Pounds</i>	<i>Dollars</i>	<i>Class</i>
Flannels.....	33" x 32" x 48"	400	1000	80.00	29.38	18.68	2.72	8
Cheviots.....	40" x 30" x 34"	800	1800	185.00	23.61	83.88	5.72	8
Checks.....	40" x 40" x 40"	450	1000	80.00	37.08	12.15	2.16	8
Denims.....	38" x 34" x 27"	425	1000	100.00	17.53	24.24	5.07	3
Tickings.....	38" x 34" x 27"	404	1000	100.00	17.53	23.38	5.70	3
Corset Jeans.....	25" x 25" x 23"	800	1500	90.00	8.33	36.01	10.80	8
Cottonade.....	40" x 48" x 30"	900	1000	150.00	33.83	27.00	4.50	8
Prints.....	80" x 30" x 36"	450	2500	150.00	18.75	24.00	6.25	8
Calicos.....	80" x 30" x 36"	450	2500	150.00	18.75	24.00	6.25	8
Canvas.....	38" x 34" x 27"	425	1000	100.00	17.75	23.94	5.63	8
Cambric.....	24" x 30" x 46"	500	3000	142.50	17.50	28.57	8.10	8
Duck.....	38" x 34" x 27"	500	1000	100.00	17.75	28.16	6.63	8
Gingham.....	30" x 30" x 27"	400	2000	140.00	14.40	27.70	6.94	8
Drills.....	24" x 29" x 18"	210	600	42.00	7.72	27.21	5.54	8
Drills.....	22" x 36" x 36"	500	2400	290.00	16.55	30.21	17.52	8
Bleached								
Sheeting.....	40" x 40" x 14"	500	1676	167.60	12.90	38.76	12.99	8
Lace Curtains.....	36" x 26" x 48"	500	150	600.00	26.00	19.23	23.05	1
Lace Curtains.....	29" x 19½" x 29½"	110	60	260.00	9.72	11.81	24.77	1
Curtain Fringe.....	22" x 38" x 45"	265	2302	233.50	20.16	18.14	11.57	1
Linen.....	40" x 28" x 27"	666	2697	950.00	17.75	37.50	53.52	1
Linen.....	40" x 28" x 27"	561	2168	1543.00	17.75	31.60	37.21	1

7. A very frequent shipment by the complainants is a box containing one dozen complete window shades, and usually weighing from twenty to twenty-one pounds. The Minnetto shades, which are the best quality, will weigh twenty-three or twenty-four pounds, and if they are seven foot shades, the box containing one dozen, will weigh twenty-five pounds. The complainants also ship shades in what they call a "standard case," containing twenty-three dozen and averaging, in weight, four hundred and ninety-five pounds, and in value \$54.74. A table in evidence and below set forth shows the value of the different grades of complainants' shades, their weight, bulk and value when packed in "standard cases," and the relative cost of labor to manufacture:

thing else. About forty per cent of the complainants' shade cloth is decorated. This decoration consists of a design printed, or stamped, upon the shade and finished in bronze, and is done by machinery. Only a few shades, less than one per cent, of the complainants' manufacture, are decorated subsequent to the cutting of the shades, the decoration prior to the cutting being the single print. The complainants have ceased altogether from decorating shades by hand, but some other manufacturers still continue hand decorations. There are four grades of decoration, called respectively, one print, two print, three print, and four print shades. It costs the complainants twenty cents a dozen for one print, and twenty-five cents a dozen for each additional print. The four prints cost ninety-five cents a dozen.

Table Showing Weights, Contents, Value, Cubic Measurements, etc., of the Twenty-three Dozen Case of Shades.

	Size of Case.	Weight.	Contents	Value.	Cubic feet in case.	Weight per cubic foot.	Value per cubic foot.	Per ct. of labor.
Minnetto shades	20½ x 25½ x 42½	588 lb.	23 doz.	\$69.00	12.70	42.86 lb.	\$5.43	.0296%
Seneca "	" " " "	542 "	23 "	63.25	12.70	41.10 "	5.06	.0323%
Ontario "	" " " "	495 "	23 "	55.20	12.70	38.79 "	4.37	.0375%
Holland "	" " " "	468 "	23 "	51.75	12.70	36.45 "	4.07	.0395%
Felt "	" " " "	439 "	23 "	34.60	12.70	34.56 "	2.71	.0693%
Average		495		\$54.74		38.65	\$4.38	.0396%

8. The classification of the different raw materials, used in the manufacture of shades, in carloads and in less than carloads, is stated in a table put in evidence, as follows:

Cloth	3rd Class C. L.	3rd Class L. C. L.
Steel	6th	
Paper	6th	
Lead	5th	
Colors	5th	4th
Iron Castings	6th	4th
Starch	6th	4th
Clay	6th	4th
Flour	6th	4th
Lumber	6th	
Dyes Aniline	4th	2nd
Dyes Wood	5th	3rd
Glue	5th	4th
Nails and Tacks	5th	4th
Shade Rollers	5th	3rd
Shade Slats	5th	3rd

Comparison with classifications 11 and 12 show some variation from the foregoing table as to two or three articles. The table is, however, correct in the main.

9. There are thirty-five different colors of the Minnetto shading; 8 colors in Senecas and Ontarios; perhaps 12 colors in the shades called Hollands; and about six colors in Felt. The Felt shade is paper. These colors are spread over the entire shade, and are put on before the cloth is cut up. The decoration is some-

Twenty cents a dozen for decorating would cover all the shades made, except about one per cent. The Senecas are printed. The Ontarios are finished when they are filled. The completed shade consists of the shade cloth cut in the proper length, usually six feet in length by thirty-eight inches in width, one end of which is attached to a roller by tacks and the other end is hemmed up and a slat run in. There may be also a fringe attached to the bottom of the shade. The roller also has brackets fastened to the ends. The market price of this finished shade is from \$1.50 to about \$3.00 per dozen. About seventy per cent of the wood used by the complainants in the manufacture of their shades comes by water from Michigan, Wisconsin and Canada.

The largest number of shades are sold from the lower grades as in shown by the following statement in evidence:

Per Cent of Shades Made by the Minnetto Shade Company from Sept. 1st to March 1st, 1893.

Minnetto	18.7%
Seneca	16.4%
Ontario	34.6%
Holland	15.2%
Felt	14.8%
	99.7%

And the following shows the average weight of Cloth and of Rollers:

		<i>Cloth.</i>	<i>Rollers.</i>
Minetto.....	1200 yds.	685	520
Seneca.....	1200 "	628	520
Ontario.....	1200 "	514	520
Holland.....	1200 "	478	520
Felts.....	1200 "	416	520
Average.....		588	520

Window Hollands, or shade cloth, the principal constituent of the window shade, is made from a loosely woven cotton fabric obtained from New England mills. That used by the complainants is sent in bales to a bleachery at Norwalk, Conn., where the bleaching is done. Complainants first grade of shading is also filled with clay and flour at Norwalk, but the lower grades are, except bleaching, treated at Minetto.

10. The standard commercial package of window hollands, or shade cloth, as manufactured and sold by the complainants, is a case of 1200 yards and weighing, with the box containing it, from 416 to 685 pounds, the box measuring 25x25x42 inches. The value of the contents ranges according to quality from \$48.00 to \$144.00. This case holds twenty pieces of hollands, containing sixty yards in each piece. This shade cloth, or hollands, constitutes about ten per cent of the total shipments of the complainants.

Taking the Minetto shade for illustration, a case of hollands measuring 25x25x42, weighing 685 pounds, and having a market value of \$144.00, will with the other materials added, when made into complete shades, more than fill two cases with Minetto shades, each case containing 28 dozen shades, meas-

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uring 20½x25½x42½ inches, weighing 588 pounds, and having a market value of \$69.00; and the two cases together weigh 1076 pounds, and are worth \$188. On the basis of 50 dozen shades from each case of hollands the shades made from a case of hollands worth \$144.00, would at complainants' stated price of \$3.00 per dozen be worth \$150. Under this calculation only \$6.00, or 12 cents per dozen, remains to cover the value of rollers, slats, attachments and some labor. While this margin may possibly be sufficient, the inference is rather plain that placing the value of the case of hollands at \$144.00 is probably an overstatement, and that it is likely to be somewhere between that figure and \$182.00, the value stated in the testimony for the defense.

It is clear, however, that of two cases, one containing hollands or shade cloth and the other finished shades, both being of similar bulk and weight, the case containing the shades has less market value; and that complainants' standard case of 20½x25½x42½ inches, filled with Minetto shades, is worth only about half as much as a case of window hollands or shade cloth measuring 25x25x42 inches. The average weight of a case of complainants' shades is 495 pounds and the average weight of the shade cloth case is about 588 pounds, a difference of only 38 pounds.

11. Complainants employ at least three sizes of cases in which to ship shades:

The one dozen case, measuring 6x7x44 inches and weighing 20 to 25 pounds.

The ten dozen case measuring 12x15x42 inches and weighing about 200 pounds.

The twenty-three dozen case measuring 20½x25½x42 inches and weighing an average of 495 pounds.

The following table, put in evidence by the defense, shows the weight and sizes and the number of these shipments for six months:

Month.	Total Weight of all shipments described as "window shades" or "window shades"	Total Number and Weight of Cases weighing 25 lbs. each or less.		Average of Weight.	Per Cent of Total Weight.	Total Number and Weight of Cases weighing from 25 to 300 lbs. each.		Average of Weight.	Per Cent of Total Weight.	Total Number and Weight of Cases weighing more than 300 lbs. each.		Average of Weight.	Per Cent of Total Weight.
		Number.	Weight.			Number.	Weight.			Number.	Weight.		
1893	Pounds.		Pounds.	Pounds.			Pounds.	Pounds.			Pounds.	Pounds.	
Sept.	273,960	8,057	63,975	20.60	22.98	552	89,160	161.63	32.54	273	121,825	447.88	44.48
Oct.	187,670	1,889	39,350	20.34	20.91	248	96,065	145.43	19.31	246	112,355	456.72	59.88
Nov.	206,135	1,746	35,900	20.31	18.26	225	28,010	124.49	10.53	439	202,825	464.01	76.22
Dec.	514,515	8,380	166,150	19.80	32.29	710	110,615	155.79	21.50	519	237,750	458.09	46.21
Jan.	902,905	28,506	468,700	19.73	51.36	1,279	168,530	127.85	18.11	678	275,575	480.88	30.53
Feb.	534,625	11,692	242,025	20.70	45.27	945	112,675	133.34	21.08	388	179,925	463.72	33.65
Totals.	2,679,710	50,380	1,009,400	20.05	37.67	3,859	540,055	139.94	20.15	2,487	1,130,255	463.78	42.18

Statement Compiled from the Duplicate Shipping Receipts of the Minnetonka Shade Cloth Co., for the Period September 1st, 1892, to February 28th, 1893, inclusive.

Using the month of November, 1892, for illustration, the number of cases shipped by complainants weighing 25 pounds or less was 1746; the number weighing from 25 pounds to 300 pounds was 235; and the number of those weighing more than 300 pounds was 439. In the other months the proportion of 25-pound shipments was much greater.

12. The roads have more weight to carry when shades are shipped in one dozen packages than they would have in transporting the same number of shades packed in a 23-dozen case. It is estimated that 23 of the one dozen packages will exceed the 23 dozen case in weight by from 70 to 80 pounds. But when the smaller cases are shipped to different consignees there must be as many different sets of bills and as many deliveries; while with the large case there is less handling, but one billing and one delivery. As hereinbefore mentioned, the complainants practically do their own loading. The "Official Classification" contains a rule (Subdivision B of rule 16) which reads as follows: "No single package or small lot of freight of one class, classified 1st-class or lower, will be taken at less than 100 lbs. at the class to which it belongs."

13. No carload rating is allowed in the "Official Classification" for articles of dry goods. Between Nov. 1, 1892, and Feb. 25, 1893, the number of carloads of 20,000 lbs. or more, shipped by complainants, was nineteen. The total weight of these shipments amounted to 502,400 pounds. For the same period complainants' total shipments were 2,218,060 pounds. It is claimed for the defense that a carload classification for window shades would result in driving small manufacturers from the business and centralize the trade in the hands of the larger manufacturers. Beyond this, and the fact that a firm in Meriden, Conn., had applied for a reduction of the classification, including a carload rate, and been refused, there is no evidence sufficient to constitute the basis of a finding upon this point.

14. Complainants' principal competitors in the manufacture and sale of shades are located in New York; Oswego, N. Y.; Chicago, Ill.; St. Paul and Minneapolis; Meriden, Conn.; Providence, R. I.; Jersey City, N. J. There are also Hand Manufacturers in Chicago, St. Louis, Cincinnati and Cleveland. A reduction of the less than carload classification on shades would confer equal benefit upon complainants' competitors in the east in reaching the Chicago market, and such reduction will also give cheaper rates to New York and other eastern points to shade manufacturers at Chicago and other points in the West.

Upon the point as to whether a reduction of the classification of shades to that of hollands and shade cloth would injure the business of the western manufacturer, the evidence shows that he is not obliged to purchase any raw ma-

terials in the east, except hollands or shade cloth, which he can also obtain from points in the south. The complainants, located at an interior point in the state of New York, must bring all the raw material used in their manufacture by boat to Oswego, or rail to Minetto. The Chicago manufacturer has the same and apparently even greater advantages in the matter of transportation of raw materials, except hollands or shade cloth, both in respect of distance from points of supply and of rates of freight. The Chicago manufacturer is, moreover, located at the complainants' principal point of distribution, and also competes for the sale of shades at various points west of Buffalo.

15. Manufactured goods are, as a rule, classified higher than the raw materials out of which they are made, because generally the process of manufacture converts the raw materials into less weight, and increases the bulk and value. But the condition of the manufacturing industry and the competition of different producing markets are also matters which have considerable weight with the Classification Committee. The classification principle of a higher class for the finished article than for the raw material of which it is composed has, however, certain exceptions. For instance, woolen cloth is in the first class and is still in the first class when converted into woolen clothing, although the process of manufacture greatly enhances the value and possibly increases the bulk. Again, some of the ingredients used in the manufacture of soap are worth considerably more than the soap itself; but soap is in the fourth class, L. C. L., and the sixth class, C. L., while some of the ingredients used in the production of soap take higher rating.

CONCLUSIONS.

The Preliminary Question.

We have first to determine what effect the complainants' admitted practice of shipping shades as hollands shall have upon our action in this case. The classification as regards these two articles was and is in no wise ambiguous, and we find that complainants did persist in designating their shade shipments as hollands with a view of securing third instead of first class rates thereon. We are not moved from this conclusion by the fact that complainants did not prepay shipments nor allow for freight charges in settling with their customers. That freight charges enter largely into all or nearly all commercial transactions involving the transportation of property, is too well known to require discussion. That they do enter into complainants' calculations is demonstrated by their having brought this case and having at various times requested the classification committee to change the rating on

window shades. Moreover, if we are to regard them as having no interest in the amount of freight charged upon their shipments, then we must look upon their attitude in insisting upon describing shades as hollands for transportation purposes, while they regard shades and hollands as different articles in dealing with their customers, as absurd. Such a view is, therefore, altogether untenable. Complainants admit that the reductions asked for in the complaint will not be likely to increase the number of their shipments or add to their shipping tonnage. We think this is explained, in part at least, by the fact that under their practice of shipping shades as hollands their business has become adjusted to a third class rating on shades, and that, so far as complainants are concerned, the granting of a third class rating as prayed for here, will merely enable them to maintain that adjustment. Complainants' motive in endeavoring to secure a third class rating for shades as far back as 1890 and since must have been with a view of changing their practice of describing shades as hollands without submitting to higher rates. We think they were keenly alive to the impropriety of shipping shades under the name of hollands; otherwise their efforts would have been directed towards securing such a reduction in the classification as would place all hollands, decorated or undecorated, cut or uncut, in the third class.

We are also forced by the facts in this case to find that complainants' practice of misdescribing their shade shipments as window hollands would have availed them nothing if the agent of the receiving road had correctly applied first class charges to shipments described simply as "window hollands." Billing and carrying such shipments at third class rates was not warranted by the classification, which did and does limit third class rating for window hollands and shade cloth to such as are plain, uncut, and undecorated. This method of billing and forwarding complainants' shades as window hollands under third class rates was practically acquiesced in by the defendants during a period of years. Moreover, complainants did not attempt to conceal their practice of thus describing goods offered for carriage to the defendants. It was known to a local agent of the receiving road; it was known to a representative of the "Merchants' Despatch," a freight line operating over the New York Central system; it was known to freight inspectors in the service of the Carrier's Inspection Bureau as far back as 1890; it was the subject of conversation at different times during recent years between a member of the complaining firm and officers connected with the committee charged by the carriers with duties pertaining to classification; it was presumably a matter of some notoriety, and the

subject of more or less frequent consideration by the carriers' representatives. We find further, that the receiving carrier, if not the others, was chargeable with knowledge of this practice of its agent in erroneously billing this freight, described simply as "window hold-lands," at third class rates.

The amendment of March 2, 1889, subjecting shippers, as well as individuals in railroad service, to fine and imprisonment for the offense of false billing, false classification, false weighing, or false report of weight, or any other device or means by which unjust discrimination may be secured, was designed to protect carriers as well as innocent shippers. The absence of that provision against shippers was made the basis of vehement protests by carriers in every section of the country, and its passage was hailed as a just recognition by Congress of the right of carriers to be protected from the fraudulent acts of their customers. But notwithstanding the presence of this provision in the statute, carriers and their representatives have almost invariably withheld from the prosecuting officers of the Government the evidence of violations by shippers which they alone could furnish. They have seemed to prefer that the people should regard them as accomplices in the illegal transactions rather than as the victims of law breaking shippers, and even when called upon to testify before a grand jury, many railway officials have deliberately assumed the role before the public of participants in the offense, by refusing to give evidence concerning alleged violations of the law on the ground that their testimony might tend to criminate themselves. These considerations, pertinent in a general sense, may or may not be applicable to the attitude of the defendants with reference to the continued misdescription and improper rating of complainants' freight. Upon this point we go no farther than to say that the carriers have shown great lack of vigilance. Apart from being able to invoke the whole power of the law and the aid of the prosecuting officers of the Government, the exercise of ordinary care on their part in the reception and billing of complainants' freight would have rendered it impossible for complainants to derive any advantage from the misdescription in which they indulged.

It is not within our province to adjudicate whether any person has or has not so demeaned himself as to violate the penal provisions of the Act to Regulate Commerce; that is matter for determination by a court of competent jurisdiction in a proceeding where the accused may avail himself of his constitutional right of trial by jury, and nothing said herein should be construed as assuming to decide any such question. But this Commission has authority 4 INTER 8.

to determine what effect the admitted or proven acts of parties shall have upon the standing of such parties in cases before it. We took this view in the case of Ottinger, a ticket broker (*Ottinger v. Southern Pac. R. Co.* 1 Inters. Com. Rep. 607, 1 I. C. C. Rep. 144); and in the case of Slater, a disappointed applicant for an annual pass (*Slater v. Northern Pac. R. Co.* 2 Inters. Com. Rep. 243, 2 I. C. C. Rep. 859). The Commission refused to entertain the complaint of the ticket broker, and declined to assist complainant Slater in retaliating upon the carrier for revoking his annual pass; but the Commission did, nevertheless, for the guidance of the carrier and in the interest of the general traveling public, consider and rule upon the question presented by the facts in that case. We think this indicates the rule which should be followed in this case: Where it appears that a complainant has invoked the aid of the law for the purpose of securing what he, with the acquiescence of the carrier, had previously obtained in apparent contravention of the law, such acquiescing carrier will not be held entitled to plead violations of the law by complainant in bar of a decision on the merits, nor will the individual interests of the complainant be taken into consideration; but the Commission will examine the evidence and make such report thereon as, under the provisions of the law, the rights of other shippers and the public generally may require. If, independently of any action or interest of complainants, the conduct of defendants with reference to the transportation which is the subject of the proceeding is shown by the evidence to be unlawful, it is our duty to execute and enforce the statutory provisions applicable thereto.

Decision on the Merits.

Prior to February 2, 1891, all window shades were in the first class of the Official Classification. At that date the carriers determined that plain mounted shades were entitled to a lower classification and placed them in the second class, leaving all other kinds of shades in class 1. This first and second class rating for window shades remained undisturbed by the carriers until January 1st of the present year, when they abolished the second class rating for plain-mounted shades, and returned to the practice in force prior to February, 1891, of charging first class rates on all window shades. The defendants participated in this action, and the new classification is in force upon their roads. The action of the carriers, in so far as it resulted in consolidating the classification of window shades into one class, should be approved. Under Classification No. 11, in force prior to January 1, 1894, while plain-mounted shades were given second class rates, the unmounted or otherwise unfinished

article, so long as it came properly under the designation of window shade, was chargeable at first class rates—more than the plain, finished article. Again, the above findings indicate that through the employment of machinery in shade decoration the difference in value between nine-tenths of the decorated shades and those which are left plain, without any decoration, is only about 20 cents a dozen. For the purposes of transportation rating this difference, or any approximate sum, is trifling, and the carriers were not justified in placing plain and machine decorated shades in different classes. On both of these grounds, therefore, the action of the carriers in putting all shades in a single class is to be commended. But we have searched the evidence in vain to find any justification for the carriers' course in placing all shades in the first instead of a lower class. We think that in this respect their action was arbitrary, and that the facts point to the necessity of a reduction rather than an increase in the rating of this article for transportation purposes. The evidence is undisputed that economies introduced in the manufacture of window shades since 1887 have reduced the value of the cheaper grades fully two thirds and effected a still more marked decrease in the value of the higher grades. This extraordinary reduction of values carries with it a corresponding diminution in the risk which carriers assume in contracting to safely transport the freight to destination.

All of the materials used in shade making are, as shown in the eighth finding, classified by the carriers in the third class or lower, with the single exception of a second class rating for less than carload shipments of aniline dyes; but these dyes are in the fourth class when shipped in carloads. Curtain fringe, in the first class, might be regarded as another exception, but it is only attached to the better grades, and those constitute but a small proportion of the volume of shade traffic. The value of the roller, slat, and fixtures, and cost of labor required to manufacture, are insignificant in comparison with the value of the cloth or hollands which form the body of the shade. The excess in value of this single article over the combined value of all other material used in the construction of a complete window shade is so great that of two cases similar in bulk and weight, one containing plain window hollands and the other complete shades, the case containing hollands has, as shown in the tenth finding, very much greater, and sometimes double, market value. Yet the carriers have carried for several years, and still continue to carry, plain cloth or hollands at third class rates, and it must be presumed that such rating for the cloth or hollands is neither unreasonable nor unprofitable to the carriers. Moreover, practically all the other materials

used in the production of shades are transported by them at the same or lower rates.

As to the volume of shade traffic offered for transportation, we have it on defendants' own showing, by the table in the eleventh finding, that complainants' shipments amounted to considerably more than two and a half million pounds during a period of six months in 1892-93, and there is no proof or suggestion that the complainants have anything like a monopoly of the manufacture of shades. They are large producers; but the manufacturers at New York, Oswego, Meriden, Providence, and Jersey City, in the east, and at Chicago, St. Paul, and perhaps at other points in the west, also produce largely, and actively compete for the trade of various markets reached by the defendant and other lines.

In the elements of bulk, weight and value, several of the dry-goods articles described in the table set out in the sixth finding as taking third class rates have greater similarity to a 23-dozen case of finished shades than exists between such a case of shades and the first-class articles mentioned in that table. There is, however, little analogy in uses or character between window shades and the dry-goods articles referred to. With the exception of lace curtains, these articles are dry-goods in the piece; and lace curtains are in the category of ornamental house furnishings, while the window shade is regarded as a household necessity. But the fact that both shades and lace curtains are in the first class, the latter many times more valuable, is an element to be noted, though against this it must be considered that many incongruities are unavoidable when the carriers undertake, as they do by the Official Classification, to divide the great mass of freight articles into practically six classes; and the desirability of simplicity in the classification is a feature which should not be overlooked. The items of similar bulk and weight, less value and risk of carriage, and important volume of traffic, are all in the direction of giving to window shades a classification as low as that which is provided for window hollands.

So far, we have considered this question without reference to the rates themselves. Rates between New York and Chicago constitute the basis upon which rates to other points in eastern territory are adjusted. These rates between New York and Chicago are to-day exactly what they were on April 1, 1887, to wit: 75, 65, 50, 35, 30 and 25 cents, respectively, on the classes 1 to 6, inclusive. Thus, while through economy in manufacture the value of shades has been enormously reduced since April, 1887, as herein shown, the rate between the points named remains the same, that is, the first class rate of 75 cents per hundred pounds. This fact, standing alone, would perhaps indicate little, for the introduction of

great economies in manufacture has been common to very many articles of commerce; but it becomes matter of some significance when considered in connection with the other facts that the relation in point of value of window shades and window hollands, the constituent commodity, has been reversed in the intervening time, so that now a similar case of the latter is the more valuable commodity, and that since 1887 the carriers have reduced the classification of hollands to third-class, while they have recently raised the classification of plain shades to first class, where other shades have been continuously.

In comparing window shades and hollands for the purposes of this case we have based our considerations upon the 1200-yard case of hollands and a case of similar size containing shades. But finished shades are frequently shipped in smaller packages, many of which contain only one dozen shades. If a shipment consisting of one dozen shades and weighing not above 25 pounds were charged for carriage by defendants at one fourth of the hundred pound rate, this would be a very material element in this case. But this is not the fact. A 25-pound shipment pays as much as a hundred pound shipment; and so does a shipment weighing seventy-five pounds. This, we think, affords the carriers a sufficient margin for any extra expense involved in billing, handling and delivering consignments of less than one hundred pounds. A case similar in size to that which holds 1200 yards of hollands holds about 28 dozen shades. If these shades should be sent in 28 different packages to one consignee, it is possible that their transportation would involve some additional labor and time in handling than is involved in the transportation of a 28-dozen case of shades. But we are not altogether assured of this; the comparatively light 25-pound package may be easily and quickly handled, while a case weighing approximately 500 pounds is a heavy and cumbersome article. It should also be noted in this connection that the carriers, who make the classification, have not attempted to prescribe different classes for different sizes of packages containing either window shades or hollands. Any quantity of shades can be shipped at first class rates and any quantity of plain, uncut hollands at third class rates. It may be that hollands are very seldom shipped in small packages, while shades frequently are so shipped. But considering the rule of charging for one hundred pounds on shipments of less weight, the ease with which small packages containing nonbreakable material can be handled, the fact that the carriers do not make a distinction in classification between small and larger packages, and that mathematical exactness in rating is impracticable, we do not think that the single circumstance of fre-

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quent shipment in small packages should outweigh the other weighty reasons herein set forth for a change in window shade classification to third class; especially, when the article with which shades are mainly compared may, whatever the actual custom is, be freely shipped under the classification at third class in any quantity, weight, or size of case, and when it may be inferred from the evidence, as shown by the table in the eleventh finding, that in point of tonnage the greater number of pounds of shades shipped is represented by shipments in large cases.

From a 1200-yard case of hollands and the other necessary and comparatively very cheap materials, fifty dozen shades can be made, and these will more than fill two cases, each similar in size and weight to the average case filled with hollands. If the western manufacturer who buys his case of hollands in the east and pays third-class rates thereon to the factory should be enabled to ship shades at the same rates, he will enjoy much greater advantage than he has under the present adjustment of third class for hollands and first class for shades, so far as shipping out from his factory is concerned. As to the trade of Chicago, the manufacturer at that point must pay the rate on hollands from the east, but shades which he manufactures therefrom are already in that market; while the eastern manufacturer must pay a rate on shades to Chicago in addition to the cost of getting material to his factory. Moreover, the Chicago maker is at least as favorably situated as the eastern manufacturer in the matter of obtaining raw materials other than hollands. Neither, in view of the fact that the 50-dozen shades which can be made from a case of hollands must pay greater total transportation charges than the case of hollands even at the same rate per hundred pounds, are we able to see how makers or dealers in hollands or shade cloth can suffer disadvantage from a reduction of the rate on shades. This brings us to notice the theory of comparison advanced in behalf of the defense that as 1200 yards of hollands will make 50 dozen shades, the whole 50 dozen must, on account of cost of other material and of manufacture, be worth more than the 1200-yard case of hollands, and therefore shades should pay higher rates than hollands. 50 dozen shades are worth more than a case of hollands, and it is not contended in this case that such a quantity of shades should be carried for a *total charge* to the shipper as low, or anything like as low, as is paid by the shipper on a case of hollands. On the contrary, the whole 50 dozen shades do now, and will under third class rates, pay the carriers very much greater total transportation charges than those afforded by third class rates on a case of hollands. For example: An average case of hollands weighs 533 lbs., and the

third-class rate New York to Chicago of 50 cents will amount to a total transportation charge of \$2.87; while sending the 50-dozen shades in one dozen packages of 25 lbs. each, or a total of 1250 lbs. at the third class rate, will give the carriers an aggregate sum for transportation of \$6.25; and even when the shades are sent in two 28-dozen cases, each weighing 495 lbs., or together 990 lbs., the third class rate will amount to a total of \$4.95, and 4 dozen out of the 50 dozen shades have been left out of calculation. It is thus demonstrated, even on the theory of comparison insisted upon by the defense, that under third class rates for both hollandes and shades the carriers will receive full and proportionate compensation for carrying the greater bulk and weight of the entire 50 dozen shades over the bulk and weight represented by the case of hollandes from which that quantity of shades can be made, while the difference in value and risk of carriage between a case of hollandes and that quantity of shades is very small.

We can see no shipping or manufacturing interests which will be unjustly affected by reducing the rating on shades to third class. On the contrary, we are convinced, from the great reduction in value which has taken place since April, 1887, and the arbitrary increase of shade classification by the carriers during the progress of this proceeding, and upon all the other facts and considerations herein which pertain to the rights of shade shippers and consignees generally, and of purchasers of that article of household necessity, that the classification of window shades as first class in the Official Classification has become unjust; and

that the legal duty of defendants under the statute to so classify traffic and fix charges thereon that the burdens of transportation are reasonably and justly distributed among the articles they carry, requires them to classify window shades not higher than they classify window hollandes. This latter commodity having been in the third class for several years, such classification is, as before stated, presumably proper. The classification of shades should be reduced to that of "window hollandes and shade cloth, plain, uncut and undecorated," and order will be issued directing defendants to base charges for the transportation of window shades accordingly.

In stating facts and deciding the questions herein we have been compelled, of course, to base calculations upon figures which appear in evidence; these figures may vary somewhat from those which pertain to the business of shade manufacturers other than complainants, but it is not believed that such variation, if in evidence, would materially affect the findings and conclusions set forth in this report.

None of the reasons which induce us to order a reduction of the less than carload rating for window shades apply to the question of a lower carload classification for that commodity. Neither window hollandes, shade cloth, nor any of the other articles with which window shades have been compared in this case, and which are included under the head of dry goods in the Official Classification, are given carload rates. In view of this fact and the different aspect put upon this case by our decision of the preliminary question, we do not feel called upon to pass upon the carload question in this report.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF ARKANSAS.

LITTLE ROCK & MEMPHIS R. CO.

v.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO.

(Two cases.)

SAME

v.

ST. LOUIS SOUTHWESTERN R. CO

(Two cases.)

SAME

v.

LITTLE ROCK & FT. SMITH R. CO.

(Two cases.)

(50 Fed. Rep. 400.)

1. Refusal to permit a forwarding company to perform an act involving the use of the tracks and terminal facilities of a receiving company is not a discrimination or denial of equal facilities by

one carrier to a connecting carrier within the prohibition of the Interstate Commerce Act.
2. The tracks and terminal facilities of a railroad company can be used by a connecting company

for the exchange of interstate freight only with the consent of the former.

3. No common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other in the same manner and to the same extent a third carrier is.
4. The fact that one connecting railway company has a contract for the interchange of interstate freight which involves the use of the receiving railway's tracks and terminal facilities will not authorize a court of equity to compel the receiving railway to grant a like contract or concession to another connecting company.
5. A connecting railway company desiring an interchange of passengers and freight cannot demand as a matter of right an interchange of freight at the point of physical connection without first furnishing at such point reasonable and proper facilities for the interchange sought and cannot rely upon the terminal facilities at another point or compel the receiving railway to go to any expense of providing proper facilities at the point of physical connection.
6. A court of equity has no power under the Inter-

state Commerce Act to compel a receiving company which has made a contract or agreement with a connecting company to establish the same rate upon through freight in favor of another company with which there is no contract and compel the receiving company to accept that rate, as no power is conferred by the Act upon any tribunal to provide for the necessary divisions growing out of a through routing and a through rating.

7. The insistence by a railway company upon its right to prepayment of the freight upon goods received from a connecting carrier rather than to consent to retain a lien upon the goods until payment is made or to hold the consignee responsible in case of delivery before payment as is done in case of freight received from other carriers cannot be construed to be a denial of equal facilities or a discrimination against the former.
8. A railroad company cannot be compelled to receive connecting carrier's cars to facilitate transportation if it has idle cars of its own, although it receives freight from another competing road in the cars of the latter and transports them over its road.

(January 5, 1894.)

ON DEMURRERS to bills and complaints at law and in equity in six suits brought to compel defendants to afford the plaintiff equal facilities for the interchange of interstate freight and passengers that were afforded to other roads, and for damages for refusal to afford such facilities. *Demurrers sustained.*

The facts are stated in the opinion.

Messrs. Rose, Hemingway & Rose, for plaintiff.

Messrs. J. M. & J. G. Taylor and Sam. H. West, for defendant, St. Louis S. W. R. Co.

Messrs. Dodge & Johnson for the other defendants.

Williams, D. J., delivered the opinion of the court:

The Little Rock & Memphis Railroad Company filed separate bills in equity against the St. Louis, Iron Mountain & Southern Railway Company and the Little Rock & Ft. Smith Railway Company. The bills are substantially alike as to allegations of fact, as well as the prayers for relief. At the same time the plaintiff company filed complaints at law against the same companies. The complaints at law are couched in substantially the same words as are used in the bills in equity.

It is stated in the bills that the plaintiff and defendants are corporations owning and operating railroads under the laws of the state of Arkansas; that all of the railroads mentioned are engaged in interstate commerce; and the terminal of the respective roads are stated. The wrong complained of is—

"That the defendant refuses to receive any freight from your orator, except upon the prepayment of all charges thereon, at the same time that it receives freight from all other persons and corporations without demanding the payment of freight charges, but collecting such charges upon the delivery of the goods, as is customary in the railroad business.

In the other case the language is somewhat different, and is as follows:

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"The defendant company, for the purpose of injuring and oppressing your orator, refuses to accept interstate freight at Little Rock upon through billing from the line of your orator, in conjunction with the defendant's line, at the same time that it accepts freight upon through billing from all other lines of railroad terminating at the city of Little Rock, and it refuses to accept freight from your orator except upon a prepayment of all freight charges, at the same time that it accepts freight from all other individuals and corporations without the prepayment of freight charges, collecting its freight charges, as is customary with railroad companies, upon the delivery of the freight as its destination; that the St. Louis, Iron Mountain & Southern Railway Company, a corporation organized under the laws of the state of Arkansas, and likewise engaged in the business of interstate commerce, has a line from Memphis to Little Rock, and parallel to that of your orator, and for the like purpose of oppressing and injuring your orator the defendant accepts from said company passengers on through tickets at greatly reduced rates, and with through checking of baggage, at the same time that it refuses to accept passengers over your orator's lines at through rates, but charges to such passengers local rates, and requires them to recheck their baggage at Little Rock."

To these bills, demurrers have been interposed, upon the ground that no cause of action is stated therein, and because there is no equity in the bills. The defendants urge that the questions presented by the bills have all been settled adversely to the plaintiff by this and other courts. The plaintiff insists that the law, as applicable to the facts now presented, has not been settled by any court, and undertakes to distinguish the cases at bar from the cases cited by defendants. To the end that the contention of the plaintiff may be stated fairly, I will state its exact position, as found on the brief of counsel, which is:

"Both cases are brought under the Act to Regulate Commerce, approved February 4, 1887, as amended by the Act of March 2, 1889. The second clause of the third section bears directly upon the question; and to it, as construed in the light of other provisions, we must look for a solution of the question presented in these cases. It reads as follows:

" 'Every common carrier, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but this shall not be construed as requiring any such common carrier to give the use of its tracks, or terminal facilities, to another carrier engaged in a like business.'

"The requirements of the clause are four; three mandatory, and one prohibitory. Of the mandatory provisions, two relate to all connecting carriers, without reference to the existence or nonexistence of competing lines. The others apply only to the duty of the carrier in its relation to competing carriers. In the first place, it is made the duty of all carriers coming within the Act to afford all reasonable and proper facilities for the interchange of traffic; and it must do this whether it connects with one line only, or with competing lines. The third requirement demands that the reasonable and proper facilities afforded shall also be equal, and the fourth prohibits discrimination among competing lines in rates and charges. It is not necessary to consider, in this case, the duty of the carrier under the first two requirements. The defendant determined what were reasonable and proper facilities for the interchange of traffic, and we do not complain of the determination reached. The basis of our complaint is that the facilities afforded have not been equal, and that the defendant has discriminated against the plaintiff, in withholding from it facilities afforded to competitors of the plaintiff connecting with defendant under the same circumstances and conditions as plaintiff. . . . The court is not required to determine what contract would be reasonable. That has been fixed by the defendant in its contract with the plaintiff's competitors. And, as the plaintiff does not controvert the reasonableness of the terms of that contract, it is necessary only for the court to coerce the defendant to give the plaintiff the benefit of it."

In *Little Rock & M. R. Co. v. East Tennessee,*

V. & G. R. Co. 4 Inters. Com. Rep. 263, 47 Fed. Rep. 774, Judge Hammond, in delivering the opinion of the court, said:

"If this bill averred that the East Tennessee, Virginia & Georgia Railway refused to give passengers going over the plaintiff road the same rates and facilities, including through tickets, and traffic transfers, that it affords to the Iron Mountain road for passengers going to Little Rock, or any other point on the plaintiff's road, the court would not hesitate to say that it would be a violation of this [third] section of the Interstate Commerce Act."

The state of case to which this language was applied was not made by the bill, nor had counsel been heard upon that state of facts. Plaintiff, however, insists that that precise state of case is now made by the bills before the court, and that the law, as announced by Judge Hammond, is applicable to it. Plaintiff further urges that the law applicable to the facts, as presented by the bill, is declared in *New York & N. R. Co. v. New York & N. E. R. Co.* 3 Inters. Com. Rep. 542, 4 I. C. C. Rep. 702, where it is claimed it has been decided—

"That when a railroad connects with two competitors, under substantially similar conditions, even at points a little apart, that, if it makes through rates with one, it must make the same with the other, and that this duty is enforceable."

The relief asked is—

"That the said defendant be enjoined from further discriminating against your orator, and that it be required to afford your orator the same facilities and conveniences in the transaction of business that it affords to other corporations and individuals."

The concluding portion of the third section of the Act, under which the plaintiff asks relief, declares:

"But this shall not be construed as requiring any such common carrier to give the use of its tracks, or terminal facilities, to another carrier engaged in like business."

It is clear from this language, that none of the grants, if they may be called such, in the preceding portion of the section, include, or were intended to include, the use of the tracks or terminal facilities of the receiving railway company. Therefore, in construing the section, we must at all times look to see whether what is asked includes the use of the defendant's tracks and terminal facilities. If it does, the law itself denies the prayer. In short, in ascertaining whether "equal facilities" have been denied, and whether "discrimination" exists, the court is not to call that a discrimination which arises from a refusal to permit the forwarding company to perform an act which involves the use of the tracks and terminal facilities of the receiving company, nor shall the court declare that to be a denial of "equal facilities" which flows from a refusal to a forwarding company to perform an act which involves the use of the track or terminal facilities of the receiving company. In *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 888, 87 Fed. Rep. 628, in construing the third section of the Act, to which the plaintiff has appealed, Judge Jackson said: "That the provision in the third

section of the Act to the effect that a common carrier shall not be required "to give the use of its tracks and terminal facilities to another carrier engaged in like business" is a limitation upon, or qualification of, the duty of affording all reasonable, proper, and equal facilities for the interchange, or for the receiving, forwarding, and delivering of traffic to, from, and between connecting lines; and therefore it is "left open to any common carrier to contract or to enter into arrangements for the use of its tracks and terminal facilities with one or more connecting lines without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such line, or of discrimination against other carriers who are not parties to, or included in, such arrangements. No common carrier can, therefore, justly complain of another that it is not allowed the use of the other's tracks and terminal facilities upon the same or like terms and conditions which, under private contract or agreement, are conceded to other lines."

The point of connection of the plaintiff's railway with that of the defendant is not stated in the bill with any more accuracy than that it is at Little Rock. Nor is it stated that at the point of connection, or near thereto, the plaintiff company has facilities, in the way of tracks, switches, yards, and depots, for the interchange of interstate traffic, equal to those possessed by the Iron Mountain road at its connection with the defendant's railway. Judge Jackson, in speaking of that condition of affairs, in the same case, says:

"It by no means follows, because certain facilities for the interchange of freight are furnished by a railroad to another connecting line or lines, at one point, upon certain terms, conditions, and considerations, and where ample accommodations for the transaction of such business are provided and maintained at the joint expense of the companies using them, that another company, making a physical connection with the road furnishing such facilities, at another different and distant place, is entitled to demand, at said different point of connection, the same or equal facilities. The company making the physical connection at a point other than that at which the established road has already provided its facilities and conducts its interchange with other connecting lines, cannot demand or require an interchange of freight at such point of physical connection without first furnishing at such point reasonable and proper facilities for the interchange sought. It cannot rely upon the terminal facilities at another point of the road with which it has formed the physical connection; nor can it compel the road with which the connection is made to join with it in the expense of providing at that point the facilities necessary and proper for the interchange."

In *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.* 4 Inters. Com. Rep. 254, 51 Fed. 478,—a case having many of the phases of the cases at bar,—Judge Field, in construing the third section of the Act of March 2, 1889, said:

"The first subdivision of this section does not make all preferences or advantages which may be given by a common carrier unlawful. Only those which are undue or unreasonable

are forbidden. The second subdivision is similarly guarded in its provisions. Common carriers are there only required according to their respective powers, to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and are forbidden to discriminate in their rates and charges between them; and even this provision is subject to the limitation that it shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

After having made this statement, the learned justice continues by quoting approvingly from the opinion of Judge Jackson in *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 386, 37 Fed. Rep. 624, where it is said:

"No provision of the Interstate Commerce Act confers equal facilities upon connecting lines, under dissimilar circumstances and conditions. . . . The provision in the second subdivision of the third section of the Interstate Commerce Act, that a common carrier shall not be required to give the use of its tracks and terminal facilities to another carrier engaged in like business, is a limitation upon, or qualification of, the duty declared of affording all reasonable, proper, and equal facilities for the interchange of traffic, and the receiving, forwarding, and delivering of passengers and property to and from the several lines, and those connecting therewith. It follows from this, as it was decided in that case (*Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*) that a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities with one or more connecting lines without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The Act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated."

The adjudications establish four propositions: First, that the tracks and terminal facilities of the defendants can only be used by the plaintiff for the exchange of interstate freight, with the consent of the defendants; second, that no common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other railway company in the same manner and to the same extent another is; third, that the fact that one connecting railway company has a contract for the interchange of interstate commerce freight, which involves the use of the receiving railway's tracks and terminal facilities, would not authorize a court of equity to compel the receiving railway to grant a like contract or concession to another connecting company; fourth, that the connecting railway company, desiring an interchange of freight and passengers, cannot demand, as a matter of right, an interchange of freight at the point of physical connection without first furnishing at such point reasonable and proper

facilities for the interchange sought, and cannot rely upon the terminal facilities at another point, nor compel the receiving railway to go to any expense of providing proper facilities at the point of physical connection. These propositions having been established by two justices of the supreme court, I have no disposition to disregard their construction of the Interstate Commerce Act. There is nothing in the bills from which it may be inferred that the plaintiff owns, or has the proper, or any, facilities for the interchange of interstate commerce freight.

The effect of granting the relief asked would be to put the plaintiff in a position where it could receive interstate freight at Memphis, Tenn., destined to Ft. Smith, Ark., bring such freight at a distance of 185 miles, to Little Rock, over its own line, and deliver it to the Little Rock & Ft. Smith road, to be taken a further distance of 165 miles. In a case of that kind, by whom and how is the rate to be fixed from Little Rock to Ft. Smith? The plaintiff answers:

"By the same rate the defendant would receive if the freight had been brought by the Iron Mountain road from Memphis to Little Rock. That the compensation must be the same."

The answer savors of equity, and is certainly persuasive; but the contract existing between the Little Rock & Ft. Smith Railway and the Iron Mountain Railway may have been based upon the use of the tracks, switches, yards, stations, depots, and terminal facilities granted by one of these roads to the other, and, if so, it would not furnish a guide for any rate. But suppose the contract was not based upon any of these considerations. Has a court of equity, under the Interstate Commerce Act, been clothed with the power to compel the receiving company, which has made a contract or agreement with another connecting and competing company, to establish the same rate, as against the receiving company, at the instance of a railway company with which there is no contract, and compel the receiving company to accept that rate?

It is said that this precise question was decided by the Interstate Commerce Commission in *New York & N. E. Co. v. New York & N. E. R. Co.* 8 Inters. Com. Rep. 542, 4 I. C. C. Rep. 702. While such a decision, in the absence of adjudications by the courts, is entitled to great respect, and while it might be persuasive, if it went to the extent claimed for it, such decisions are not binding on this court. In the cases of the plaintiff against the East Tennessee, Virginia & Georgia Railway Company and the St. Louis, Iron Mountain & Southern Railway Company (2 Inters. Com. Rep. 460, 3 I. C. C. Rep. 16) Judge Walker, in speaking for the Commission upon the question of whether, under the Interstate Commerce Act, a compulsory through routing and through rating had been provided for by that Act, said:

"The facts in the present case clearly develop the importance of such an amendment, or of some amendment which shall provide a mode of procedure for carrying into effect the establishment of through routes and through

rates, and the equitable apportionment of the rate established, in case where the refusal of such routes and rates works an unlawful preference. As the statute now stands, there is no way apparent in which practical relief can be afforded to the complainant, without authority to provide for the necessary divisions being conferred, either upon the Commission, the courts, or some other tribunal."

It appears from this that under the Act, as it then stood, there was no authority "to provide for the necessary divisions" conferred either upon the Commission, the courts, or other tribunal. The Act has not been amended since that expression of opinion, although Congress has been appealed to to amend it so as to confer that power on the Commission and courts. If it be true that the Act does not confer the power on any tribunal to provide for the necessary divisions growing out of a through routing and a through rating, that ends the matter. The fact that the receiving company has fixed a through routing and a through rating by contract or agreement with another connecting company neither extends the jurisdiction of this court, nor confers upon it powers under the Act which it did not have before. Ascertaining the rule by which the rights of litigants, and the damages consequent upon their invasion, may be measured, is one thing; and ascertaining whether the court has jurisdiction to use the measure offered, or any other, is quite another.

The Supreme Court of the United States, in *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 682, 28 L. ed. 297, held that the refusal of a common carrier to make through traffic arrangements at or upon joint rates with one connecting railroad company, such as it makes or enters into with another connecting line, does not constitute any undue or unreasonable discrimination in charges or facilities. It is true that decision was rendered before the enactment of the Interstate Commerce Act. But Judge Jackson, in the Kentucky & I. Bridge Co. case, after quoting what the court had decided, said:

"That decision is conclusive of the present question, unless some provision of the Act to Regulate Commerce has expressly, or by clear implication, provided otherwise. It is insisted for the petitioner that such is the case, and the second clause of section 3 of that Act is relied on, in connection with section 5258, U. S. Rev. Stat., as establishing a different rule and regulation from that announced in the above decision."

After stating that neither section 5258 nor the Interstate Commerce Act had changed the common law rule in relation to common carriers, the learned judge asks:

"Is it a public duty, imposed by the Act to Regulate Commerce, that every common carrier subject to the provisions of that law shall concede or afford through routing and through rates to all connecting lines whenever and so long as it voluntarily makes or enters into such arrangements with connecting lines? After a careful examination of the Act, and the argument of counsel and authorities cited, we fail to discover any such requirements. . . . Such arrangements, which usually include the reciprocal interchange of cars and the use of

each other's tracks and terminal facilities, are prompted by considerations varied and complex, as shown in the above statement of facts. In some instances, and between some companies, they may be mutually desirable and beneficial, while in other cases, and with other connecting lines, they might be prejudicial and injurious to the interests of one or both. Can companies in the latter situation (that is, those with whom a connection might be prejudicial or injurious) properly claim, as matter of right, what the former have acquired under and by virtue of private contract and arrangement? No provision of the law, rightly construed, sanctions or supports such a proposition. The statute does not undertake to create, between connecting lines, such an agency or *quasi* partnership relation as is necessarily involved in agreements or arrangements for the establishment of through routes and the making of through rates. As such arrangements exist by contract, express or implied, the fact that a common carrier enters into them with one or more connecting lines does not impose upon such carrier the duty or obligation to make the same or like contracts with all other lines."

One of the things complained of is that the defendant railway refuses to accept interstate freight upon through billing in conjunction with the plaintiff's line, and accepts such freight on through billing in conjunction with all other lines of railroad terminating at Little Rock. This is but another way of stating that one railway company has, by contract or agreement, acquired an arrangement for a through routing and a through rating with the defendant company, and that the defendant company refuses to make a like contract with the plaintiff, and, because it will not, it should be compelled by mandatory injunction to do so. This court possesses no such power. The bills do not allege whether the freight refused was in cars belonging to the plaintiff, or other railway corporations other than the defendants, or whether the defendants were without cars of their own in which to carry such freight. It was urged before *Justice Field*, in *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.* 4 Inters. Com. Rep. 253, 51 Fed. Rep. 473, that there was a custom among railways to receive freight from connecting lines, and not demand the prepayment of freight, and the alleged custom was pleaded as the foundation of a right, and in response to that he says:

"There is no law or custom requiring a railway company receiving freight from a connecting line to advance or assume the payment of the charges due thereon for the transportation from its point of origin to the connecting line. . . . A railway company, like any other common carrier, has a right to demand that its charges for transporting goods shall be paid in advance, and is under no obligation to receive the goods for transportation unless such charges are paid, if demanded."

It follows that if the receiving railway company is under no obligations to receive freight unless the prepayment of freight charges is tendered, if payment is demanded, and if there be no law or custom requiring it to do so, no right can grow out of an alleged law or cus-

tom which does not exist. A railway company may, undoubtedly, waive the right of prepayment, and retain a lien upon the goods until payment is made, and, in case of delivery before payment, may hold the consignee responsible, or it may refuse to do either, and demand prepayment. The exercise of these rights, or the waiver of some of them, at different times, can no more be construed to be a denial of "equal facilities," or a "discrimination," than it would be on the part of an hotel keeper to require some of his guests to pay in advance, and allow others to pay when they had concluded their stay at the hotel.

At the same time the bills were filed in the cases to which attention has thus far been directed, a bill was also filed against the St. Louis Southwestern Railway Company by the plaintiff. The only difference in the bills is that in the last mentioned bill there is an averment which is not in the others, to wit:

"The lines of railway of your orator and the defendant intersect at the town of Brinkley, at which place switches, and all other conveniences for the interchange of traffic, have been established; that the St. Louis, Iron Mountain & Southern Railway owns a line that parallels that of your orator, about thirty miles north of Brinkley, which extends from Memphis westward; that the defendant refuses to receive freight or passengers coming over your orator's line, except at local rates, and refuses to honor through tickets or through bills of lading over the line of your orator in conjunction with its own, but requires all freight to be rebilled and reloaded, and all passengers to purchase new tickets, at the said town of Brinkley, while, at the same time, it issues and accepts through tickets and through bills of lading from other railway companies," etc.

That the plaintiff has the facilities at Brinkley for an interchange of interstate commerce freight (an allegation not contained in the other bills) is distinctly alleged, but the bill shows that the defendant requires the freight offered to be rebilled and reloaded. The inference is that the plaintiff tendered the freight in its own cars, and the defendant declined to take it in that condition, as it had cars of its own, in which it preferred or desired to carry the freight. The refusal was, not to transport the freight, but to transport it in the cars of the plaintiff, or in the cars of others. That precise question was presented in the *Oregon* case, and *Justice Field*, speaking for the court, said:

"Its chief contention is that the defendant, as a common carrier by railway of freight and passengers, is obliged (1) to receive freight tendered to it by the complainant at Portland, Or. (that being a point where it connects with the road of the complainant) in the cars in which it is tendered, and transport the same to the point of destination in such cars, over its road, and pay to the company owning the cars the current rate of mileage for their use, and also pay the charges for transportation from point of origin to Portland; (2) to honor tickets or coupons for passage over its lines, north of Portland, issued by the complainant. This obligation of the defendant is asserted on three grounds: (1) the alleged established custom between railroad companies

operating connecting lines; (2) the third section of the Interstate Commerce Act; and (8) the fifth section of the defendant's charter.

As the receiving company is under no obligation to take the freight in the cars in which it is tendered, and transport it in such cars, when it has cars of its own, not in use, to transport it, there can be no question that it shall pay the owner of such cars, should it receive them in such case, car mileage for their use. The car mileage, in that case, must be upon an arrangement between the parties."

It would seem from this case that the defendant had the right, if it had unemployed cars of its own, which is not negatived by any allegation in the bill, to carry the freight in its own cars, and to refuse to pay for the use of cars it did not need in the conduct of its business. Prior to the enactment of the Interstate Commerce Act, it would hardly have been contended that a connecting railway company would have had a remedy in equity, to compel the company with which the connection was made to accept freight in the cars of other companies than its own, and transport the same to a point of destination on its line, or that a remedy at law, for damages for such refusal, existed. It seems to me that to allow the plaintiff company to load one or more of its cars at Memphis, Tenn., with freight to Ft. Smith, Ark., bring it to Little Rock, and compel the Little Rock & Ft. Smith Railway to transport the cars to Ft. Smith, without any agreement as to rates, and without the Little Rock & Ft. Smith Railway having any privilege to haul the freight in its own cars, would be giving the plaintiff the absolute use of the tracks of the defendant, to enable the plaintiff to carry on an interstate commerce business. The "use of the tracks" of a common carrier for such a purpose is denied, in express terms, by the concluding clause of section 8 of the Act. If it may thus tender cars of freight for transportation, it is difficult to see why the locomotive and tender should be detached from such cars. If a court of equity, by mandatory process, has the power to compel the receiving company to accept and transport interstate commerce freight in other cars than its own, it has the same right to say that such cars shall, if it will facilitate the business of delivery, be transported to the point of destination with and by the same motive power that brought them to the connecting road. The running of freight cars over the track of another railroad, without its consent, is just as much "use of the tracks" as if the locomotive was attached.

I have given these causes my best consideration, and it seems to me that if the court undertakes to adopt a rate agreed upon between the defendants and other connecting companies, or any other rate, the court would be making a contract which the law does not authorize it to make, between the plaintiff and defendants. In *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 679, 28 L. ed. 296, the court said:

"A court of equity is not, any more than a court of law, clothed with legislative power. It may enforce in its own appropriate way, the specific performance of an existing legal

obligation, arising out of contract, law, or usage, but it cannot create the obligation."

In *Memphis & L. R. R. Co. v. Southern Exp. Co. (Express Cases)* 117 U. S. 29, 29 L. ed. 803, the court below had rendered just such a decree, in form, as this court is now asked to make, and the court said:

"Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be; and it did so by declaring that they should be furnished to the same extent and upon the same terms that the company accorded to itself, or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities, and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies, at these rates and on these terms, so long as they ask to be carried. In this way,

as it seems to us, the court has made an arrangement for the business intercourse of these companies, such, as, in its opinion, they ought to have made for themselves. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt."

If a decree was entered in this case in favor of the plaintiff, would it not have to be in substantially the same language as the decree in the Express Cases:

"To accord to the plaintiff the same facilities, in the matter of the interest of interstate commerce freight, that the defendant accords to other companies connecting with defendant's railway, as to freight delivered to defendants at Little Rock, and destined to Ft. Smith."

Suppose there were three or more railroads connecting with the Little Rock & Ft. Smith Railway at Little Rock, all engaged in interstate commerce; and that two of them had contracts with that company for through routing and through rating, and that these contracts were dissimilar as to rates and charges. Which of the rates would the court be compelled to accept, when it undertook to decree a rate for the plaintiff? But admit they should be found to be alike, and that the court should adopt the rate so found, and that the contracts were to expire on the 1st day of January next, and that after that time the rate, by contract, should be increased. Is this litigation to remain open as long as these corporations exist, and interstate commerce continues, and is the court to make orders from time to time to meet the varying changes? Again, suppose the contracts shall not be renewed at all. Could the defendant come into this court, and plead the expiration of the contracts, and have the mandatory injunction set aside? If it could, does that not show that the power of the court to act in the first instance depended, not upon any provision of the Interstate Commerce Act, but upon

evidence by which an equitable rate might be ascertained?

In *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.* 2 Inters. Com. Rep. 768, 41 Fed. Rep. 559,—a case involving a construction of the third section of the Interstate Commerce Act, and many of the questions now presented,—Judge Caldwell, in delivering the opinion of the court, said:

"The precise question in this case is, can the United States circuit court, in the exercise of its equity powers, require a railroad company engaged in interstate commerce traffic to enter into an agreement with another railroad company, engaged in like traffic, for a joint through routing and joint through rates; and, upon the refusal of the company to comply with such a requirement, may the court itself make such a contract for the parties?"

The question is answered in the negative. The fact that in the case at bar there exists a contract with another company for similar services, while that was not true in the other case, cannot confer jurisdiction in this case, if there was none in the other. Through routing and through rating cannot be effected without the use of the tracks of the companies creating the through routing and rating. Such contracts are entered into for the very reason that they do away with rebilling and reloading freight, and give to the parties to the arrangement the use of each other's cars and tracks for the purpose of forwarding the freight from its origin to its destination without breaking

bulk. If this be true, and if it also be true that nothing contained in the third section of the Interstate Commerce Act is to be so construed as "requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business," where does the court get the power to say, in the absence of a contract giving the plaintiff such a right, that it shall have the use of defendant's tracks in order to aid it in carrying on interstate commerce traffic? The prayer of the bills cannot be granted without compelling the defendants to permit the plaintiff to run its own, or cars other than those of the defendants, over their tracks. To stop the cars at the point of physical connection, and reload the freight into the cars of the receiving company, is to break a through routing; and to break a through routing is to break a through rating.

Being of the opinion that the defendants are not required to allow the plaintiff the use of their tracks for the purpose of enabling the plaintiff to do an interstate commerce business, and that the relief asked cannot be granted without the use of defendants' tracks, and compelling the defendants to haul freight, in other cars than their own, over their own tracks, and at a less rate than they would receive, or be entitled to receive, if the freight was hauled in their own cars, I cannot see my way clear to grant the relief asked.

The demurrers to the bills, as well as those to the complaints at law, are sustained.

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UNITED STATES SUPREME COURT.

THE INTERSTATE COMMERCE COMMISSION, *Appt.*, .

v.

W. G. BRIMSON ET AL.

(See S. C. 154 U. S. 447, 38 L. ed. —.)

[No. 888.]

Act to Regulate Commerce—power of Congress—appropriate means—judiciary—compelling testimony before Interstate Commerce Commission—due process of law.

1. The 12th section of the Act of Feb. 4, 1887, as amended in 1889 and 1891, is constitutional and valid, so far as it authorizes or requires the circuit courts of the United States to use their process in aid of inquiries before the Interstate Commerce Commission.
2. Congress has plenary power, subject to the limitations imposed by the Constitution, to prescribe the rule by which commerce among the several states is to be governed.
3. Congress may, in its discretion, employ any appropriate means, not forbidden by the Constitution, to carry into effect, and accomplish the objects of, a power given to it by the Constitution.
4. The judiciary can only inquire whether the means devised by Congress in the execution of a power granted are forbidden by the Constitution.
5. A proceeding to compel the attendance of a witness before the Interstate Commerce Commission, or to require him to answer questions put to him, or to compel the production of books, documents or papers in his possession is a case of which, under the Constitution, a court of the United States may take cognizance.
6. In matters of contempt, a jury is not required by "due process of law;" courts possess the power to punish for contempt.

Argued April 16, 17, 1894. Decided May 26, 1894.

APPEAL from a judgment of the Circuit Court of the United States for the Northern District of Illinois, dismissing a petition filed by the Interstate Commerce Commission under the Act of Congress entitled "An Act to Regulate Commerce" of February 4, 1887, and amended by the Acts of March 2, 1889, and Feb. 10, 1891, invoking the aid of the circuit court in requiring the attendance and testimony of witnesses and the production of documents, books and papers, in a case before the said Interstate Commerce Commission. *Reversed, and cause remanded for further proceedings.*

See same case below, 53 Fed. Rep. 476, 480. *Messrs. Lawrence Maxwell, Jr., Solicitor Gen., and Geo. F. Edmunds, for appellant:*

The Constitution declares that Congress shall have power "to regulate commerce with foreign nations and among the several states."

The power to regulate commerce necessarily and confessedly includes the power to provide all means fairly adapted to the complete exercise of the power.

One (and perhaps the most salutary of all) of these means is the establishment of a national, official body, by whatever name styled, to put into execution the principles and regu-

lations declared by law, and in so doing, and, as essentially and indispensably a part thereof, to investigate the course and practice of interstate commerce as carried on by whomsoever engaged in it, and so to ascertain whether or not it is carried on according to the requirements of law.

Congress possessed the power of making it the legal duty of every such carrier and of every other person having knowledge of the subject under consideration, to appear, on due summons, before the Commission and produce the papers and give the evidence it or he might possess legitimately relating to the matter so lawfully under consideration.

Congress, having imposed it, could provide the natural and necessary means of compelling performance, as well as punishing nonperformance of such duty.

The natural, necessary and only lawful means of compelling the performance of any legal duty (except payment of taxes and military service, etc.) is by the exertion of the judicial power. This is done by an application to a court, in whatever mode or form the law may provide, by the party entitled to have the duty performed, against the party complained of.

Such a proceeding as that in this case by a

NOTE.—As to power of Congress to regulate commerce, see note to *Gibbons v. Ogden*, 6: 23; and to *Brown v. Maryland*, 6: 678.

As to tonnage tax, see note to *Inman SS. Co. v. Tinker*, 24: 118.

As to interstate commerce; regulation of; power of Congress, how far exclusive, see note to *Gloucester Ferry Co. v. Pennsylvania*, 23: 158.

As to power of Congress to control commerce; state

statute, when valid as being a regulation of commerce; *drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid*, see note to *Harmon v. Chicago*, 37: 216.

As to powers of court to punish for contempt, see note to *Ex parte Robinson*, 22: 205.

That there is no review of decree punishing for contempt; *limits to rule*, see note to *New Orleans v. New York Mail SS. Co.* 22: 354.

As to what is "due process of law," see note to *Pearson v. Yewdall*, 24: 486.

MEM.—References in note are to U.S. Repts. L. ed.

party having a statutory standing as complainant against a party who has refused to perform a duty that a valid statute required him to perform is, within the very letter as well as the spirit of the Constitution a "case" and a "controversy," which the judicial power was established to hear, try, and determine.

It is a due and constant exercise of the judicial power to command the performance of any duty that any person or corporation is legally bound to perform, either to the public or to an individual, and to do it under such modes and forms of procedure as the legislative power shall have prescribed. If Congress has no power to impose such a duty the judiciary can neither compel a performance nor punish a nonperformance. But if Congress has and exercises the power to impose such a duty, no matter to whom it may be imputed, the judiciary is bound (if the law has so provided) to hear the complaint of the party seeking performance, and to decide whether the other party owes the duty demanded, and, if the duty is found to exist, to decree its performance.

This is both a "case" and a "controversy" arising under the laws of the United States, and to which the United States were, in substance and effect, parties. The controversy had two opposing parties legally interested in it. It was brought into court by one of them, praying redress and the performance of a legal obligation against the other. The court had been given jurisdiction of that very class of cases and controversies. The mode of procedure was provided for by law.

The admitted jurisdiction of the courts to hear and determine complaints by the Commission for disobedience of their final orders upon carriers is of precisely the same legal character as the jurisdiction here invoked.

It is the province of the legislative and not of the judicial power to say what the form of procedure and remedy shall be in every case of an officer or person who has refused to do that which a valid law has required him to do, subject of course to the provisions requiring jury trial, etc., not applicable here. In cases like the present one, the legislative power has declared that the procedure shall be of the character employed in this case.

The judiciary cannot constitutionally compel affirmative obedience to any part of the interstate commerce acts if it cannot do it as to this part of them.

Hayburn's Case, 2 U. S. 2 Dall. 409 (1: 437); *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 818 (6: 223); *United States v. Ferreira*, 54 U. S. 18 How. 45 (14: 44); *United States v. Ritchie*, 58 U. S. 17 How. 525 (15: 286); *Den v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272 (15: 872); *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 851, 37 Fed. Rep. 618; *Ex parte Fassett*, 142 U. S. 479 (85: 1087); *Passavant v. United States*, 148 U. S. 214 (87: 426); *Fong Yue Ting v. United States*, 149 U. S. 698 (87: 909); *Re Pacific R. Co.* 82 Fed. Rep. 241; *Canal & L. Comrs. v. Willamette Transp. & L. Co.* 6 Or. 219; *People v. State Ins. Co.* 19 Mich. 392; *Re Lippman*, 3 Ben. 95; *Re Meador*, 1 Abb. (U. S.) 317; *Re McLean*, 37 Fed. Rep. 648.

As the decree of the court below was based

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solely upon the question of the power of the court to act at all, the matter of the relevancy of the questions asked and of the papers called for is not open for consideration here.

Passavant v. United States, 148 U. S. 214 (87: 426); Circuit Court of Appeals Act, March 5, 1891, §§ 5, 6.

But if the propriety of the action of the Commission is now open for review, then it is insisted that the questions refused to be answered and the papers refused to be produced were relevant to the subject-matter under consideration by the Commission.

If these companies were engaged in interstate commerce, there was nothing connected with any part of their affairs that the commission had not a right and was not bound, in case of complaint, to know, not only who were the owners of their stock and the controllers of their roads, but whether they or their officers were owners or interested in the steel company, whose interstate business they were transacting. The hearing had just begun. The statements of these officers were not conclusive, and had the questions been answered, and the books produced their denials might have been overcome perhaps by their own evidence. But the examination was suspended at the threshold by the necessity of applying to the court in the manner before stated.

Perfectly analogous to the jurisdiction contended for here are many instances of immemorial jurisdiction where the principal and final matters were not before the court called upon to act. Among these are:

Injunctions to stay waste, etc., pending suits at law to try titles (*Erhardt v. Boaro*, 113 U. S. 537 (28: 1116); *Kinsler v. Clarke*, 2 Hill, Eq. 617); certiorari (Story, Eq. Pl. § 18); bills to perpetuate testimony (Story, Eq. Jur. § 1512. See also Act of 1787, § 30); bills for examination of witnesses (Story, Eq. Pl. § 19; and see Act of 1827, § 2); bills of discovery (Story, Eq. Pl. § 19); and the judicial course on letters rogatory. 10 Stat. at L. 680; 12 Stat. at L. 769; Rev. Stat. 4071; *Nelson v. United States*, Pet. C. C. 285; *Mexico v. Arrangois*, 5 Duer, 684; *Kuehling v. Leberman*, 9 Phila. 160; *Re Spanish Consul at New York*, 1 Ben. 225.

No court of the United States can exercise any other than judicial power, and it cannot exercise judicial power without having a "case" or a "controversy" before it. How, then, can all these courts exercise power in all these varied instances otherwise than under the very principle before stated, that is, that it is the exertion of judicial power to pass and act upon the application of a party demanding relief in respect to another who is bound by law to do the thing asked, and that such an application in the form prescribed by law is a "case" and if disputed is a "controversy?"

Messrs. E. Parmalee Prentice, James C. Hutchins and Charles S. Holt, for appellees:

This investigation was in its nature judicial, and authority to make it could not lawfully be conferred by Congress upon the Interstate Commerce Commission, which is in its nature an administrative and not a judicial body.

1 Kent, Com. 804; *United States v. Ferreira*, 54 U. S. 18 How. 45 (14: 44).

The Interstate Commerce Commission is an administrative body.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 Inters. Com. Rep. 351, 87 Fed. Rep. 567.

The inquiry which the Commission was pursuing was judicial.

It is not one of the constitutional means included in the power to regulate interstate commerce, to delegate to a non-judicial body the duty of inquiring whether such commerce is carried on according to the "requirements of law." The proposition thus laid down by counsel is that Congress may authorize compulsory inquiry by a non-judicial body for the purpose of discovering and punishing past violations of law. A more startling proposition has seldom been asserted in this court. These violations are, if anything, crimes, punishable by heavy penalties of fine and imprisonment, and the investigation of the question whether crime has been committed is not an administrative act within any possible construction of the language. Such an inquiry is a function of the courts, with their historic appropriate machinery of the grand jury.

Com. v. Jones, 10 Bush, 725; *Cooley*, Const. Lim. (5th ed.) 109, 110.

Whether we look, therefore, at the prescription of duty, or at the enforcement of duty, we find no place for the operation of the Commission in such an investigation as this.

Re Pacific R. Co. 82 Fed. Rep. 251.

The Commission is in no respect a judicial body. Under our system of government such a body cannot conduct such an inquiry.

Kilbourn v. Thompson, 108 U. S. 168 (26: 877); *Boyd v. United States*, 116 U. S. 616 (29: 746).

The power of visitation is a power applicable only to ecclesiastical and eleemosynary corporations. The visitation of civil corporations is by the government itself, through the medium of the courts of justice.

2 Kent, Com. (18th ed.) 800.

The state has authority to interfere to ascertain whether or not the course pursued by a civil corporation is in excess of corporate power.

Waterman, Corp. 668; *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371.

Even if Congress could empower the Commission to make this investigation, still it could not empower this court to grant the order applied for; because, whether the character of the inquiry is judicial or non-judicial, the question does not here arise in a case or controversy as required by the Constitution.

The Federal Constitution, limits the judicial power of the United States and only "cases" and "controversies" can find an entrance into the Federal courts.

Chisholm v. Georgia, 2 U. S. 2 Dall. 482 (1: 485).

A case, in the sense of this clause of the Constitution, arises when some subject touching the Constitution, laws or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law.

Story, Const. § 1646; *Osborn v. United States*, 22 U. S. 9 Wheat. 745 (6: 206); *Smith v. Adams*, 180 U. S. 178 (82: 997); *Hayburn's Case*, 2 U. S. 4 INTER 8.

S. 2 Dall. 409 (1: 486); *United States v. Todd*, 54 U. S. 13 How. 52 (14: 47) note.

The language of the Act does not make it the duty of any carrier or other person to furnish information, but simply confers authority upon the Commission to inquire into the management of the business of all common carriers subject to the provisions of the Act.

United States v. Mitchell, 58 Fed. Rep. 998; *United States v. Hudson*, 11 U. S. 7 Cranch, 42 (8: 259); *United States v. Lancaster*, 2 McLean, 481.

But even if it were held that there is an implied "duty" as broad as the "right conferred by the Act," that is not broad enough to cover the duty here insisted on.

If the duty exists it must be one that is expressly or by implication contained in and defined by the Act of Congress.

The only possible definition of the duty asserted by counsel for the Commission in this case is, that it consisted in furnishing to the Commission all books, papers and information which the Commission might see fit to ask for. This is simply arming the Commission with unlimited powers of inquisition. Under the guise of a duty it empowers the Commission to create as many separate duties as it sees fit, and the very act of creation is a legislative act. If Congress delegate power in these broad terms, it can delegate any power whatever.

The application to the court is not for a decision whether the information is necessary, but for the enforcement of a duty which is assumed by the hypothesis to have been previously created. It must then have been either created by the Commission, acting as a legislature, or adjudged by the Commission, acting as a court. Either hypothesis is fatal.

When the Commission asks the question, either a duty to answer is thereby finally established or it is not. If it is finally established, then the act of the Commission is a legislative act, which is in the first place beyond the power of the Commission; but if valid, the court has no power to do anything except enforce it or punish its violation, without inquiry as to the materiality or necessity of the information sought. This makes the court the mere ministerial agent of the Commission.

If the duty is not established finally, but only provisionally (i. e. subject to the court's inquiry as to its propriety and necessity) then the court is called upon to take part in a legislative act, which is wholly beyond its competency; and what bears especially on the point now in hand, the supposed "case or controversy" consisting of the assertion on one side, and denial on the other, of an established duty, becomes a mere advisory inquiry whether it is lawful and expedient that a duty shall be established.

The provision of section 12 of the Interstate Commerce Act, under which this proceeding was taken, is, that the Commission "may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, documents, etc."

This application is stamped from the outset with the marks of its purely ancillary character.

It is only by splitting up the investigation

into minute fragments that the Commission can find any part of it to submit to the court for judicial action. If it had been attempted to carry on this entire investigation in the first instance by petition to the court, it would not have been possible to pretend that it made a case or controversy of which the court could take cognizance. A part cannot be greater than the whole, and the Commission cannot set 'n motion the judicial power by dismembering their case and bringing a small fragment into court to be decided and returned to them for such use as they may choose to make of it.

Moreover, if each refusal of a witness to answer a question in such an investigation may be made the subject of a separate judicial inquiry, under the guise of enforcing a duty, there may be as many separate controversies as there are questions. It follows also that each controversy thus submitted to the court gives the right of appeal to the defeated party. Thus, the extraordinary spectacle would be presented of this court or of the court of appeals deciding in succession a series of objections to evidence, arising in a controversy carried on before another and non-judicial tribunal. It is a perversion alike of language and of thought to speak seriously of this as a proper method of judicial action.

The courts have uniformly and repeated refused to recognize as "cases or controversies" questions arising at a preliminary stage before the judicial power is called into exercise, or subject to revision by another department after the courts have done with them.

United States v. Ritchie, 58 U. S. 17 How. 525 (15: 236); *Election Supra. Case*, 114 Mass. 247; *Ex parte Siebold*, 100 U. S. 399 (25: 727).

The court will look at the nature of the right, and not merely at the form in which it is asserted, to determine whether there is or is not a "case" for judicial consideration.

Den v. Hoboken Land & Imp. Co. 59 U. S. 18 How. 282-284 (15: 276, 377).

The case at bar is fatally defective, both as to substance, and form, and can by no possibility gain any standing in a Federal court.

The application is an attempt to borrow the process of contempt for use in an administrative inquiry, and it has no other substantial purpose.

The right of trial by jury as guaranteed by the Constitution forbids the creation of new methods of procedure in cases involving private rights.

Scott v. Neely, 140 U. S. 106 (35: 358); *Puterbaugh v. Smith*, 131 Ill. 199.

The judicial process of contempt is not a legitimate method for the enforcement of executive or legislative command.

Kilbourn v. Thompson, 108 U. S. 168 (26: 377); *Langenberg v. Decker*, 16 L. R. A. 108, 131 Ind. 471; *Wyatt v. People*, 17 Colo. 252.

The mere ownership of the stock in the switching roads by the steel company would not constitute a violation of the Interstate Commerce Law.

Pullman Palace Car Co. v. Missouri Pac. R. Co. 115 U. S. 587 (29: 499).

Mr. Justice Harlan delivered the opinion of the court:

This appeal brings up for review a judgment 4 INTER S.

rendered December 7, 1892, dismissing a petition filed in the Circuit Court of the United States on the 15th day of July 1892 by the Interstate Commerce Commission under the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and amended by the acts of March 2, 1889 and February 10, 1891. 24 Stat. at L. 379, chap. 104; 25 Stat. at L. 855, chap. 382; 26 Stat. at L. 743, chap. 128; 1 Rev. Stat. Supp. 529, 684, 891.

The petition was based on the 12th section of the Act authorizing the Commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books, and papers.

The circuit court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court, this proceeding was not a case to which the judicial power of the United States extended. 4 Inters. Com. Rep. 315, 53 Fed. Rep. 476, 480.

The provisions of the Interstate Commerce Act have no application to the transportation of passengers or property, or to the receiving, delivering, storing, or handling of property, wholly within one state and not shipped to a foreign country from any state or territory, or from a foreign country to any state or territory. But they are declared to be applicable to carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.

The term "railroad" as used in the Act includes all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" includes all instrumentalities of shipment or carriage.

All charges made for services rendered or to be rendered in the transportation of passengers or property, as above stated, or in connection therewith, or for the receiving, delivering, storing, or handling of such property, are required to be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. § 1.

Any carrier subject to the provision of the Act, directly or indirectly, by special rate, rebate, drawback, or other device, charging, de-

manding, collecting, or receiving from any person or persons a greater or less compensation for services rendered or to be rendered in the transportation of passengers or property, than it charges, demands, collects, or receives for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, is to be deemed guilty of unjust discrimination, which the Act expressly declares to be unlawful. § 2.

So it is made unlawful for any such carrier to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or to any particular description of traffic, or to subject any particular person, company, firm, corporation, or locality, or any particular kind of traffic, to undue or unreasonable prejudice or disadvantage in any respect. And carriers subject to the provisions of the Act are required to afford, according to their respective powers, all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and not to discriminate in their rates and charges between such connecting lines; but this regulation does not require a carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. § 3.

It is made unlawful for any carrier subject to the provisions of the Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this does not authorize the charging and receiving as great compensation for a short as for a longer distance. Upon application to the Commission, the carrier may in special cases, after investigation by that body, be authorized to charge less for longer than for short distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which the carrier may be relieved from the operation of this section. § 4.

It is also made unlawful for any carrier subject to the provisions of the Act to enter into any contract, agreement, or combination with any other carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance is deemed a separate offense. § 5.

Another section of the Act provides for the printing and posting by carriers of their rates, fares, and charges for the transportation of passengers and property, including terminal charges, classifications of freight, and any rules or regulations affecting such rates, fares, and charges, including the rates established and charged for freight received in this country to be carried through a foreign country to any

place in the United States; forbids any advance or reduction in such rates, fares, and charges, so established and published, except upon public notice, of which changes the Commission shall be notified; requires every carrier to file with the Commission copies of all contracts, agreements, or arrangements with other carriers relating to any traffic affected by the provisions of the Act, as well as copies of schedules of joint tariffs of rates, fares, or charges for passengers and property over continuous lines or routes operated by more than one carrier; declares it to be unlawful for any carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time; authorizes in addition to the penalties prescribed for neglect or refusal to file or publish rates, fares, and charges, a writ of mandamus to be issued by any circuit court of the United States in the judicial district wherein the principal office of the carrier is situated, or wherein such offense may be committed, and if such carrier be a foreign corporation, in the judicial circuit wherein it accepts traffic, and has an agent to perform such service, to compel compliance with the above provisions of the section relating to schedules of rates, fares, and charges—such writ to issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of the Act, and the failure to comply with its requirements being punishable as and for a contempt; and empowers the commissioners, as complainants, to apply, in any such circuit court of the United States, for a writ of injunction against the carrier, to restrain it from receiving or transferring property among the several states and territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several states and territories of the United States, as mentioned in the 1st section of the Act, until the carrier shall have complied with the provisions last referred to. § 6.

So a common carrier subject to the provisions of the Act is forbidden to enter into any combination, contract, or agreement, expressed or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being, and being treated, as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of the Act. § 7.

By the 11th section a commission is created and established, to be known as the Interstate Commerce Commission, and to be composed of five commissioners, appointed by the Pres-

ident, by and with the advice and consent of the Senate. § 11.

Other sections give a right of action to the persons injured by the acts of carriers done in violation of the statute; prescribe penalties against carriers for illegal exactions and discriminations; and indicate how the provisions of the statute may be enforced against carriers by the Commission.

The 12th section (26 Stat. at L. 743, chap. 128) the validity of certain parts of which is involved in this proceeding, provides as follows: "That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

"The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

"Every person deposing as herein provided shall be cautioned and sworn (or affirm if he so request) to testify the whole truth; and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

"If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with Commission. All depositions must be promptly filed with the Commission.

"Witnesses whose depositions are taken pursuant to this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States." § 12.

The nature of the present proceeding, instituted pursuant to the authority conferred by that section, will appear from the following summary of the pleadings and orders in the cause:

Prior to the 14th of June, 1892, informal complaint was made to the Interstate Commerce Commission, under the provisions of the Interstate Commerce Act, that the Illinois Steel Company, a corporation of Illinois, had caused to be incorporated under the laws of that state the Calumet & Blue Island Railroad Company, the Chicago & Southeastern Railway Company of Illinois, the Joliet & Blue Island Railway Company, and the Chicago & Kenosha Railway Company, for the purpose of operating its switches and side tracks at South Chicago, Chicago, and Joliet, respectively, and engaging in traffic by a continuous shipment from cities and places without to cities and places within Illinois, in connection,

respectively, with the Baltimore & Ohio Railroad Company, the Baltimore & Ohio Southwestern Railroad Company, the Illinois Central Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Pittsburgh, Fort Wayne & Chicago Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, the Belt Railway Company, the Chicago & Alton Railroad Company, the Chicago Railway Transfer Company, the Atchison, Topeka & Santa Fé Railway Company, the Elgin, Joliet & Eastern Railway Company, the Chicago & Northwestern Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company; that it had also caused to be incorporated under the laws of Wisconsin, the Milwaukee, Bay View & Chicago Railway Company, for the purpose of operating its switches and side tracks at or near Milwaukee, in that state, and engaging in traffic or traffic by a continuous shipment from places and cities without to cities and places within Wisconsin, in connection with the Chicago, Milwaukee & St. Paul Railway Company, and the Chicago & Northwestern Railway Company; and that said Illinois Steel Company owned and controlled the above named companies, which it caused to be incorporated under the laws of Illinois, and operated them in connection with the other companies named, "as a device for the purpose of evading the provisions of the Act to Regulate Commerce, and obtaining special, illegal, unjust, and unreasonable rates for the transportation of interstate traffic," and, by the connivance and consent of said other connecting railroad companies, in such a manner as to give the Illinois Steel Company an illegal, undue, and unreasonable preference and advantage, subjecting other persons, firms, and companies to undue and unreasonable prejudice and discrimination in the transportation of property from divers cities and places without the states of Illinois and Wisconsin to divers cities and towns within those states.

It was made to appear to the Commission that the companies so owned, controlled, and operated by the Illinois Steel Company for more than the six months then last past had been and were still engaged in the transportation of property by railroad in connection with the other companies named "under a common control, management, and arrangement for a continuous carriage or shipment" from divers cities and towns without to divers cities and towns within the states of Illinois and Wisconsin, and that none of the companies, so owned, controlled, and operated, had filed with the Commission copies of their contracts, agreements, and common arrangements with the other companies, nor their tariffs nor schedules of rates, fares, and charges as required by the Act of Congress.

The Commission, of its own motion, decided to investigate the matters set forth in said informal complaint by inquiring into the business of all of said railroad companies and the management thereof with reference as well to the alleged making of illegal, unjust, and unreasonable rates, as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company, and the failure, as

above stated, to file with the Commission the above contracts, agreements, and tariffs.

An order was thereupon made by the Commission, which recited the facts of the informal complaint made to it, and required each of the above mentioned companies to make and file in its office in Washington, a full, complete, perfect, and specific verified answer, setting forth all the facts in regard to the matters complained of and responding to the following questions:

1. Does any contract, agreement, or arrangement in writing or otherwise exist between the companies above alleged to be under the control [of] and operated by the said Illinois Steel Company and any of the other companies with reference to interstate traffic? If so, state the contract, agreement, or arrangement.

2. Or [are] any tariffs of rates and charges for the transportation of interstate property in effect between said companies above alleged to be under the control of and operated by the Illinois Steel Company and said other railroad companies? If so, what are they and what are the divisions thereof between the several carriers?

3. Have the companies above alleged to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned during the six months last past, or have they delivered any such traffic to such other carriers during that time, for any person, firm, or company other than the Illinois Steel Company; and if so, to what amount?

The order further required all of the companies named to appear before the Commission at a named time and place in Chicago, when that body would proceed to make inquiry into and investigate the management of the said business by the carriers so ordered to appear.

Each of the companies which, according to the allegations of the petition, the Illinois Steel Company had caused to be incorporated, filed its answer with the Commission, and averred that it had in all respects complied with the obligations imposed upon it by the laws of the state and of the United States; that it was not engaged in interstate commerce within six months preceding the filing of the complaint against them; and it answered "No" to each of the above specific questions. The Calumet & Blue Island Railway Company also denied that the operation of its railways was a device to evade the provision of the Interstate Commerce Act, or had resulted in obtaining for the Illinois Steel Company special, illegal, unjust, or unreasonable rates in interstate traffic or in securing to that company illegal, undue, or unreasonable preferences.

The Commission, notwithstanding these denials, conceived it to be their duty to proceed with the investigation by the examination of witnesses and the books and papers of the corporations involved, and especially to ascertain whether the Illinois Steel Company was the owner in fact of the railroads, which it was alleged to have caused to be incorporated, and whether such incorporations were for the purpose of giving to that company

an undue and illegal preference in the transportation of its property and freight.

Among the witnesses subpoenaed to testify before the Commission was William G. Brimson, the president and manager of the five roads so incorporated in Illinois. Being asked what constituted the principal traffic of the roads, he said: "The business of these roads, except as indicated in the answers, is that of switching — switching business. We do a switching and terminal business, in that we are open to any business, for anybody's property, or persons who may locate at such place where we can go to them; mainly our business it with the Illinois Steel Company. This is the great proportion of our business." In reply to the question whether his company engaged in transportation business other than as stated by him, he said that they did not, "except the Calumet & Blue Island, as stated in our reply. On that we do engage in other business to a certain extent." Having stated that his companies did not engage in the transportation business for everybody and anybody having occasion to employ them, and that their business was limited to the above companies with which they had traffic arrangements, he was asked whether the companies of which he was president and manager were owned by the Illinois Steel Company. The witness, under the advice of counsel, refused to answer this question.

J. S. Keefe, secretary and auditor of the five roads mentioned, was examined by the Commission as a witness. He admitted that he had in his possession a book showing the names of the stockholders of the Calumet & Blue Island Railway Company, but refused, upon the demand of the Commission, to produce it. He also refused to answer the question, "Do you know, as a matter of fact, whether the Illinois Steel Company owns the greater part of the stock of these several railroads?"

William R. Stirling, the first vice president of the Illinois Steel Company, was also examined as a witness, and after stating that that company had a contract with the five railroads in question to handle the railroad business at the five "plants" of the Steel Company, refused to answer the question, "Is that the only relation which your company sustains to these railroad companies?"

On the succeeding day the Commission issued a subpoena *duces tecum*, directed to J. S. Keefe, secretary and auditor of the five railroads in question, commanding him to appear before that body, and bring with him the stock books of those companies. A like subpoena was issued to William R. Stirling, as first vice president of the Steel Company, commanding him to appear before the Commission and produce the stock books of that company. Keefe and Stirling appeared in answer to the subpoenas, but refused to produce the books or either of them so ordered to be produced.

The Commission thereupon, on the 15th day of July, 1892, presented to and filed in the court below its petition embodying the above facts, and prayed that an order be made requiring and commanding Brimson, Keefe, and Stirling to appear before that body and answer the several questions propounded by them

and which they had respectively refused to answer, and requiring Keefe and Stirling to appear and produce before the Commission the stock books above referred to as in their possession.

The answers of Brimson, Keefe, and Stirling in the present proceeding, besides insisting that the question propounded to them, respectively, were immaterial and irrelevant were based mainly upon the ground that so much of the Interstate Commerce Act as empowered the Commission to require the attendance and testimony of witnesses and the production of books, papers and documents, and authorizes the circuit court of the United States to order common carriers or persons to appear before the Commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, was repugnant to the Constitution of the United States.

Is the 12th section of the Act unconstitutional and void, so far as it authorizes or requires the circuit court of the United States to use their process in aid of inquiries before the Commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (Art. 3, § 2) and as the circuit courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by Congress (25 Stat. at L. 484, chap. 866) the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy" within the meaning of the Constitution. The circuit court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said: "Undoubtedly, Congress may confer upon a non-judicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry, an offense punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties within the meaning of the Constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a non-judicial body." *Re Interstate Commerce Commission*, 4 Inters. Com. Rep. 815, 58 Fed. Rep. 476, 480.

In other words if the Interstate Commerce Act made the refusal of a witness duly summoned

to appear and testify before the Commission in respect to a matter rightfully committed by Congress to that body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an Act of Congress, in the name of the Commission, and under the direction of the Attorney General of the United States, against the witness so refusing to testify, to compel him to give evidence before the Commission touching the same matter, would not be a case or controversy of which cognizance could be taken by any court established by Congress to receive the judicial power of the United States.

This interpretation of the Constitution would restrict the employment of means to carry into effect powers granted to Congress within much narrower limits than, in our judgment, is warranted by that instrument.

The Constitution expressly confers upon Congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes, and to make all laws necessary and proper for carrying that power into execution. Art. 1, § 8. While the completely internal commerce of a state is reserved to the state itself, because never surrendered to the general government, commerce, the regulation of which it committed by the Constitution to Congress, comprehends traffic, navigation and every species of commercial intercourse or trade between the United States, among the several states, and with the Indian tribes. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 193, 194 [6: 23, 60]. "It may be doubted," this court has said, "whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficiency would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full convention of its necessity." *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 446 [6: 678, 688]; *Philadelphia & S. M. SS. Co. v. Pennsylvania*, 122 U. S. 326, 346 [30: 1200, 1205], 1 Inters. Com. Rep. 308. "In the matter of interstate commerce," this court, speaking by Mr. Justice Bradley, has declared, "the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems." *Robbins v. Shelby County Tazng Dist.* 120 U. S. 439, 494 [30: 694, 696], 1 Inters. Com. Rep. 45. The same principle was announced by the present Chief Justice in *Stoutenburgh v. Hennick*, 129 U. S. 141, 148 [32: 687, 689].

What is the nature of the power thus expressly given to Congress, and to what extent, and under what restrictions, may it be constitutionally exerted?

This question was answered when Chief Justice Marshall said that it was the power "to prescribe the rule by which commerce is to be governed." "This power," the Chief Justice continued, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 189, 196, 197 [6: 23, 68, 70].

Congress thus having plenary power subject to the limitations imposed by the Constitution to prescribe the rule by which commerce among the several states is to be governed, the question necessarily arises, what are the principles that should control the judiciary when determining whether a particular Act of Congress, avowedly adopted in execution of that power, is consistent with the fundamental limitations of the Constitution?

The general principle applicable to this subject was long ago announced by this court, and has been so often affirmed and applied that argument in support of it is unnecessary, even if it were possible to suggest any thought not heretofore expressed in the adjudged cases. In the great case of *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316, 421, 428 [4: 579, 605], it was said: "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." Again: "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

Guided by these principles, we proceed to inquire whether the twelfth section of the Interstate Commerce Act, so far as it authorizes

the present proceeding, assumes to invest the circuit courts of the United States with functions that are not judicial.

It was not disputed at the bar, nor indeed can it be successfully denied, that the prohibition of unjust charges, discriminations, or preferences, by carriers engaged in interstate commerce, in respect to property or persons transported from one state to another, is a proper regulation of interstate commerce, or that the object Congress has in view by the Act in question may be legitimately accomplished by it under the power to regulate commerce among the several states. In every substantial sense such prohibition is a rule by which interstate commerce must be governed, and is plainly adapted to the object intended to be accomplished. The same observation may be made in respect to those provisions empowering the Commission to inquire into the management of the business of carriers subject to the provisions of the Act, and to investigate the whole subject of interstate commerce as conducted by such carriers, and, in that way, to obtain full and accurate information of all matters involved in the enforcement of the Act of Congress. It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case.

Interpreting the Interstate Commerce Act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investigation by a Commission established for the purpose of enforcing that Act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly and indirectly, imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principal of constitutional law that "the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." 17 U. S. 4 Wheat. 316, 409 [4: 579, 602]. The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without entrenching upon the domain of another department of the government. That it may not do with safety to our institutions.

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Union Pac. R. Co. v. United States ("Sinking Fund Cases") 99 U. S. 700, 718 [25: 496, 501].

An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules.

It is to be observed that independently of any question concerning the nature of the matter under investigation by the Commission—however legitimate or however vital to the public interests the inquiry being conducted by that body—the judgment below rests upon the broad ground that no *direct* proceeding to compel the attendance of a witness before the Commission, or to require him to answer questions put to him, or to compel the production of books, documents or papers in his possession relating to the subject under examination, can be deemed a case or controversy of which under the Constitution, a court of the United States may take cognizance, even if such proceeding be in form judicial. And the theory upon which the judgment proceeded is applicable alike to corporations and individuals, although by the established doctrine of the courts a railroad corporation may, under legislative sanction and upon making compensation, appropriate private property for the purposes of its right of way, because and only because its road is a public highway established primarily for the convenience of the people and to subserve public objects, and, therefore, subject to governmental control. *Cherokee Nation v. Southern Kansas R. Co.* 185 U. S. 641, 657 [34: 295, 302].

What is a case or controversy to which, under the Constitution, the judicial power of the United States extends? Referring to the clause of that instrument, which extends the judicial power of the United States to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or that shall be made under their authority, this court, speaking by Chief Justice Marshall, has said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Consti-

tution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States." *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 788, 819 [8: 204, 228]. And in *Den v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272, 284 [15: 372, 377], *Mr. Justice Curtis*, after observing that Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty, nor on the other hand, bring under judicial power a matter which, from its nature, is not a subject for judicial determination, said: "At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." So, in *Smith v. Adams*, 180 U. S. 173 [32: 897], *Mr. Justice Field*, speaking for the court, said that the terms "cases" and "controversies" in the Constitution embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."

Testing the present proceeding by these principles, we are of opinion that it is one that can properly be brought under judicial cognizance.

We have before us an Act of Congress authorizing the Interstate Commerce Commission to summon witnesses and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision—assuming it to be applicable to a matter that may be legally entrusted to an administrative body for investigation—is, we repeat, not disputed and is beyond dispute. Upon every one, therefore, who owes allegiance to the United States, or who is within its jurisdiction, enjoying the protection that its government affords, rests an obligation to respect the national will as thus expressed in conformity with the Constitution. As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the Commission imposes upon any one, summoned by that body to appear and to testify, the duty of appearing and testifying, and upon any one required to produce such books, papers, tariffs, contracts, agreements, and documents, the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the Commission requires at his hands. These propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion. Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in 4 INTER 8.

violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to Congress, are the distinct issues between that body and the witness. They are issues between the United States and those who dispute the validity of an Act of Congress and seek to obstruct its enforcement. And those issues made in the form prescribed by the Act of Congress, are so presented that the judicial power is capable of acting on them.

The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by indictment under an Act of Congress declaring it to be an offense against the United States for any one to refuse to testify before the Commission after being duly summoned, or to produce books, papers, etc., in his possession upon notice to do so, or imposing penalties for such refusal to testify or to produce the required books, papers, and documents. A prosecution for such offense or a proceeding by information to recover such penalties would have as its real and ultimate object to compel obedience to the rightful orders of the Commission, while it was exerting the powers given to it by Congress. And such is the sole object of the present direct proceeding. The United States asserts its right, under the Constitution and laws, to have these appellees answer the questions propounded to them by the Commission, and to produce specified books, papers, etc., in their possession or under their control. It insists that the evidence called for is material in the matter under investigation; that the subject of investigation is within legislative cognizance, and may be inquired of by any tribunal constituted by Congress for that purpose. The appellees deny that any such rights exist in the general government, or that they are under a legal duty, even if such evidence be important or vital in the enforcement of the Interstate Commerce Act, to do what is required of them by the Commission. Thus has arisen a dispute involving rights or claims asserted by the respective parties to it. And the power to determine it directly, and, as between the parties, finally, must reside somewhere. It cannot be that the general government, with all the power conferred upon it by the people of the United States, is helpless in such an emergency, and is unable to provide some method, judicial in form, and *direct in its operation*, for the prompt and conclusive determination of this dispute.

As the circuit court is competent under the law by which it was ordained and established to take jurisdiction of the parties, and as a case arises under the Constitution or laws of the United States when its decision depends upon either, why is not this proceeding judicial in form and instituted for the determination or distinct issues between the parties, as defined by formal pleadings, a case or controversy for judicial cognizance, within the meaning of the Constitution? It must be so regarded, unless, as is contended, Congress is without power to provide any method for enforcing the statute or compelling obedience to the lawful orders of the Commission, except through criminal prosecutions or by civil actions to recover penalties imposed for non-com-

pliance with such orders. But no limitation of that kind upon the power of Congress to regulate commerce among the states is justified either by the letter or the spirit of the Constitution. Any such rule of constitutional interpretation, if applied to all the grants of power made to Congress, would defeat the principal objects for which the Constitution was ordained. As the issues are so presented that the judicial power is capable of acting on them finally as between the parties before the court, we cannot adjudge that the mode prescribed for enforcing the lawful orders of the Interstate Commission is not calculated to attain the object for which Congress was given power to regulate interstate commerce. It cannot be so declared unless the incompatibility between the Constitution and the Act of Congress is clear and strong. *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 128 [8: 162, 175]. In accomplishing the objects of a power granted to it, Congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the Constitution.

We do not overlook those constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. *Kilbourn v. Thompson*, 108 U. S. 168, 190 [26: 377, 386]. We said in *Boyd v. United States* 116 U. S. 616, 630 [29: 746, 751]—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employés of the sanctity of a man's home, and the privacies of his life. As said by Mr. Justice Field in *Re Pacific R. Commission*, 32 Fed. Rep. 241, 250, "of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value."

It was said in argument that the twelfth section was in derogation of those fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guarantees. This court has already spoken fully upon that general subject in *Counselman v. Hitchcock*, 142 U. S. 547 [35: 1110], 3 Inters. Com. Rep. 816. We need not add anything to what has been there said. Suffice it in the present case to say that as the Interstate Commerce Commission, by petition in a circuit court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend

before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits.

It may be proper to state in this connection that after the decision in *Counselman v. Hitchcock*, the Interstate Commerce Act was amended by an Act approved February 11, 1893, which provides "that no person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the Act of Congress, entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*. That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense, and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment." 27 Stat. at L. 443, chap. 83. But that Act was not in force when this case was determined below. Nor does it reach the question whether a proceeding like the present one can be maintained in a circuit court of the United States.

In the course of the argument at the bar our attention was called to *Hayburn's Case*, 2 U. S. 2 Dall. 409 [1: 436], and *United States v. Ferreira*, 54 U. S. 13 How. 40, 46 [14: 42, 44], as announcing principles not in harmony with the views we have expressed in this opinion.

Hayburn's case was an application for a mandamus to be directed to the Circuit Court of the United States for the District of Pennsylvania, commanding that court to proceed in a petition by Hayburn to be put on the pen-

sion list of the United States in conformity with an Act of Congress, approved March 28, 1792, chap. 11, which provided for the settlement of the claims of widows and orphans barred by limitations previously established, and to regulate claims to invalid pensions. This court took the case under advisement, but as Congress provided in another way for the relief of invalid pensioners, no decision was made. Nevertheless, by a note to Hayburn's case, we are informed of the views expressed at the circuit by different members of this court in relation to the Act of 1792. They concurred in holding that it was not in the power of Congress to assign to the courts of the United States any duties except such as were properly judicial, and to be performed in a judicial manner; and that the duties assigned to the circuit courts were not of that description, and were not contemplated by the Act of Congress as of that character; and, consequently, that the Act could be considered as only appointing commissioners for the purposes mentioned in it by official instead of personal descriptions, which positions the judges of the court were at liberty to accept or decline.

In a note prepared by *Chief Justice Taney*, under the direction of this court, and found in 54 U. S. 13 How. 52 [14: 47], an account is given of *United States v. Todd*, which also involves the validity of the Act of 1792, so far as it imposed upon the circuit courts duties relating to pensions. And it is there stated that *Chief Justices Jay and Justice Cushing*, upon further reflection, became satisfied that the power conferred by the Act of 1792 on the circuit court as a court could not be construed as giving such power to the judges of the court as commissioners.

The same general principles were announced in *Ferreira's case*, which arose under the treaty of 1819 between Spain and the United States, and under certain acts of Congress passed to carry a particular article of that treaty into execution. The case came before this court upon appeal from a decision or award made by the district judge, acting upon a special statute authorizing him to receive and adjudicate certain claims. A motion to dismiss the appeal for want of jurisdiction in this court raised the question whether the district judge exercised judicial power, strictly speaking, under the Constitution. The motion to dismiss was sustained. *Chief Justice Taney*, referring to the statutes under which the district judge proceeded, said: "It is manifest that this power to decide upon the validity of these claims is not conferred on them as a judicial function to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term are to be made; no process to issue; and no one is authorized to appear in behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*, and all that the judge is required to do is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence nor his award are to be filed in the court in which he presides, nor recorded there; but he is required to transmit

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both the decision and the evidence upon which he decided to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge. It is too evident for argument on the subject that such a tribunal is not a judicial one, and that the Act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges and their respective jurisdictions are referred to in the law merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commission." 54 U. S. 13 How. 40, 46, 47 [14: 42, 44].

It thus appears that the Act of 1792, above referred to, attempted to impose upon the courts of the United States duties purely administrative in their character. So, also, the acts of Congress involved in *Ferreira's case* conferred no authority upon the district judge to determine finally any questions of a judicial nature, and, without requiring any petition to be filed, and without empowering the district attorney to enter an appearance for the United States, so as to make it a party to the proceeding, or to authorize a judgment against it, gave that officer the power only of adjusting, without the presence of parties, certain claims, the allowance and payment of which, after being so adjusted, were made to depend wholly upon the discretion of the Secretary of the Treasury.

Some allusion should be made in this connection to *Gordon v. United States*, 117 U. S. appx. p. 697 and *Re Sanborn*, 148 U. S. 222 [37: 429].

In *Gordon's case*, the question was whether this court had jurisdiction to review the action of the Court of Claims in respect to a claim examined and allowed in the latter court under an Act of Congress (12 Stat. at L. 65, chap. 92, §§ 5, 7, 14) which, among other things, provided that no money should be paid out of the Treasury for any claim passed upon by the Court of Claims, until after an appropriation therefor should be estimated by the Secretary of the Treasury, and an appropriation to pay it be made by Congress. Under that Act neither the Court of Claims nor this court could do anything more than certify their opinion to the Secretary of the Treasury, and it depended upon that officer, in the first place, to decide whether he would include it in his estimates of private claims, and if he decided in favor of the claimant, it rested with Congress to determine whether it would or would not make an appropriation for its payment. Neither the Court of Claims nor this court could, by any process, enforce its judgment; and whether the claim was paid or not, did not depend on the decision of either court, but upon the future action of the Secretary of the Treasury and of Congress.

The appeal of *Gordon* was dismissed upon the ground that Congress could not "authorize or require this court to express an opinion on a case where its judicial power could not be ex-

exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect." "The award of execution," said Chief Justice Taney, "is a part and an essential part, of every judgment, passed by a court exercising judicial power. It is no judgment, in the legal sense of term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this Act of Congress," p. 702. See *De Groot v. United States*, 72 U. S. 5 Wall. 419 [18:700].

In Sanborn's case, above cited, the same principles were announced. That case arose under an Act of Congress of March 3, 1887 (24 Stat. at L. 505, chap. 105) one section of which provided that "when any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted." § 12. This court dismissed an appeal from a finding of the Court of Claims, under this Act. Referring to the cases of Hayburn, Todd, Ferreira, and Gordon, above cited, it observed: "Such a finding is not made obligatory on the department to which it is reported—certainly not so in terms—and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made by the statute the final and indisputable basis of action either by the department or by Congress," p. 226 (481).

The views we have expressed in the present case are not inconsistent with anything said or decided in those cases. They do not, in any manner, infringe upon the salutary doctrine that Congress (excluding the special cases provided for in the Constitution, as, for instance, in section two of article two of that instrument) may not impose upon the courts of the United States any duties not strictly judicial. The duties assigned to the circuit courts of the United States by the 12th section of the Interstate Commerce Act are judicial in their nature. The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such

a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in *Anderson v. Dunn*, 19 U. S. 6 Wheat. 204 [5:242], and in *Kilbourn v. Thompson*, 103 U. S. 168, 190 [26:877,886], of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502, and authorities there cited.

Without the aid of judicial process of some kind, the regulations that Congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One mode, as already suggested—the validity of which is not questioned—of compelling a witness to testify before the Interstate Commerce Commission, to answer questions propounded to him relating to the matter under investigation and which the law makes it his duty to answer, and to produce books, papers, etc., is to make his refusal to appear and answer, or to produce the documentary evidence called for, an offence against the United States punishable by fine or imprisonment. A criminal prosecution of the witness under such a statute, it is conceded, would be a case or controversy within the meaning of the Constitution, of which a court of the United States could take jurisdiction. Another mode would be to proceed by information to recover any penalty imposed by the statute. A proceeding of that character, it is also conceded, would be a case or controversy of which a court of the United States could take cognizance. If, however, Congress, in its wisdom, authorizes the Commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the Act of Congress, and of compelling the witness to perform his duty, is said not to be judicial, and is beyond the power of Congress to prescribe.

We cannot assent to any view of the Constitution that concedes the power of Congress to accomplish a named result, indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result, directly, and by a different proceeding judicial in form. We could not do so without denying to Congress the broad discretion with which it is invested by the Constitution of employing all or any of the means that are appropriate or plainly adapted to an end which it has unquestioned power to accomplish, namely, the protection of interstate commerce against improper burdens and discriminations. Indeed, of all the modes that could be constitutionally prescribed for the enforcement of the regulations embodied in the Interstate Commerce Act, that provided by the 12th sec-

tion is the one which, more than any other, will protect the public against the devices of those who, taking advantage of special circumstances, or by means of combinations too powerful to be resisted and overcome by individual effort, would subject commerce among the states to unjust and unreasonable burdens.

The present proceeding is not merely ancillary and advisory. It is not, as in Gordon's case, one in which the United States seeks from the circuit court of the United States an opinion that "would remain a dead letter, and without any operation upon the rights of the parties." The proceeding is one for determining rights arising out of specified matters in dispute that concern both the general public and the individual defendants. It is one in which a judgment may be rendered that will be conclusive upon the parties until reversed by this court. And that judgment may be enforced by the process of the circuit court. Is it not clear that there are here parties on each side of a dispute involving grave questions of legal rights, that their respective positions are defined by pleadings, and that the customary forms of judicial procedure have been pursued? The performance of the duty which, according to the contention of the government, rests upon the defendants, cannot be directly enforced except by judicial process. One of the functions of a court is to compel a party to perform a duty which the law requires at his hands. If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of Sanborn's case, will be a "final and indisputable basis of action," as between the Commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.

This view is illustrated by the case of *Fong Yue Ting v. United States*, 149 U. S. 698, 728 [37: 905, 918], which arose under the Act of May 5, 1892, chap. 60, prohibiting the coming of Chinese persons into the United States. That Act provided for the arrest and removal from the United States of any person of Chinese descent unlawfully within this country, unless such persons shall establish, by affirmative proof, to the satisfaction of a justice, judge or commissioner of the United States before whom he might be brought and tried, his lawful right to remain in the United States. It also authorized the arrest of such person by any customs official, collector of internal revenue, or United States marshal, and taken before a United States judge. This

court said: "When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, defendant, and a judge—*actor, reus et iudex*. 3 Bl. Com. 25; *Osborn v. Bank of United States*, 23 U. S. 9 Wheat. 738, 819 [6: 204, 228]. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge, or the validity of the statute."

Another suggestion thrown out in argument against the validity of the 12th section of the Interstate Commerce Act, in the particular adverted to, is that the defendants are not accorded a right of trial by jury. If, as we have endeavored to show, this proceeding make a case or controversy within the judicial power of the United States, the issue whether the defendants are under a duty to answer the questions propounded to them, and to produce the books, papers, documents, etc., called for, is manifestly not one for the determination of a jury. The issue presented is not one of fact, but of law exclusively. In such a case, the defendant is no more entitled to a jury than is a defendant in a proceeding by mandamus to compel him, as an officer, to perform a ministerial duty. Of course, the question of punishing the defendants for contempt could not arise before the Commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the circuit court, is determined adversely to the defendants and they refuse to obey, not the order of the Commission, but the final order of the court. And, in matters of contempt, a jury is not required by "due process of law." From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt. And this inherent power is recognized and enforced by a statute expressly authorizing such courts to punish contempts of their authority when manifested by disobedience of their lawful writs, process, orders, rules, decrees, or commands. Rev. Stat. § 725; 1 Stat. at L. 88; 4 Stat. at L. 487; *United States v. Hudson*, 11 U. S. 7 Cranch, 32 [8: 259]; *Anderson v. Dunn*, 19 U. S. 6 Wheat. 204, 237 [5: 242, 247]; *Ex parte Robinson*, 86 U. S. 19 Wall. 505, 510 [22: 205, 207]; *Ex parte Terry*, 128 U. S. 289, 302, 303 [32: 405, 408]; *Cartwright's Case*, 114 Mass. 280, 288. Surely it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury.

We are of opinion that a judgment of the circuit court of the United States determining the issues presented by the petition of the Interstate Commerce Commission and by the answers of appellees, will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. And a final order by that court dismissing the petition of the

Commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting and which may be enforced by judicial process. If there is any legal reason why appellees should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below when it enters upon the consideration of the merits of the questions presented by the petition.

In view of the conclusion reached upon the only question determined by the circuit court, what judgment shall be here entered? The case was heard below upon the petition of the Commission and the answers of the defendants. But no ruling was made in respect to the materiality of the evidence sought to be obtained from the defendants. Passing by every other question in the case, the circuit court, by its judgment, struck down so much of the

twelfth section as authorized or required the courts to use their process in aid of inquiries before the Commission. Under the circumstances, we do not feel obliged to go further at this time than to adjudge, as we now do, that that section in the particular named is constitutional, and to remand the cause that the court below may proceed with it upon the merits of the questions presented by the petition and the answers of the defendants and make such determination thereof as may be consistent with law. Any other course would, it might be apprehended, involve the exercise of original jurisdiction, and might possibly work injustice to one or the other of the parties.

For the reasons stated the judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion. Reversed.

Dissenting: Mr. Justice Brewer, The Chief Justice, Mr. Justice Jackson. Mr. Justice Field was not present at the argument of this case and took no part in the consideration or decision of it.

JOHN H. REAGAN ET AL., *Appts.*,
v.
THE FARMERS LOAN & TRUST COMPANY ET AL.

(See S. C. 154 U. S. 362, 38 L. ed. —.)

[No. 928.]

Suit against a state—jurisdiction of Federal court—state power to regulate charges by carrier—equity powers of United States court—validity of statute—courts may restrain rates fixed by a commission—equal protection of property—14th Amendment—reasonableness of rates—rates prescribed by Texas railroad commission unjust.

1. A suit to restrain the enforcement by state officers of unjust and unreasonable rates fixed for carriers by state authority is not a suit against the state, within the prohibition of the 11th Amendment, since the state is interested only in a governmental and not in a pecuniary sense.
2. The constitutionality of a state statute will not oust the jurisdiction of a Federal court in a suit between citizens of different states to prevent such wrongful administration of the statute by state officers, as will make it an illegal burden and exaction upon an individual.
3. A section of a statute prescribing penalties, and another section declaring the effect as evidence of freights fixed by commissioners may be dropped as invalid without affecting the validity of the remainder of the statute, where it appears that the prime object of the statute was the establishment of rules for the operation of railroads, and the regulation of their rates, which can be fully accomplished irrespective of those sections.
4. Although the formation of a tariff of charges for transportation by a common carrier is a legislative or ministerial rather than a judicial function, the court may decide whether or not such rates are unjust and unreasonable and such as to work a practical destruction to rights of property, and if found so to be may restrain their operation.
5. The fixing and enforcement by a railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstitutional denial of the equal protection of the laws.
6. A schedule of rates made by railroad commissioners, being challenged as a whole, the court must either condemn or sustain it as a whole and cannot rearrange it or prepare a new schedule.
7. An injunction against the enforcement of unreasonable and unjust rates fixed by railroad commissioners must not extend to restraining the commission from proceeding to establish other rates.
8. A tariff of railroad rates fixed by a commission, which will so diminish the earnings of a road that they will not be able to pay one half the interest on its bonded debt above the operating expenses, is unjust and unreasonable, where, without waste or mismanagement in construction or operation, the road has cost far more than the amount of stock and bonds outstanding, which represent money expended in its construction, and the rates have been voluntarily decreased by the company within ten years more than 50 per cent, while under these rates the stock, representing two fifths of the value of the road, has never received a dividend, and for the last three years the earnings above operating expenses have been insufficient to pay the bonded debt.

NOTE.—As to power of Congress to regulate commerce, see note to *Gibbons v. Ogden*, 5: 23, and to *Brown v. Maryland*, 6: 673.

As to tonnage tax see note to *Inman SS. Co. v. Tinker*, 24: 118.

As to interstate commerce; regulation of; power of

MEM.—References in note, are to U.S. Repts. L. ed.

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Congress; how far exclusive, see notes to *Gloucester Ferry Co. v. Pennsylvania*, 20: 154.

As to power of Congress to control commerce; state statute when valid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when valid, see note to *Harmon v. Chicago*, 37: 216.

Argued April 4, 5, 1894. Decided May 26, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Texas, perpetually enjoining the International & Great Northern Railroad Company from putting or continuing in effect the rates or tariffs of the railroad commission of Texas, described in the complaint, and perpetually enjoining said railroad commission and the Attorney General of Texas, from instituting any suits for penalties under the law of Texas of April, 3, 1891, or under or by virtue of the said tariffs of said railroad commission, etc., and perpetually restraining said railroad commission from issuing any further tariffs, and decreeing that the rates and tariffs heretofore made and issued by said commission and described in the complaint are unreasonable, unfair and unjust, and cancelling the same, and declaring the same to be null and void, etc. *Reversed in part and affirmed in part.*

Statement by Mr. Justice Brewer:

On April 8, 1891, the legislature of the state of Texas passed an act to establish a railroad commission. The first section provides for the appointment and qualification of three persons to constitute the commission; the second for the organization of the commission, while the third defines the powers and duties of the commission, and is as follows:

"Sec. 3. The power and authority is hereby vested in the railroad commission of Texas, and it is hereby made its duty, to adopt all necessary rates, charges, and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having the penalties inflicted as by this act prescribed through proper courts having jurisdiction.

"(a) The said commission shall have power, and it shall be its duty, to fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this state into such general and special classes or subdivisions as may be found necessary and expedient.

"(b) The commission shall have power, and it shall be its duty, to fix to each class or subdivision of freight a reasonable rate for each railroad subject to this act for the transportation of each of said classes and subdivisions.

"(c) The classifications herein provided for shall apply to and be the same for all railroads subject to the provisions of this act.

"(d) The said commission may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines if found necessary to do justice, and may make rates for express companies different from the rates fixed for railroads.

"(e) The said commission shall have power, and it shall be its duty, to fix and establish for all or any connecting lines of railroad in this state reasonable joint rates of freight charges for the various classes of freight and cars that may pass over two or more lines of such railroads.

"(f) If any two or more connecting railroads shall fail to agree upon a fair and just division of the charges arising from the transportation of freights, passengers or cars over their lines, the commission shall fix the *pro rata* part of such charges to be received by each of said connecting lines.

"(g) Until the commission shall make the classifications and schedules of rates as herein provided for, and afterwards if they deem it advisable, they may make partial or special classifications for all or any of the railroads subject hereto, and fix the rates to be charged by such roads therefor; and such classifications and rates shall be put into effect in the manner provided for general classifications and schedules of rates.

"(h) The commission shall have power, and it shall be its duty from time to time, to alter, change, amend, or abolish any classification or rate established by it when deemed necessary; and such amended, altered, or new classifications or rates shall be put into effect in the same manner as the originals.

"(i) The commission may adopt and enforce such rules, regulations, and modes of procedure as it may deem proper to hear and determine complaints that may be made against the classifications or the rates, the rules, regulations, and determinations of the commission.

"(j) The commission shall make reasonable and just rates of charges for each railroad subject hereto for the use or transportation of loaded or empty cars on its road; and may establish for each railroad or for all railroads alike reasonable rates for the storing and handling of freight and for the use of cars not unloaded after forty eight hours' notice to the consignee, not to include Sundays.

"(k) The commission shall make and establish reasonable rates for the transportation of passengers over each or all of the railroads subject hereto, which rates shall not exceed the rates fixed by law. The commission shall have power to prescribe reasonable rates, tolls, or charges for all other services performed by any railroad subject hereto."

The first paragraph of the fourth section is in these words:

"Sec. 4. Before any rates shall be established under this act, the commission shall give the railroad company to be affected thereby ten days' notice of the time and place when and where the rates shall be fixed; and said railroad company shall be entitled to be heard at such time and place, to the end that justice may be done; and it shall have process to enforce the attendance of its witnesses. All process herein provided for shall be served as in civil cases."

The remaining paragraphs give power to adopt rules of procedure. The fifth, sixth, and seventh sections are as follows:

"Sec. 5. In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations, and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair, and just, and in such respects shall not be controverted

therein until *finally found* otherwise in a direct action brought for that purpose in the manner prescribed by sections 6 and 7 hereof.

"Sec. 6. If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act, or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending: *Provided*, That if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice.

"Sec. 7. In all trials under the foregoing section the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts, or charges complained of are unreasonable and unjust to it or them."

Sections 8, 9, 10, 11, 12, and 13 contain special provisions which are not material to the consideration of any question presented in this case.

Section 14 reads:

"Sec. 14. If any railroad company subject to this act, or its agent or officer, shall hereafter charge, collect, demand or receive from any person, company, firm or corporation a greater rate, charge, or compensation than that fixed and established by the railroad commission for the transportation of freight, passengers, or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling, or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its said agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the state of Texas a sum not less than \$100 nor more than \$5000."

Section 15 defines unjust discrimination, and imposes a penalty of not less than \$500 nor more than \$5000 upon any railroad company violating any provision of the section.

Section 16 is leveled against officers and agents of railroads, and imposes a penalty of not less than \$100 nor more than \$1000 for certain offenses denounced therein.

Section 17 declares that any railroad company violating the provisions of the act shall be liable to the persons injured thereby for the damages sustained in consequence of such violation, and in case it is guilty of extortion or discrimination, as defined in the act, shall pay, in addition to such damages to the person

injured, a penalty of not less than \$125 nor more than \$500.

In sections 18 and 19 are further provisions as to penalties. The remaining sections, 20 to 24, inclusive, contain matter of detail which is unimportant in this case.

Three of the plaintiffs in error, Reagan, McLean, and Foster, were duly appointed and qualified as members of said railroad commission, and organized it on the 10th day of June, 1891. The other plaintiff in error, Culberson, is the attorney general of the state, who, by section 19 of the act, was charged with the duty of instituting suits in the name of the state for the recovery of all the penalties prescribed by the act, excepting those recoverable by individuals under the authority of section 17.

After the commission had organized on June 10, it proceeded to establish certain rates for the transportation of goods over the railroads in the state, and also certain regulations for the management of such transportation. Thereafter, on April 30, 1892, the Farmers' Loan & Trust Company filed its bill in the Circuit Court of the United States for the Western District of Texas, making as defendants the railroad commissioners, the attorney general, the International & Great Northern Railroad Company, and Thomas M. Campbell, the receiver thereof, duly appointed by the district court of Smith county, Texas. That bill, which is too long to be copied in full, alleged that the plaintiff was the trustee in a trust deed executed by the railroad company on the 15th day of June, 1881, to secure a second series of bonds, aggregating \$7,054,000, bearing interest at the rate of 6 per cent per annum; and that there was a prior issue of bonds to the amount of \$7,954,000, secured by a conveyance to John S. Kennedy and Samuel Sloan, as trustees. It then set forth the railroad commission act heretofore referred to, or so much thereof as was deemed material, the proceedings of the commission, and the notices that were given to the railroad company, and attached as exhibits the several orders prescribing rates and regulations. It also averred generally that such rates were unreasonable and unjust, set forth certain specific facts which it claimed established the injustice and unreasonableness of those rates, and prayed a decree restraining the commission from enforcing those rates, or any other rates, and also restraining the attorney general from instituting any suits to recover penalties for failing to conform to such rates and obey such regulations. The International & Great Northern Railroad Company appeared, filed an answer and also a cross bill similar in its scope and effect to the bill filed by the plaintiff, and praying substantially the same relief. The railroad commission and the attorney general at first filed answers, but, after a certain amount of testimony had been taken (of the nature and extent of which we are not advised, inasmuch as it is not preserved in the record) they withdrew their answers and filed demurrers, leave being given at the same time to the complainant and cross complainant to amend the bill and cross bill before the filing of the demurrer. The amendments to the bill and cross bill were similar, and contained

allegations more in detail of the losses in revenue sustained by the company through the enforcement of the tariffs, and the average reduction caused by such tariffs in the rate theretofore existing; and also setting forth certain contract rights under an act of the legislature of the state of Texas, passed on February 7, 1883. Thereafter the cause was submitted to the court on the bills and cross bills and demurrers, and, on March 23, 1893, a decree was entered in favor of the plaintiff as follows:

"This cause having been set down for final hearings on the pleadings and evidence, and being called for hearing thereon, the defendants John H. Reagan, William P. McLean, L. L. Foster, and Charles A. Culberson presented their motion, on file herein, for leave to withdraw their answers and file demurrers, which motion was granted conditioned upon the said defendants paying all costs of taking depositions and evidence, herein against them to be taxed, and for which execution may issue, and on condition that the complainant and cross complainant have leave to amend before the filing of the demurrers of the said defendants, which leave was granted, and whereupon said amendments were filed, and the demurrers of the said defendants were filed to the original bill of complaint and cross-bill in this cause, as also to all amendments thereto, and were, by complainant and cross complainant, set down for argument by consent, and were by all parties forthwith submitted; and thereupon, in consideration thereof, it was ordered, adjudged, and decreed that said demurrers be, and the same are hereby, overruled: and the defendants John H. Reagan, William P. McLean, L. L. Foster, and Charles A. Culberson having entered of record their refusal to make further answer, and the fact that they stood upon their demurrers, and all parties submitting the cause for final decree, it is now, upon consideration thereof, ordered, adjudged, and decreed that the bill of complaint as amended, and the cross bill of complaint as amended, in the above entitled cause, be, and the same are hereby, sustained and taken for confessed. And the said cause coming on further to be heard upon the bill of complaint herein as amended, and upon the answer of the defendant railroad company thereto, confessing the same, it is further ordered, adjudged, and decreed as follows, to wit:

"First. That the injunctions heretofore issued in this cause be, and the same are hereby, made perpetual, and accordingly,

"Second. That defendant, the International & Great Northern Railroad Company be, and it is hereby, perpetually enjoined, restrained, and prohibited from putting or continuing in effect the rates, tariffs, circulars, or orders of the railroad commission of Texas, or either or any of them, as described in the bill of complaint herein and in 'Exhibit C' thereto and therewith filed, and from charging or continuing to charge the rates specified in said tariffs, circulars, or orders, or either or any of them.

"Third. It is further ordered, adjudged, and decreed that the defendants, the railroad commission of Texas and the defendants, John H. Reagan, William P. McLean, and L. L. Foster,

acting as the railroad commission of Texas, and their successors in office, and the defendant, Charles A. Culberson, acting as attorney general of the state of Texas, and his successors in office, be, and they are hereby, perpetually enjoined, restrained, and prohibited from instituting or authorizing or directing any suit or suits, action or actions, against the defendant railroad company for the recovery of any penalties under and by virtue of the provisions of the act of the legislature of the state of Texas, approved April 8, 1891, and fully described in the bill of complaint; or under or by virtue of any of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under or by virtue of the said act and the said tariffs, orders, or circulars of said railroad commission, or any or either of them combined, and said defendants Reagan, McLean and Foster and the railroad commission of Texas are further perpetually restrained from certifying any copy or copies of any of said orders, tariffs, or circulars, or from delivering, or causing or permitting to be delivered, certified copies of any of said orders, tariffs, or circulars to the said Culberson or any other party, and from furnishing the said Culberson, or any other party, any information of any character for the purpose of inducing, enabling, or aiding him or any other party to institute or prosecute any suit or suits against the said defendant railroad company for the recovery of any penalty or penalties under the said act.

"Fourth. It is further ordered, adjudged, and decreed that the said railroad commission of Texas and the said Reagan, McLean and Foster be perpetually enjoined, restrained, and prohibited from making, issuing, or delivering to the said railroad company, or causing to be made, issued, or delivered to it, any further tariff or tariffs, circular or circulars, order or orders.

"Fifth. It is further ordered, adjudged, and decreed that all other individuals, persons, or corporations be, and they are hereby, perpetually enjoined, restrained, and prohibited from instituting or prosecuting any suit or suits against the said railroad company for the recovery of any damages, overcharges, penalty, or penalties, under or by virtue of the said act or any of its provisions, or under and by virtue of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under and by virtue of the said act and the said tariffs, orders, and circulars, or any or either of them combined.

"Sixth. It is further ordered, adjudged, and decreed that all rates, tariffs, circulars, and orders heretofore made and issued by said commission, and fully described in 'Exhibit C' to the bill of complaint herein, be, and they are hereby, declared to be unreasonable, unfair, and unjust as to complainant and cross complainant, and they are hereby canceled and declared to be null, void, and of no effect.

"Seventh. It is further ordered, adjudged, and decreed that all costs herein be taxed against said defendants Reagan, McLean, Culberson, and Foster and the railroad commission of Texas, and that execution may issue therefor."

From that decree the railroad commission and the attorney general have appealed to this court.

Messrs. Charles A. Culberson, Atty. Gen. of Texas, Henry C. Coke and W. S. Simkins, for appellants:

This being a suit by a citizen of the state of New York against the attorney general and the railroad commission, it is in effect a suit against the state of Texas inhibited by the 11th Amendment to the Constitution of the United States.

Ex parte Ayers, 128 U. S. 443 (81: 216); *Penoyer v. McConnaughey*, 140 U. S. 10 (85: 365); *Re Tyler*, 149 U. S. 190 (87: 697); *Rensselaer & S. R. Co. v. Bennington & R. R. Co.* 18 Fed. Rep. 617; *McWhorter v. Pensacola & A. R. Co.* 2 L. R. A. 504, 24 Fla. 417.

The law does not deny the right of trial by jury. If such were the case it would not render it objectionable. Trial by jury is not essential to due process of law.

Walker v. Saurinet, 92 U. S. 90 (23: 678); *Kennard v. Louisiana*, 92 U. S. 480 (23: 478); *Hurtado v. California*, 110 U. S. 538 (28: 237); *State v. Whisner*, 35 Kan. 275; *Janes v. Reynolds*, 2 Tex. 252; *Reagh v. Spann*, 8 Stew. (Ala.) 108.

The penalties denounced by the statute are not immoderate or excessive.

O'Neil v. State, 58 Vt. 140, 56 Am. Rep. 557, 144 U. S. 381 (86: 455); *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 341; *Chicago & N. W. R. Co. v. Dey*, 2 Inters. Com. Rep. 325, 1 L. R. A. 744, 85 Fed. Rep. 877.

The legislature has the authority to establish courts inferior to the supreme court and to allot and distribute its jurisdiction as it may deem proper.

Atlantic Exp. Co. v. Wilmington & W. R. Co. 18 L. R. A. 393, 111 N. C. 463.

By section 22 of the act its provisions are expressly limited to the transportation of passengers, freight and cars between points within this state and the rates fixed are also thus limited. In the United States all commerce is subject to regulation, interstate commerce by Congress and internal commerce by the states.

Stone v. Farmers Loan & T. Co. 116 U. S. 334 (29: 645); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 215 (29: 166), 1 Inters. Com. Rep. 382; *Hatterman v. Western U. Teleg. Co.* 127 U. S. 411, (32: 229), 2 Inters. Com. Rep. 59; *Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co.* 2 Inters. Com. Rep. 351, 37 Fed. Rep. 618.

Traffic arrangements and competitive conditions cannot take from the state its right to regulate domestic commerce.

Chicago, B. & Q. R. Co. v. Dey, 38 Fed. Rep. 663.

If such regulation can be said to affect interstate commerce in any way it is incidentally and so remotely as not to amount to a regulation of such commerce.

Picklen v. Shelby County Taxing Dist. 145 U. S. 24 (36: 601), 4 Inters. Com. Rep. 79; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192 (36: 673), 4 Inters. Com. Rep. 87; *Louisville & N. R. Co. v. Tennessee R. Co.* 19 Fed. Rep. 699.

A regulation of commerce, by which the revenue derived from the use of property

clothed with a public trust is reduced, is not a taking of property for public use.

Varner v. Martin, 21 W. Va. 534; *Memphis Freight Co. v. Memphis*, 4 Coldw. 419; *Jenal v. Green Island Draining Co.* 12 Neb. 163; *Sholl v. German Coal Co.* 118 Ill. 427, 59 Am. Dec. 379; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *Gilmer v. Lime Point*, 18 Cal. 239.

Sections 1 and 15 of an act of the legislature of Texas alleged to have been passed February 7, 1854, constitutes no contract between the railroad company, the state and bondholders.

Pennsylvania R. Co. v. Miller, 132 U. S. 75 (82: 267); *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 454 (33: 978), 3 Inters. Com. Rep. 209; *Dows v. Chicago*, 78 U. S. 11 Wall. 112 (20: 67); *Cross v. Del Valle*, 68 U. S. 1 Wall. 5 (17: 515); *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.* 78 U. S. 6 Wall. 742 (18: 856); *Bound v. South Carolina R. Co.* 47 Fed. Rep. 33; *Dill v. Shahan*, 25 Ala. 694, 60 Am. Dec. 540; *Wetmore v. Fiske*, 15 R. I. 354.

The act approved March 10, 1875, authorizing the consolidation, contains no provision in reference to rates.

Tomlinson v. Branch, 82 U. S. 15 Wall. 460 (21: 159); *Beach, Railways*, §§ 553, 556, 557.

The act of the legislature of the state of Texas, approved April 8, 1891, creating the railroad commission and defining its powers and duties, is valid and constitutional.

Den v. Hoboken Land & Imp. Co. 59 U. S. 18 How. 280 (15: 376).

Though "due process of law" generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding (2 Coke Inst. 47, 50; *Hoke v. Henderson*, 15 N. C. 15, 25 Am. Dec. 677; *Taylor v. Porter*, 4 Hill, 146, 40 Am. Dec. 274; *Van Zant v. Waddel*, 2 Yerg. 280; *State Bank v. Cooper*, 2 Yerg. 599; *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430; *Greene v. Briggs*, 1 Curt. 811) yet this is not universally true.

Paulsen v. Portland, 149 U. S. 41 (37: 641); *San Mateo County v. Southern Pac. R. Co.* ("Railroad Tax Cases,") 18 Fed. Rep. 751; *Bartlett v. Wilson*, 59 Vt. 35; *Eames v. Savage*, 77 Me. 221, 53 Am. Dec. 751; *Weimer v. Buxbury*, 30 Mich. 211; *Re Ryers*, 72 N. Y. 10, 28 Am. Rep. 88; *People v. Smith*, 21 N. Y. 596; *Re Union Elec. R. Co.* 2 L. R. A. 359, 112 N. Y. 74; *Baltimore v. Scharf*, 54 Md. 517; *Baltimore Belt R. Co. v. Baltzell*, 75 Md. 99; *Budd v. New York*, 143 U. S. 517 (36: 247), 4 Inters. Com. Rep. 45; *McMillen v. Anderson*, 95 U. S. 41 (24: 335); *Burlington, C. R. & N. R. Co. v. Dey*, 8 Iowa, 339.

Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.

Cooley, Const. Lim. (6th ed.) 434; *Lewis Em. Dom.* § 865; *Davidson v. New Orleans*, 96 U. S. 105-107 (24: 620); *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 706 (28: 573); *Stuart v. Palmer*, 74 N. Y. 184, 30 Am. Rep. 239; *People v. O'Brien*, 2 L. R. A. 255, 111 N. Y. 1.

The general rule is that the method pursued should be appropriate to the case, adapted to the end to be attained, just to the parties, with notice and an opportunity to be heard before an appropriate and impartial tribunal.

Cooley, Const. Lim. (6th ed.) 694, 695; *Mills*, Em. Dom. §§ 84, 85; *Lewis*, Em. Dom. § 318; *Buffalo Bayou*, B. & C. R. Co. v. *Ferris*, 26 Tex. 599; *Rhine v. McKinney*, 58 Tex. 391; *Menges v. Albany*, 56 N. Y. 374.

Argument is unnecessary to show that railroad commissions are peculiarly appropriate tribunals to fix and establish rates. It is universally accepted law.

Stone v. Farmers Loan & T. Co. 116 U. S. 307 (29: 686); *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418 (38: 970), 3 Inters. Com. Rep. 209; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 839 (36: 176); *Tilley v. Savannah, F. & W. R. Co.* 5 Fed. Rep. 658; *Chicago & N. W. R. Co. v. Dey*, 2 Inters. Com. Rep. 325, 1 L. R. A. 744, 35 Fed. Rep. 873; *People v. Harper*, 91 Ill. 366; *State v. Chicago, M. & St. P. R. Co.* 83 Minn. 281; *Georgia R. Co. v. Smith*, 70 Ga. 694; *Stone v. Yazoo & M. V. R. Co.* 62 Miss. 607, 52 Am. Dec. 193; *McWhorter v. Pensacola & A. R. Co.* 2 L. R. A. 504, 24 Fla. 417; *Wellman v. Chicago & G. T. R. Co.* 88 Mich. 592; *State v. Fremont & E. M. V. R. Co.* 22 Neb. 313; *Atlantic Exp. Co. v. Wilmington & W. R. Co.* 18 L. R. A. 898, 111 N. C. 463.

In all such cases, where not in conflict with the state constitution, the findings of the board of commissioners or other tribunal may be made final and conclusive.

Mills, Em. Dom. § 322; *Lewis*, Em. Dom. §§ 520, 536; 2 Dill. Mun. Corp. § 619; *Ex parte Cook*, 49 Cal. 403; *Rhoads v. Cushman*, 45 Ind. 85; *Emery v. Bradford*, 29 Cal. 85; *Houston T. & B. R. Co. v. Randolph*, 24 Tex. 383; *Re Fowler*, 53 N. Y. 63; *Williams v. School Dist. No. 6*, 38 Vt. 279; *Norfolk S. R. Co. v. Ely*, 95 N. C. 77; *Passavant v. United States*, 148 U. S. 219 (37: 428); *Hilton v. Merritt*, 110 U. S. 97 (28: 83); *Quinby v. Conlan*, 104 U. S. 425 (26: 802); *Ex parte Fassett*, 142 U. S. 479 (35: 1087); *Fong Yue Ting v. United States*, 149 U. S. 714 (37: 918); *Cooley*, Taxn. 528, 529.

The railroad commission is a special tribunal peculiarly adapted to discharge the duties devolved upon it and invested with legislative and judicial or, certainly, quasi judicial powers, which are to be exercised after the manner of the legislature and the courts.

Tilley v. Savannah, F. & W. R. Co. 5 Fed. Rep. 659; *Re County Seat of Linn County*, 15 Kan. 500; *People v. Turner*, 117 N. Y. 227; *Ballard v. Thomas*, 19 Gratt. 14; *State v. Jersey City*, 35 N. J. L. 381; *Arrowsmith v. Harmoning*, 118 U. S. 195 (30: 248); *Kelly v. Pittsburgh*, 104 U. S. 78 (26: 658); *Wellman v. Chicago & G. T. R. Co.* 88 Mich. 624; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 460 (38: 982), 3 Inters. Com. Rep. 209.

Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable.

Keokuk N. L. Puckett Co. v. Keokuk, 95 U. S. 89 (24: 381); *Allen v. Louisiana*, 108 U. S. 83 (26: 819); *Little Rock & Ft. S. R. Co. v. Worthen*, 120 U. S. 102 (30: 590); *Florida Cent. R. Co. v. Schutte*, 108 U. S. 142 (26: 835); *Well v. Calhoun*, 25 Fed. Rep. 873.

When rates are established either by the legislature or a commission, whether they are reasonable is a legislative or administrative question, and not ordinarily the subject of judicial investigation and determination.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 460 (38: 982), 3 Inters. Com. Rep. 209; *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 471 (22: 688); 4th Annual Report, Interstate Commerce Commission, 17; *Tilley v. Savannah, F. & W. R. Co.* 5 Fed. Rep. 658; *Wellman v. Chicago & G. T. R. Co.* 88 Mich. 623; *Georgia R. Co. v. Smith*, 70 Ga. 694.

The state may regulate and control the imposition of tolls.

Blake v. Winona & St. P. R. Co. 19 Minn. 418, 18 Am. Rep. 345.

The rights of the companies and bondholders are subordinate to those of the public.

Talcott v. Pine Grove Twp. 1 Flip. 45; *Gates v. Boston & N. Y. A. L. R. Co.* 58 Conn. 343; *State v. East Line & R. R. Co.* (Tex.) 48 Am. & Eng. R. Cas. 656; *Munn v. Illinois*, 94 U. S. 133 (24: 86); *Tilley v. Savannah, F. & W. R. Co.* 5 Fed. Rep. 654.

Interest of the carrier is not alone to be considered in fixing a rate, but the interest of the public is paramount and should be given its due weight.

2d Annual Report, Interstate Commerce Commission, 9; *Re Atlanta & W. P. R. Co.* 2 Inters. Com. Rep. 472; *Thurber v. New York Cent. & H. R. Co.* 2 Inters. Com. Rep. 751; *Delaware State Grange Patrons of Husbandry v. New York, P. & N. R. Co.* 3 Inters. Com. Rep. 554.

The courts cannot interfere or substitute their judgment for that of the commissioners, but the tariffs as fixed by the commissioners must, in so far as the courts are concerned, be left to the test of experience.

Pensacola & A. R. Co. v. State, 3 L. R. A. 661, 25 Fla. 310; *Storrs v. Pensacola & A. R. Co.* 29 Fla. 631; *Chicago & N. W. R. Co. v. Dey*, 2 Inters. Com. Rep. 825, 1 L. R. A. 744, 35 Fed. Rep. 878; *Tilley v. Savannah, F. & W. R. Co.* 5 Fed. Rep. 654.

Messrs. John F. Dillon, E. B. Kruttschnitt, Herbert B. Turner and John J. McCook, for the Farmers' Loan & Trust Company, appellee:

This is not a suit against the state of Texas, and hence is not one within the prohibition of the 11th Amendment to the Constitution of the United States.

Pennoyer v. McConaughy, 140 U. S. 1 (35: 363); *Poindexter v. Greenhow*, 114 U. S. 288 (29: 192); *McWhorter v. Pensacola & A. R. Co.* 2 L. R. A. 504, 24 Fla. 417, 37 Am. & Eng. R. Cas. 566.

The United States circuit court, sitting as a court of equity, has the fullest jurisdiction.

Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 153 (24: 94); *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 (24: 97); *Stone v. New Orleans & N. E. R. Co.* 116 U. S. 352 (29: 651); *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174 (32: 377); *Mobile v. Louisville & N. R. Co.* 84 Ala. 115, 36 Eng. & Am. R. Cas. 171; *Baltimore v. Radecke*, 49 Md. 217; *Tuchman v. Welch*, 42 Fed. Rep. 548; *Schandler Bottling Co. v. Welch*, 43 Fed. Rep. 563.

This suit being one within the jurisdiction of a court of general equity powers, it is within

the jurisdiction of the courts of the United States.

Omaha Horse R. Co. v. Cable Tramway Co. 32 Fed. Rep. 727.

The Texas Railroad Commission Act, in respect of fixing and enforcing rates of charges, is in violation of the Constitution of the United States. It denies to railway companies the equal protection of the laws, and deprives the companies of their property without due process of law.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 564 (30: 246), 1 Inters. Com. Rep. 81; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 458 (33: 981); *Munn v. Illinois*, 94 U. S. 113 (24: 77); *Spring Valley Water Works v. Schottler*, 110 U. S. 347 (28: 173); *Stone v. Farmers Loan & T. Co.* 116 U. S. 307 (29: 686); *Dow v. Beidelman*, 125 U. S. 680 (31: 841), 2 Inters. Com. Rep. 56; *Chicago & N. W. R. Co. v. Dey*, 2 Inters. Com. Rep. 825, 1 L. R. A. 744, 85 Fed. Rep. 866; *Pensacola & A. R. Co. v. State*, 8 L. R. A. 661, 25 Fla. 310, 37 Am. & Eng. R. Cas. 579.

Legislative regulation of fares and rates, is limited by the line of reasonableness; if unreasonable they deprive the company of its property without due process of law, and the question whether they are unreasonable is a judicial question.

Hudd v. New York, 148 U. S. 517 (36: 247), 4 Inters. Com. Rep. 45; *Chicago & G. T. R. Co. v. Wellman*, 148 U. S. 339 (36: 176).

The Texas Railroad Commission is not a court. Its proceedings relating to the fixing of rates are administrative and not judicial.

Kilbourn v. Thomson, 108 U. S. 168 (26: 377); *Houston T. & B. R. Co. v. Randolph*, 24 Tex. 317; *Willis v. Owen*, 43 Tex. 41; *United States v. Lee*, 106 U. S. 196 (27: 171); *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 37 Fed. Rep. 567; *Interstate Commerce Com. v. Lehigh Valley R. Co.* 3 Inters. Com. Rep. 796, 49 Fed. Rep. 177; *Toledo Produce Exchange v. Lake Shore & M. S. R. Co.* 3 Inters. Com. Rep. 831.

The Texas act is unconstitutional.

Marx v. Hanthorn, 148 U. S. 172 (37: 410); *Pensacola & A. R. Co. v. State*, 8 L. R. A. 661, 25 Fla. 310, 37 Am. & Eng. R. Cas. 579.

The commission's rates are confiscatory.

Messrs. Alexander G. Cochran, Winslow S. Pierce and R. S. Lovett, for the International & Great Northern Railroad Company, Cross, complainant and appellee.

Mr. Justice Brewer delivered the opinion of the court:

The questions in this case are of great importance, and have been most ably and satisfactorily discussed by counsel for the respective parties.

We are met at the threshold with an objection that this is, in effect, a suit against the state of Texas, brought by a citizen of another state, and, therefore, under the 11th Amendment to the Constitution, beyond the jurisdiction of the Federal court. The question as to when an action against officers of a state is to be treated as an action against the state has been of late several times carefully considered by this court, especially in the cases of *Ex parte*

Ayers, 128 U. S. 443 [31: 216], by *Mr. Justice Matthews*, and *Pennoy v. McConaughy*, 140 U. S. 1 [35: 363], by *Mr. Justice Lamar*. In the former of these cases it was said (p. 505 [239]):

"To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

And in the latter (p. 9 [865]):

"It is well settled that no action can be maintained in any Federal court by the citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that 'no state shall pass any law impairing the obligation of contracts.' This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself.

"In the application of this latter principal, two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

"The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, and thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *Ex parte Ayers*, 128 U. S. 443 [31: 216]; *Louisiana v. Jumel*, 107 U. S. 711 [27: 448]; *Antoni v. Greenhow*, 107 U. S. 769 [27: 468]; *Cunningham v. Macon & B. R. Co.* 109 U. S. 446 [27: 992]; *Hagood v. South-ern*, 117 U. S. 52 [29: 805].

"The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the 11th Amendment, an action against the state. *Osborn v. Bank of United States*, 23 U. S. 9 Wheat. 738 [6: 204]; *Davis v. Gray*, 33 U. S. 16 Wall. 208 [21: 447]; *Tomlinson v. Branch*,

82 U. S. 15 Wall. 480 [21: 189]; *Litchfield v. Webster County*, 101 U. S. 778 [25: 925]; *Allen v. Baltimore & O. R. Co.* 114 U. S. 811 [29: 200]; *Louisiana Board of Liquidation v. McComb*, 92 U. S. 531 [23: 623]; *Pindecker v. Greenhoe*, 114 U. S. 270 [29: 185]."

Appellants invoke the doctrines laid down in these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates is the state, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of state officers under a constitutional statute is not subject to challenge in the Federal court. We are unable to yield our assent to this argument. So far from the state being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the state can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the state is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and Federal, is in restraining the collection of taxes, illegal in whole or in part.

Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. In *Cunningham v. Macon & B. R. Co.* 109 U. S. 446, 452 [27: 992, 994], it was said:

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.

"In these cases he is not sued as, or because he is, the officer of the government, but as an 4 INTER 8.

individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. See *Mitchell v. Harmony*, 54 U. S. 18 How. 115 [14: 75]; *Bates v. Clark*, 95 U. S. 204 [24: 471]; *Meigs v. McClung*, 18 U. S. 9 Cranch, 11 [8: 639]; *Wilcox v. Jackson*, 38 U. S. 18 Pet. 498 [10: 284]; *Brown v. Huger*, 62 U. S. 21 How. 805 [16: 125]; *Grisar v. McDowell*, 73 U. S. 6 Wall. 863 [18: 863].

Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the Federal courts. *Mercer County Supra. v. Cowles*, 74 U. S. 7 Wall 118 [19: 86]; *Lincoln County v. Luning*, 133 U. S. 529 [33: 766]; *Chicot County v. Sherwood*, 148 U. S. 529 [37: 546].

We need not, however, rest on the general powers of a Federal court in this respect for in the act before us express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit. Section 6 provides that any dissatisfied "railroad company, or other party at interest, may file a petition" "in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant." The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis county, but in Travis county. The language differing from that which ordinarily would be used to describe a court of the state was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts. The Circuit Court for the Western District of Texas is "a court of competent jurisdiction in Travis county. Not only is Travis county within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held. 23 Stat. at L. 35. It comes, therefore, within the very terms of the act. It cannot be doubted that a state, like any other government, can waive exemption from suit. Were this in terms a suit against the state, if by express statute the state had waived its exemption and consented that suit might be brought against it by name in any court of competent jurisdiction in Travis county, it might well be argued that thereby it consented to a suit, brought by a citizen of another state, in the Circuit Court of the United States for the Western District of Texas, sitting in Travis county, on the ground that the limitations of the 11th Amendment to the Federal Constitution simply create a personal privilege which can at any time be waived by the state. However, it is unnecessary to go so far as that, for

this cannot, for the reasons heretofore indicated, in any fair sense be considered a suit against the state.

Still another matter is worthy of note in this direction. In the famous *Dartmouth College Case*, 17 U. S. 4 Wheat. 518 [4: 629], it was held that the charter of a corporation is a contract protected by that clause of the National Constitution, which prohibits a state from passing any law impairing the obligation of contracts. The International & Great Northern Railroad Company is a corporation created in the state of Texas. The charter which created it is a contract whose obligations neither party can repudiate without the consent of the other. All that is within the scope of this contract need not be determined. Obviously, one obligation assumed by the corporation was to construct and operate a railroad between the termini named; and on the other hand one obligation assumed by the state was that it would not prevent the company from so constructing and operating the road. If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or of property, it would not be doubted that that express stipulation formed a part of the obligation of the state which it could not repudiate. Whether, in the absence of an express stipulation of that character, there is not implied in the grant of the right to construct and operate, the grant of a right to charge and collect such tolls as will enable the company to successfully operate the road and return some profit to those who have invested their money in the construction, is a question not as yet determined. It is at least a question which arises as to the extent to which that contract goes, and one in which the corporation has the right to invoke the judgment of the courts; and if the corporation, a citizen of the state, has a right to maintain a suit for the determination of that question, clearly a citizen of another state, who has, under authority of the laws of the state of Texas, become pecuniarily interested in, equitably, indeed, the beneficial owner of the property of the corporation, may invoke the judgment of the Federal courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the state in limitation of the right to collect tolls. Our conclusion from these considerations is that the objection to the jurisdiction of the circuit court is not tenable, and this, whether we rest upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States.

Passing from the question of jurisdiction to the act itself, there can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation. *Stone v. Farmers Loan & T. Co. (Railroad Commission Cases)* 116 U. S. 807 [29:636]. No valid objection, there-

fore, can be made on account of the general features of this act; those by which the state has created the railroad commission and entrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads of the state.

Specific objections are made to the act, on the ground that, by section 5, the rates and regulations made by the commission are declared conclusive in all actions between private individuals and the companies, and that by section 14 excessive penalties are imposed upon railroad corporations for any violation of the provisions of the act; and thus, as claimed, there is not only a limitation but a practical denial to railroad companies of the right of a judicial inquiry into the reasonableness of the rates prescribed by the commission. The argument is, in substance, that the railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, cannot be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property; that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the commission from re-establishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable, and oppressive regulations may be prescribed by the commission.

It is enough to say in respect to these matters, at least so far as this case is concerned, that it is not to be supposed that the legislature of any state, or a commission appointed under the authority of any state, will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals; and also that no legislation of a state, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the Federal courts, sitting as courts of equity. So that if in any case, there should be any mistaken action on the part of a state, or its commission, injurious to the rights of a railroad corporation, any citizen of another state, interested directly therein, can find in the Federal court all the relief which a court of equity is justified in giving. We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions, and if the rates established by the commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains un-

challenged—that which establishes the commission, and empowers it to make reasonable rates and regulations for the control of railroads. It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power. Applying this rule, and the invalidity of these two provisions may be conceded without impairing the force of the rest of the act. The creation of a commission, with power to establish rules for the operation of railroads and to regulate rates, was the prime object of the legislation. This is fully accomplished whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive or simply prima facie evidence of what is just and reasonable. The matters of penalty and the effect as evidence of the rates are wholly independent of the rest of the statute. Neither can it be supposed that the legislature would not have established the commission and given it power over railroads without these independent matters. In other words, it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties and the provision, as to evidence, were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment. Take a similar body of legislation—a tax law. There may be incorporated under such a law a provision giving conclusive effect to tax deeds, and also a provision as to the penalties incurred by non-payment of taxes. These two provisions may, for one reason or another, be obnoxious to constitutional objections. If so, they may be dropped out, and the balance of the statute exist. It would not for a moment be presumed that the whole tax system of the state depended for its validity upon the penalties for non payment of taxes or the effect to be given to the tax deed. We, therefore, for the purposes of this case, assume that the two provisions of the statute are open to the constitutional objections made against them. We do not mean by this to imply that they are so in fact, but simply that it is unnecessary to consider and determine the matter, and we leave it open for future consideration.

It appears from the bill that, in pursuance of the powers given to it by this act, the state commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the government and beyond examination by the courts.

It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of per-

sons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry, altered because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation. In *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155 [24: 94], and *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 [24: 97], the question of legislative control over railroads was presented, and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control. As stated by Mr. Justice Miller, in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 569 [30: 244, 248], 1 Inters. Com. Rep. 81, in respect to those cases:

“The great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state within which a railroad company did business to regulate or limit the amount of any of these traffic charges.”

There was in those cases no decision as to the extent of control, but only as to the right of control. This question came again before this court in *Stone v. Farmers Loan & T. Co. (Railroad Commission Cases)* 116 U. S. 807, 881 [29: 686, 644], and while the right of control was reaffirmed a limitation on that right was plainly intimated in the following words of the Chief Justice:

“From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.”

This language was quoted in the subsequent case of *Dow v. Beidelman*, 125 U. S. 680, 699 [81: 841, 848], 2 Inters. Com. Rep. 56. Again, in *Chicago, M. & St. P. R. Co. v. Minnesota*, 184 U. S. 418, 458 [83: 970, 981], 8 Inters. Com. Rep. 209, it was said by Mr. Justice Blatchford, speaking for the majority of the court:

“The question of the reasonableness of a

rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination."

And in *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 839, 844 [86: 176, 179], is this declaration of the law:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Budd v. New York, 143 U. S. 517 [86: 247], 4 Inters. Com. Rep. 45, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business, that of elevating grain, was within legislative control as to the matter of rates. It was said in the opinion: "In the cases before us, the records do not show that the charges fixed by the statute are unreasonable." Hence there was no occasion for saying anything as to the power or duty of the courts in case the rates as established had been found to be unreasonable. It was enough that upon examination it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground.

These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another state, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission.

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A classification was made by the commission, and different rates established for different kinds of goods. These rates were prescribed by successive circulars. Classification of rates is based on several considerations, such as bulk, value, facility of handling, etc., it is recognized in the management of all railroads, and no complaint is here made of the fact of classification, or the way in which it was made by the commission. By these circulars, rates all along the line of classification were reduced from those theretofore charged on the road. The challenge in the case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not therefore, within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decrees must either condemn or sustain this act of the quasi legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this.

We pass then to the remaining question, Were the rates, as prescribed by the commission, unjust and unreasonable? The bill, it will be remembered, was filed by a second mortgagee. The railroad company was made a defendant, and filed a cross bill. Each of these bills contains a general averment that the rates are unjust and unreasonable. That in the original bill, which was filed April 30, 1892, or some six or seven months after the action of the commission, is in these words:

"Eighth. That the classifications and schedules of rates and charges so announced and promulgated in and by said commodity tariffs and circulars of said commission, or sought so to be, as hereinbefore shown, are unfair, unjust, and unreasonable, and that the same cannot be adopted or put or continued in effect by the defendant company or defendant receiver without serious and irreparable loss to it, and serious and irreparable injury to and destruction of the property, rights, and interests of your orator and the beneficiaries of its trust as hereinafter more fully set forth; that the rates so charged and announced by said commission are not compensatory, and are unreasonably low, and the adoption and enforcement thereof would result, as nearly as can be estimated, in a diminution of revenues derived from the operation of said International & Great Northern Railroad, aggregating more than \$200,000 per annum, and that the revenues from said railroad, so reduced and diminished, would be inadequate and insufficient to provide for the payment of the interest upon the prior obligations of the defendant railroad company, recited in paragraph 4 hereof, and the interest upon the second mortgage bonds secured by said mortgage to your orator as trustee, after providing for the expenses of operating said lines of railroad and property, and maintaining the same in proper order and good working condition, so that the traffic and business of said road, and of every part thereof shall at

all times be conducted with safety to person and property, and with due expedition."

It may not be just to take this as an allegation of a mere matter of fact, the truthfulness of which is admitted by the demurrer, and which, as thus admitted, eliminates from consideration all questions as to the true character and effect of the rates, yet it is not to be ignored. There are often in pleadings general allegations of mixed law and fact, such as of the ownership of property and the like, which standing alone are held to be sufficient to sustain judgments and decrees, and yet are always regarded as qualified, limited, or even controlled by particular facts stated therein. It would not, of course, be tolerable for a court administering equity to seize upon a technicality for the purpose or with the result of entrapping either of the parties before it. Hence, we should hesitate to take the filing of the demurrers to these bills as a direct and explicit admission on the part of the defendants that the rates established by the commission are unjust and unreasonable. Yet it must be noticed that at first answers were filed, tendering issue upon the matters of fact, and testimony was taken, the extent of which, however, is not disclosed by the record. After that the defendants applied for leave to withdraw their answers and file demurrers. It is not to be supposed that this was done thoughtlessly. But one conclusion can be drawn from that action, and that is that upon the taking of their testimony defendants became satisfied that the particular facts were as stated in the bills, and that the conclusions to be drawn from such facts could not be overthrown by any other matters. Hence, if it appears that the facts stated in detail tend to prove that the rates are unreasonable and unjust, we must assume, as against the demurrers, that the general allegation heretofore quoted is true, and that there are no other and different facts which, if proved, might induce a different conclusion, and compel a different result.

What, then, are the special facts disclosed in the several bills? It appears that there is a bonded indebtedness of over \$15,000,000, and in addition capital stock to the amount of \$9,755,000; that the bonds and stock were issued for and represent value, and that the rates theretofore existing on the road were not sufficient to enable the company to pay all the interest on the bonds. At the time suit was commenced the first mortgage bonds outstanding amounted to \$7,054,000, drawing 6 per cent interest; the second mortgage bonds to \$7,954,000, drawing also 6 per cent interest. The stockholders had never received any dividends whatever upon their investment, but on the contrary (as appears from the cross bill filed subsequently to the commencement of the suit), they had been forced to pay a cash assessment of over a million of dollars, or about 12 per cent of the face value of the stock, for the purpose of providing in part for the interest upon the first mortgage bonds; the holders of those bonds had been compelled to accept, and had accepted, in payment of one half of the accrued and defaulted interest—a sum exceeding \$750,000—deferred certificate of indebtedness bearing interest at the rate of 5 per cent; the holders of the second mortgage bonds had

been called upon to fund, and substantially all had consented to fund, passed due interest, amounting to upwards of \$1,250,000, in third mortgage bonds, bearing 4 per cent interest, and they had also been required to reduce, and substantially all had agreed to reduce, the interest on their bonds to 4 per cent per annum for the period of six years, and thereafter to 5 per cent per annum. For about three years the road had been in the hands of a receiver, appointed on account of the default of the company in the payment of its obligations. A statement in detail was incorporated in the bill of the earnings and operating expenses of the road during the years 1889 and 1890, and the first nine months of 1891, which was supplemented by a like statement in the cross bill subsequently filed of the earnings and expenses for the entire year 1891 and the first three months of 1892. These statements show the following figures:

1889: Earnings	\$3,488,186 14
Operating expenses, exclusive of taxes	2,629,452 90
Surplus	858,733 24
1890: Earnings	3,646,422 38
Operating expenses, exclusive of taxes	3,148,245 09
Surplus	498,177 24
1891: Earnings	3,645,641 79
Operating expenses, exclusive of taxes	3,098,550 30
Surplus	555,091 50
Three months of 1892: Earnings	750,178 18
Operating expenses, exclusive of taxes	829,074 87
Deficit	69,896 69

The bill also contains a tabular statement of the revenue per ton per mile derived from the operation of the road during the years 1883 to 1893, inclusive, as follows:

"Revenue per ton per mile for 1883 (in cents) 2.08	
" " " 1884	1.90
" " " 1885	1.71
" " " 1886	1.65
" " " 1887	1.58
" " " 1888	1.53
" " " 1889	1.44
" " " 1890	1.38
" " " 1891 (first nine months) 1.30"	

The mileage owned and operated by the company within the state of Texas amounts to 825 miles. There had been necessarily expended in cash in the construction and equipment of its road more than \$50,000 per mile and it could not be replaced for less than \$30,000 per mile. There is also this allegation in the cross bill:

"That the lines of railway of your orator's company, have at all times been operated as economically as practicable, and that its operating expenses have at all times been as reasonable and low in amount as they could be made by economical and judicious management, and that it has not been possible for your orator to operate said road for less than it has been operated. That for the year ending June 30, 1892, there were employed by your orator's company seventeen general officers, who received during said year an average daily compensation of \$12.64, and, exclusive of its general officers, all of its employees during and for the year ending June 30, 1892, received an average daily compensation of \$2.01, and that at all times your orator has secured the service of

its officers and employes as cheaply as practicable, and has employed no more than necessary, and that the above were fair and reasonable rates of pay. That at all times the International & Great Northern Railroad Company has secured all supplies, material, and property, of whatever character, for the operation of its road at the cheapest market price and at as low rates as the same could be secured, and has secured and used no more than actually necessary in the operation of the road."

In the amendment to the cross bill, filed in March, 1893, is given a table showing the actual reductions in amounts received by the railroad company for the transportation of the different classes of goods under the operation of the new tariffs up to August 31, 1892, and amounting to \$159,694.51, and also a table showing the per cent of reductions as to different articles—varying from 5 per cent on cement to 54.90 per cent on grain in carloads. The bill also, in general terms, negatives the probability of any increase in amount of business to compensate for the reduction in rates, a negation sustained by the figures given in the amended bill as to the actual effect upon the receipts. It also contains a general averment that the rates on interstate business would be injuriously affected to an equal amount by reason of the reduction of rates on business within the state.

As against these facts the attorney general presses these matters: In the table in the bill heretofore referred to, showing earnings and expenses during the years 1889 and 1890, and the first nine months of 1891, there is this item, several times repeated, "balance of income account," and this on September 30, 1891, is stated at \$3,795,785.68. Of what this account is composed we are not informed (possibly there was included within it the proceeds of the land grant, which, as we are told, was made by the state to the corporation) but, whatever it includes, it was on January 1, 1889, as stated, \$2,612,118.68, which would make the increase of that account during the two years and nine months to be \$1,183,667. Confessedly no interest was paid during those years, and that amounted each year to something like \$900,000, or nearly two millions and a half for the two years and nine months. It is obvious that, no matter what may have been in the bookkeeping of the company included in this account, or how much or from what sources in prior years the road had accumulated this balance the increase during the time stated did not equal the accruing interest. The attorney general also notices the report for the year ending June 30, 1892, made by the company to the railroad commission, a copy of which is attached as an exhibit to the amendment to the cross bill, and from that he tabulates a statement which, as he contends, shows that the earnings during that year were sufficient to pay the operating expenses and fixed charges. We give the table as he has prepared it:

"Gross earnings from operation.....	\$3,568,690 26
Less operating expenses.....	2,966,204 12
Income from operation.....	\$582,486 14
To which should be added amounts expended for 'cost of road, equipment, and permanent improvements,' ad-	
4 INTER S.	

mitted to have been included in operating expenses.....	302,685 77
Dividends on (compress) stocks owned.....	8,020 00
Total income.....	\$892,591 91
Deductions from Income.	
Interest on funded debt accrued during the year, viz:	
On \$7,954,000 first mortgage bonds at 6 per cent.....	\$477,240 00
On \$7,064,000 second mortgage bonds, one month, at 6 per cent.....	85,270 00
On \$7,054,000 second mortgage bonds, eleven months, at 4½ per cent.....	290,977 50
Total interest accrued.....	\$853,487 50
Rental paid Colorado River Bridge Company.....	14,583 32
Taxes.....	28,951 85
Total deductions.....	\$847,022 17
Surplus after paying operating expenses proper. Interest accrued on bonds, taxes, etc.....	\$45,569 74"

But this table ignores that which is disclosed in the cross bill, to wit, \$750,000 in certificates of indebtedness, bearing interest at five per cent, and \$1,250,000, third mortgage bonds, bearing four per cent interest, the interest on which sums would exceed all the apparent surplus. These items also appear in the report, under the head of current liabilities, the total balance of which on July 1, 1892, is given as \$3,772,062.94, which sum may not unreasonably be taken as showing by how much the company has fallen short of paying its operating expenses and fixed charges. Again, the sum of \$302,085.77 appears in that table, under the description "Cost of road, equipment and permanent improvements, admitted to have been included in operating expenses," and is added to the income as though it had been improperly included in operating expenses. But before this change can be held to be proper, it is well to see what further light is thrown on the matter by other portions of the report. That states that there were no extensions of the road during that year, so that all of this sum was expended upon the road as it was. Among the items going to make up this sum of \$302,085.77 is one of \$113,212.09 for rails, and it appears from the same report that there was not a dollar expended for rails, except as included within this amount. Now, it goes without saying that in the operation of every road there is a constant wearing out of the rails and a constant necessity for replacing old with new. The purchase of these rails may be called permanent improvements, or by any other name, but they are what is necessary for keeping the road in serviceable condition. Indeed, in another part of the report, under the head of "renewals of rails and ties," is stated the number of tons of "new rails laid" on the main line. Other items therein are for fencing, grading, bridging, and culvert masonry, bridges and trestles, buildings, furniture, fixtures, etc. It being shown affirmatively that there were no extensions it is obvious that these expenditures were those necessary for a proper carrying on of the business required of the company. Certainly the mere title, under which these expenditures are once stated, is not sufficient to overthrow the facts so fully and clearly shown that the stockholders have never received any dividends; that in order to meet

the accumulating interest on the bonds they have had to put their hands in their pockets and advance a million and over of dollars. Those are facts whose significance cannot be destroyed by any mere manner of bookkeeping or classification of expenditures.

Further, the attorney general asserts that there are five trunk lines, of which the International & Great Northern road is one, paralleling each other, and thus dividing the business of the territory through which they pass; that the state of Texas had made large donations of land to railroad companies, and that, as appears from its executive documents, this railroad company had received a donation of 8,352,320 acres to aid in its construction, as well as exemption of all its property from taxation for twenty-five years. He also calls attention to the financial depression which has of late years pervaded every avenue of trade, and adds a table from the report of the commissioner of agriculture of Texas, showing as to different articles produced in that state an increase in the amount of product and a decrease in the prices received therefor; all of which considerations, he earnestly insists, affect the question of the reasonableness of the rates prescribed.

None of the matters mentioned in the foregoing paragraph appear in the pleadings or elsewhere in the record, and it is, therefore, doubtful to what extent they may be taken into consideration. If we may take judicial notice of the five parallel roads, must we also assume that the existence of the other four diminishes the business of the International & Great Northern, and that, if they had never been built, all the business which now passes over the five would have been carried by the one? May not the topography of the country be such as to prevent any of the business of the other roads from ever coming to the International & Great Northern, even if, without them, it was obliged to seek water or wagon transportation? May not the building of those other roads have increased the population and business to such an extent that the overflow has, so far from diminishing, really resulted in an increase of the business of the International & Great Northern? If there has been a division of business, has there not also been a competition by which the rates have been reduced, and reduced to such an extent as to forbid the propriety of any further reduction? If we may take judicial notice that the state made a grant of three million and odd acres to the company, must we also take notice of the value of that land, of its sale, and the amount realized therefrom? While undoubtedly there has been lately a period of financial depression, can we take judicial notice of the extent to which that depression has reduced the prices of the products of the state; and is the report of the commissioner of agriculture of the state to be considered as evidence before us, and accepted as substantially correct, both as to product and prices? And if the depreciation of prices, as stated in said report, be accepted as correct, will such depreciation uphold a compulsory reduction of the rates of transportation to such an extent that some of those who have invested their money in rail-

road transportation receive no compensation therefrom? Is it just to deprive one party of all compensation in order that another may make some profit? They who invest their money in railroads take the same chances that men engaged in other business do of making profit from the carrying on of their business; and, as appears from other cases submitted to us with this, some of the railroads in the state of Texas have operated at a constant loss. But such possibilities of loss are simply the natural results of all business freely carried on, against which the law is powerless to afford protection. Very different are the considerations which arise when the strong arm of the law is invoked to compel parties engaged in legitimate business, and business which cannot be abandoned at will, to so reduce their charges for service as to make the carrying on of that business result in a continued loss. In the one case the law is powerless to prevent injury; in the other it is used to work injury. Counsel suggest that the state itself may construct and operate railroads, and then may properly make rates so low that the business is done at a loss. They refer to the postal system of the United States which, carried on for the common welfare, not infrequently results in a loss which is made good out of the public treasury. But the parallel is not good. In the case suggested the loss is cast through taxation upon the general public, and all bear their proportionate share of that loss which is incurred in securing a common benefit, while the scope of this legislation is to secure such common benefit at the expense of a single class. The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain. If the state were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature. Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?

The act of 1858, to which reference has already been made, contained a section looking to the acquisition by the state of the title to railroad property. Section 17 of the acts (Tex. Gen. Laws, 1853, p. 58) is as follows:

"If the legislature of this state shall at any time make a provision by law for the repayment to any such company of the amount expended by them in the construction of said road, together with all moneys for permanent fixtures, cars, engines, machinery, chattels, and real property then in use for the said road, with all moneys expended for repairs or otherwise, and interest on such sums at the rate of twelve per centum per annum, after deducting the amount of tolls, freights, passage money, and all moneys received from the sale of lands donated by the state to said company, with twelve per centum per annum interest on all such sums, then the road, with all its fixtures and appurtenances aforesaid, and all the lands

donated to the same by the state and remaining unsold, shall vest in and revert to the state: *Provided*, That the state shall not be required to pay or allow a greater rate of interest on any amount of the money so expended by any company which shall have been borrowed from this state than the state shall have received for the same from such company."

This section, as will be perceived, provides for the payment of interest at the high rate of 12 per cent on the difference between what the company has paid out and what it has taken in, and to that extent evidences the thought of the state that justice required the return to the builders of railroads of something more than the actual cost as the condition of depriving them of the title. It is only significant, however, as an expression of the thought of the state at the time; for, were the provision ever so unjust, every corporation which, after the passage of the act, invested its money in building a road would do so with the knowledge that that was the condition upon which the investment was made, and could not, therefore, challenge its validity.

And now, what deductions are fairly to be drawn from all the facts before us? Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property was \$40,000,000; it cannot be replaced to-day for less than \$25,000,000. There are \$15,000,000 of mortgage bonds outstanding against it, and nearly \$10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates was insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest the stockholders have put their hands in their pockets and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employes have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. By the voluntary action of the company the rate in cents per ton per mile has decreased in ten years from 2.08 to 1.80. The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over \$150,000. Can it be that a tariff which under these circumstances has worked such results to the parties whose money built this road is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered results?

It is unnecessary to decide, and we do not

wish to be understood as laying down as an absolute rule that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is not sufficient business to sustain a road. Doubtless too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

But we do hold that a general averment in a bill that a tariff as established is unjust and unreasonable is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than fifty per cent; that under the rates thus voluntarily established the stock, which represents two fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one half the interest on the bonded debt above the operating expenses; and that such an averment so supported will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree reversing it being put in force.

It follows from these considerations that the decree as entered must be reversed in so far as it retains the railroad commission from discharging the duties imposed by this act, and from proceeding to establish reasonable rates and regulations; but must be affirmed so far only as it restrains the defendants from enforcing the rates already established. The costs in this court will be divided.

Decree accordingly.

JOHN H. REAGAN ET AL., *Appts.*,
v.
THE MERCANTILE TRUST COMPANY, Trustee, ET AL.

(See S. C. 154 U. S. 418, 38 L. ed. —.)

[No. 1167.]

Railway company subject to state regulation—rates established by railroad commission.

1. The Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations.
2. So much of the decree of the United States circuit court in this case as restrains the state rail-

road commissioners from proceeding under the railroad commission act to establish reasonable rates and regulations is set aside, but so much of it as restrains the enforcement of the rates already established is affirmed.

Argued April 13, 1894. Decided May 26, 1894.

APP^{EAL} from a decree of the Circuit Court of the United States for the Western District of Texas, perpetually enjoining the Texas & Pacific Railway Company from continuing in effect the rates or tariffs of the Railroad Commission of Texas, and perpetually enjoining the defendants, The Railroad Commission of Texas, and John H. Reagan *et al.*, members of said commission, and Charles A. Culberson, attorney general of said state and their successors, from instituting any suits to recover penalties under the law of Texas, of April 3, 1891, or under or by virtue of any of the tariffs or orders of said commission, etc., and also perpetually enjoining said railroad commission and said Reagan *et al.*, from making any further tariff or tariffs, etc., and also decreeing that the rates and tariffs heretofore made by said commission, and described in the complaint are unreasonable, unfair, and unjust, and that they are cancelled and null and void. *Reversed in part, and affirmed in part.*

The facts are stated in the opinion.

Messrs. C. A. Culberson, H. C. Coke and W. S. Simkins for appellants.

Messrs. John F. Dillon, E. B. Kruttschnitt, John J. McCook, Winslow S. Pierce, Alexander G. Cochran, R. S. Lovett and T. J. Freeman for appellees.

Mr. Justice Brewer delivered the opinion of the court:

The case is similar to that just decided, in which the same parties were appellants and the Farmers' Loan & Trust Company and the International & Great Northern Railroad Company, appellees. It was commenced by the Mercantile Trust Company in the same court against the appellants and the Texas & Pacific Railway Company, with like purpose to restrain the enforcement of the railroad commission act, and with like result. The Mercantile Trust Company was trustee in a deed of trust executed by the Texas & Pacific Railway Company to secure an issue of bonds, and, as a citizen of New York, invoked the jurisdiction of the Federal court.

There are some matters of difference between the two cases which call for special notice. The Texas & Pacific Railway is a corporation organized under the laws of the United States (16 Stat. at L. 573) and by reason of that fact it is earnestly insisted by counsel for it and the Trust Company that it is not subject to the control of the state, even as to rates for transportation wholly within the state. The argument is that it receives all its franchises from Congress; that among those franchises is the right to charge and collect tolls, and that the state has not the power, therefore, in any manner to limit or qualify such franchise. This is an important question and deserves consideration, even though in respect to other matters the facts should present a case exactly parallel to that just decided and calling for a like decision; because if the state has no control in the matter the decree should not be affirmed in part but *in toto*.

We are of the opinion that the contention of the railway and trust companies cannot be sustained, and that the reasoning in the cases of *Thomson v. Union Pac. R. Co.* 76 U. S. 9 Wall. 579 [19: 792] and *Union Pac. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5, 36 [21: 787, 798], leads to this conclusion.

In the first of those cases these facts appeared: The Union Pacific Railway Company (Eastern Division) a corporation created by the legislature of Kansas, received government aid in bonds and land, and, thus aided, constructed its road to become one link in the transcontinental line known as the Union Pacific system. After its construction, the legislature of Kansas having enacted a law laying certain taxes upon its property, a bill was filed to restrain the collection of those taxes, on the ground that the property of the company was mortgaged to the United States, and that it, under the Congressional grant, was bound to perform certain duties and ultimately pay five per cent of its net earnings to the United States, an obligation which would be greatly hindered if the taxes imposed should be collected. But this contention was not sustained, and while

it was said by the *Chief Justice*, delivering the opinion of the court, that Congress had the power to provide an exemption from state taxation in such a case, there was no exemption in the absence of legislation to that effect. This decision was followed by that in the other case, in which a like exemption was sought of the property belonging to the Union Pacific Railroad Company, a corporation created, like the Texas & Pacific Railway Company, by an Act of Congress, and also like the Kansas company, aided by the government in lands and bonds, but here, too, by a majority of the court, the claim of exemption was denied. *Mr. Justice Strong*, in delivering the opinion of the court, said:

"It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitutions, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.

"In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thompson v. Union Pacific*. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the state of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the general government, and, if it is not, it is prohibited by no constitutional implication."

Similarly we think it may be said that, conceding to Congress the power to remove the corporation in all its operations from the control of the state, there is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it, and there is nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the Act of incorporation Congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state to other points also with-

in the state, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the state, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the state, it intended that it should be subjected to the ordinary control exercised by the state over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the legislature of the state, passed in 1873 in respect to it, we are of opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations.

Another matter of difference between the two cases is this: The entire mileage of the International & Great Northern Railway was within the limits of the state of Texas, while the Texas & Pacific Railway Company owns and operates several hundred miles of road outside the limits of the state. No reference is made in the briefs of counsel to this difference, and probably there is nothing in the facts stated in the bill and cross bill in respect to the earnings, operating expenses, and incumbrances of the property which would in any way affect the conclusion as to the reasonableness of the rates imposed; and we only notice the difference now to guard against the inference that such a fact is always without significance in the consideration of questions as to the reasonableness of rates imposed in one of the states within which the line of the carrier runs.

Beyond these two matters of difference we see nothing that calls for any comment. It is true the figures in respect to earnings, operating expenses, incumbrances, reduction of revenue, etc., are not the same in this as in that case, but still, relatively to each other, they have the same significance, and there are in the bills and cross bills the same general averments. It would be useless, therefore, to encumber the record with a mass of figures for the sake of making it clear that the same conclusion must be reached here as in that case.

In this case also, as in that, the decision is that so much of the decree of the circuit court as restrains the defendants from proceeding under the railroad commission act to establish reasonable rates and regulations is set aside, but so much of it as restrains the enforcement of the rates already established is affirmed. The costs in this court will be divided between the parties.

JOHN H. REAGAN ET AL., *Appts.*,

v.

THE MERCANTILE TRUST COMPANY, Trustee, ET AL.

JOHN H. REAGAN ET AL., *Appts.*,

v.

THE MERCANTILE TRUST COMPANY, Trustee, ET AL.

[Nos. 1168, 1169.]

(See S. C. 154 U. S. 418, 38 L. ed. —.)

Cases followed.

The cases of *Reagan v. Farmers Loan & T. Co.* and
Reagan v. Mercantile Trust Co., *ante*, pp. 560,

575, followed, and the same decision and decrees
 made as in those cases.

Submitted April 13, 1894. Decided May 26, 1894.

APPEALS from decrees of the Circuit Court of the United States for the Western District of Texas, perpetually enjoining the railroad companies, defendants, from putting or continuing in effect the tariffs of the railroad commission of Texas, mentioned in the complaint, and perpetually enjoining defendants, the railroad commission of Texas, and the attorney general of that state *et al.*, from instituting any suits for the recovery of penalties under the law of Texas, of April 8, 1891, or under or by virtue of any of the tariffs or orders of said railroad commission, etc., and perpetually enjoining said railroad commission from making or issuing any further tariffs or orders, and decreeing that all rates and tariffs heretofore made by said commission and described in the complaint are unreasonable, unfair, and unjust, and declaring them cancelled, void and of no effect, etc. *Affirmed in part, and reversed in part.*

The facts are stated in the opinion.

Messrs. C. A. Culberson, H. C. Coke and W. S. Simkins for appellants.

Messrs. John F. Dillon, E. B. Kruttschnitt, John J. McCook, W. S. Pierce, Alexander G. Cochran for appellees.

Mr. Justice Brewer delivered the opinion of the court:

These are cases in which, as in those just decided, the tariff established by the Texas Railroad Commission was challenged, and with like result. The St. Louis Southwestern Railway Company, named in the first of these cases, is called by counsel for defendants in their brief "a reorganized bankrupt concern." Its road has a total mileage, including main line and branches, of 572 miles. It would seem to be a railroad which was unwisely built, and one whose operating expenses have always exceeded its earnings. Counsel say that "it is

familiarly known in Texas as a 'teazer,' and, if it ever passes beyond this interesting but unprofitable stage, even its friends will be surprised." We are not advised, and we can hardly be expected to take judicial notice of what is meant by the term "teazer," but it is clearly disclosed by the record that this was an unprofitable road.

The Tyler Southeastern Railway Company, named in the second suit, has a short road of ninety miles, and also appears as a "reorganized bankrupt concern," and one whose road has been operated with constant loss. In the record in each case is found two annual reports returned to the railroad commission, one for the year ending June 30, 1891, and the other for that ending June 30, 1892. Comparing the statements in these reports, defendants' counsel say that the business of the roads has largely increased since the establishment of the rates made by the commission, and urge that no complaint can be made of action which has resulted so favorably. But an examination shows that the report for the year ending June 30, 1891, includes only the earnings and operating expenses for the single month commencing June 1, 1891, when the new company took possession and commenced operations; and so the enormous increase spoken of is simply the difference between the earnings and expenses for twelve months and those for one month. The bills, with their amendments, allege a decrease in the tonnage as well as a decrease in the rates.

We think, therefore, the cases come within the reasoning of the prior opinions, and that it will not do to hold that, because the roads have been operating in the past at a loss to the owners, it is just and reasonable to so reduce the rates as to increase the amount of that loss. Hence, the decrees here will be like those ordered in the prior cases.

JOHN H. REAGAN, ET AL., *Appls.*,

v.

THE FARMERS LOAN & TRUST COMPANY, Trustee, ET AL.

[No. 1170.]

(See S. C. 154 U. S. 420, 38 L. ed. —.)

Cases followed.

This case is controlled by the cases of *Reagan v. Farmers Loan & T. Co.*, *Reagan v. Mercantile Trust Co.* (No. 1) and *Reagan v. Mercantile Trust*

Co. (No. 2) *ante*, pp. 560, 575, 577, and a like decision and decree made herein.

Submitted April 13, 1894. Decided May 26, 1894.

A PPEAL from a decree of the Circuit Court of the United States for the Western District of Texas, perpetually enjoining the Gulf, Colorado & Santa Fé Railroad Company, from continuing in effect the rates and tariffs of the railroad commission of Texas, described in the complaint, etc., and perpetually enjoining the railroad commission of Texas, and John H. Reagan *et al.*, and Charles A. Culberson, attorney general of said state, and their successors, from instituting any suits from the recovery of penalties, under the law of Texas of April 3, 1891, or under or by virtue of any of said rates or tariffs, etc., and further perpetually enjoining said commission and the members thereof, from making or issuing any further rates or tariffs, etc., and decreeing that the rates and tariffs heretofore made and issued by said commission and described in the complaint are unreasonable, unfair, and unjust, and cancelling them and declaring them to be null and void, etc. *Reversed in part and affirmed in part.*

The facts are stated in the opinion.

Messrs. C. A. Culberson, H. C. Coke and W. S. Simkins for appellants.

Messrs. John F. Dillon, E. B. Kruttschnitt, John J. McCook, H. B. Turner, Geo. R. Peck and J. W. Terry for appellees.

Mr. Justice Brewer delivered the opinion of the court:

This case is controlled by the opinions in the four preceding cases. There are one or two differences of fact, but nothing affecting the merits of the controversy. The Gulf, Colorado & Santa Fé Railroad Company was incorporated by the state of Texas, but a part of its line was constructed through the Indian Territory under authority of an Act of Congress. The figures as to earnings, etc., are also different, but they tend to the same result as to the reasonableness of the rates.

A like decree will be entered in this as in the former cases.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CHICAGO, MILWAUKEE & ST. PAUL R. CO., *Appl.*,

v.

WABASH, ST. LOUIS & PACIFIC R. CO.

(See S. C. 61 Fed. Rep. 963.)

1. A pooling contract between several railroad companies which control the business of a large section of country by which all their roads are to be run as one so far as through business is concerned, and each company is to receive a certain proportion of the gross earnings, by either a division of business or of receipts, is void as against public policy.
2. An action will not lie to compel a railroad company to pay over its earnings in excess of its share under an illegal pooling contract by which

several companies agree to divide the earnings from a certain class of business by either giving each its share of the business or of the earnings, since it is not a suit merely to compel an accounting of moneys received but is one to compel specific performance of the contract.

3. Performance of an illegal contract on one side only does not make it an executed contract so that an action can be maintained for the consideration.

May 7, 1894.

A PPEAL by complainant from a decree of the Circuit Court of the United States for the Eastern District of Missouri sustaining a demurrer to a bill filed to compel defendant

to account for freights which it had received and appropriated to its own use in excess of its share under a pooling contract for the division of business and gross receipts among certain railroad companies. *Affirmed.*

Statement by Caldwell, C. J.:

On December fifth and December twenty-ninth, 1883, contracts providing, among other things, for a pooling and division of competitive traffic were entered into by and between seven railroad companies, to wit: The Union Pacific; The Chicago, Rock Island & Pacific; The Chicago, Milwaukee & St. Paul; The Wabash, St. Louis & Pacific; The Chicago & Northwestern; The Chicago, St. Paul, Minneapolis & Omaha, and The Missouri Pacific.

There were four contracts. The first was between the Union Pacific Railway Company as party of the first part, and The Chicago, Rock Island & Pacific Railway Company as party of the second part, and The Chicago, Milwaukee & St. Paul Railway Company as party of the third part.

The other three contracts admitted the other parties in to the pool, and made some modifications and extensions of the original contract. The four contracts were in effect one and will be so treated. The following are some of the material provisions of the contract:

The preamble declares the object of the contract to be to "make the railway system of the party of the first part substantially a part of the railway system of each of the other parties hereto, as to westward bound traffic which will pass through Council Bluffs, in the state of Iowa, and each of the railway systems of the other parties, substantially a part of the system of the party of the first part, as to east bound traffic which will pass through the same place."

"It is declared to be the purpose of the parties hereto by the execution of these articles, and the performance of the several covenants, promises and agreements herein set out, to establish and operate through lines of railway, which shall connect, when the same can be done by a reasonably direct line through Council Bluffs, all points on the system of the party of the first part with all points on the several systems of the other parties (excepting the Kansas division of the party of the first part and its railroads in the state of Kansas) including all extensions of the main lines, branches, and other railways mentioned in the preamble hereto, and all lines and branches which are now owned, controlled or operated by either of the parties hereto in connection with any of its railways above mentioned, and which may be added thereto by construction, purchase, lease, or otherwise, and to secure the operation of all of said lines as to such through traffic as they should be if operated by one corporation which owned all of them."

"The party of the first part covenants, promises and agrees with each and both of the other parties, that:

It will, so far as it lawfully can, deliver to the railways of said other parties, at Council Bluffs, all eastward bound through traffic which may be received by it for transportation to any point which can be reached with reasonable directness, over any of the through

lines composed of the railroads of two or more of the parties hereto, passing through Council Bluffs, and that it will make all lawful and reasonable efforts to secure the transportation of all such through traffic which may be received by it for transportation over such through lines.

"It will divide all competitive through traffic which shall be transferred from its own railways to those of the other parties, as nearly as shall be practicable, into two equal parts, and transfer one of said parts to the railways of each of said parties for transportation to destination, or to the proper connecting line.

"The rates which shall be charged for the transportation of through traffic over the through lines hereby established, for which provision has not been made in the preceding section, shall be fixed in the manner following:

"The established or current rate of the party of the first part as per schedules hereto attached and made a part hereof, between the points at which traffic is received or to which it is destined and Council Bluffs, shall be added to the established or current rates of the parties of the second and third parts, as per schedules hereto attached and made a part hereof, between the points on their several lines at which such traffic is received or to which it is destined and Council Bluffs, and the sum of the two rates shall be the through rate. Provided, however, that the rates upon all through traffic between competitive points which may be connected by a through line over the Northern Pacific Railroad, shall be so adjusted that the rates between such points and all Chicago and Mississippi river points by way of Council Bluffs, shall be as low as by way of St. Paul."

"The through rates on east bound through traffic over the lines hereby established may be reduced by the party of the first part, and the like rates on like traffic west bound may be reduced by the party of the second or third part, by whom it shall be delivered to the party of the first part, when such reduction shall be rendered necessary by competition with lines other than those hereby established. When any through rate is reduced by a party, for any reason, it shall immediately notify the other party hereto of such reduction, and the facts which it is claimed justified such reduction. A reduction of a rate shall continue only so long as shall be necessary because of competition. No rates shall be reduced by any party otherwise than as provided in this and preceding sections."

"If any through rate shall be reduced by any party for reasons which are not satisfactory to the other parties, the rates fixed by the schedule shall be immediately restored and maintained until a majority shall direct a modification, and all traffic transported under modified rates shall be accounted for at full rates in the division of the proceeds of the through rate traffic between the parties. In no case shall a schedule of rates be in any manner modified, altered or reduced for the purpose of drawing traffic from the railways of any party hereto. If any party shall feel aggrieved because of any modification of any through rate, or of any order restoring a rate which has been cut, or by the action of any party tending to

evade or in any wise impair agreed rates, the party so aggrieved may make it the basis of a complaint which shall be determined by reference as hereinafter provided. On the hearing of any such reference, the referees may affirm the order made by a majority of the parties or direct the restoration of the rate reduced, and in a proper case make an award to the party or parties injured by any evasion or unjustifiable reduction of a rate, as compensation for any damages which shall have been sustained.

"If the east bound competitive traffic actually transported by either of the parties of the second or third part, in any one month, shall not amount to the equal share to which it shall be entitled under the provisions of these articles, the balances shall be so adjusted as to give to each the proceeds of an equal share of the gross revenue received by both for the transportation of such traffic.

"To prevent confusion in the settlement of accounts, the following distances are arbitrarily established:

"From Council Bluffs to all points east thereof, which take Chicago rates, five hundred miles; from Council Bluffs to all points east thereof, which take Mississippi river rates, three hundred and forty miles.

"No covenant, promise or agreement in said original articles or in these supplemental articles contained, shall be so construed as to affect or control (otherwise than by securing equality of rates as provided in said original and the supplemental articles) through traffic specially routed, marked and consigned by the shippers over through lines of which the Southern Pacific Railroad does now or shall hereafter form a part, but the rates on all through traffic between competitive points which may be connected by a through line over the Southern Pacific Railroad, shall be so adjusted that the rates between such points and all Chicago and Mississippi river points by way of the Southern Pacific shall be as high as by the way of Council Bluffs.

"If at any time while this contract remains in force, the construction of new railroads or the extension of existing ones, or the purchase or lease of railroads or traffic or other arrangements made by any one or more of the parties hereto, shall materially change the relations now existing between the parties with regard to traffic, the contract set out in the original and in the supplemental articles shall be so modified, altered and amended as to establish between them with regard to the then existing circumstances, substantially the relations hereby established between them with regard to the circumstances now existing. It is declared to be the purpose and intent of the parties to maintain the relations hereby established with regard to existing railroads and operating and traffic arrangements, and to adjust such relations to any change which may be made therein with regard to through traffic.

"If the parties cannot agree upon the modifications, alterations or amendments which shall be made, if any, under the provisions of this section, the difference or differences which may thereby arise shall be determined by reference as in the original and the supplemental articles provided.

"Each party will contribute to a common

fund all of the gross revenue which it shall receive for the transportation of both east and west bound freight traffic, hereinafter described, to or from Council Bluffs, and to and from Missouri valley in the performance of the covenants, promises and agreements set out in said original and supplemental articles.

"For the purpose of ascertaining the full amounts of the gross revenue which the parties shall severally contribute, each shall account and pay for all through traffic, both east and west bound, so transported by it as follows:

"For all through traffic except lumber, between the said Union Pacific and the Sioux City Pacific railways and the railways of other parties hereto covered by said original and supplemental articles, which shall originate at, be destined to, or cross the Mississippi river at any point between the cities of Dubuque and St. Louis, both inclusive, at the rates for like traffic between Chicago and Council Bluffs.

"Through traffic which shall be transported for the government of the United States shall be accounted for at the actual rates paid for the same, that is, the regular rate less the discount which may be made because of land grants.

"When a penalty is charged on traffic for excess of weights such traffic shall be accounted for at the regular rates for actual weight.

"Each party shall deliver to each of the others quarter-monthly statements showing what through traffic covered by said original articles and the supplemental articles referred to has, during the quarter-month immediately preceding been transferred over its railroads or any of them, in what it consisted, between what stations and in what directions it was transported, and the rates charged and received therefor.

"The party of the third part hereto undertakes to account to the other parties and pay to the common fund, provided for in the second section hereof, at Chicago rates, for all through traffic which may be received on its line, which can be lawfully transported from the point at which it shall be received, to destination or the proper connecting railway, over any of the through lines by the original articles and the supplemental articles established, with reasonable directness through Council Bluffs, though such traffic or some portion thereof, may not have been so actually transported: Provided, however, that no greater amount of traffic, to or from California points, actually transported by way of the line of the party of the third part and the Southern Pacific line shall be reported to such common fund than the amount that shall be necessary (when added to the amount reported for other through traffic transported by the party of the third part) to make the sum equal to the proportion of the common fund to which the third party is entitled.

"Said common fund shall, when settlements are made between the parties in manner and form, as provided in said original articles, be divided into four equal parts, one of which shall be paid to each of the parties hereto.

"This result shall be accomplished so far as shall be practicable by a physical division of

the traffic to be accounted for (aided by divisions from one line to another) into four equal parts, one of which shall be transported by each of the parties hereto.

"When for any reason such division of the traffic has not been made during the month, the party or parties who shall receive an excess over the share to which it shall be entitled as above provided, shall pay to the party or parties who shall not have received their full shares, a sum or sums of money sufficient to make the division exact in producing gross revenue to the parties."

The pooling and division of traffic intended by the contracts were to be accomplished, so far as might be, by a physical division of the traffic itself between the companies, in certain fixed proportions, and where this was not or could not be done it was to be accomplished by pooling and division of the gross earnings of such traffic between the companies in such fixed proportions. The contract was to continue for twenty-five years.

In May, 1884, Solon Humphreys and Thomas E. Tutt were appointed receivers of the property, rights and franchises of the Wabash, St. Louis & Pacific Railway Company by the Circuit Court of the United States for the Eastern District of Missouri, and, as such receivers, they operated the railway committed to their charge, until, under the decree and order of the court, the property was sold and transferred to the purchasers.

The receivers acquiesced in the contracts referred to until March 31, 1887, when, by consent of all the parties they were abandoned.

In the course of business, under the contracts, the traffic involved was not actually divided between and carried by the companies in the proportions fixed, but the Wabash, St. Louis & Pacific Railway Company, among others, actually carried more than the share allotted to it, and the Chicago, Milwaukee & St. Paul Railway, among others, actually carried less. The pool commissioners provided for by the contracts, ascertained and made a statement of the differences and in making an adjustment of them directed that the Wabash receivers should pay to the Chicago, Milwaukee & St. Paul Railway Company a sum which, after deducting admitted credits, amounted to eighteen thousand four hundred and four dollars and forty cents (\$18,404.40) and this suit was instituted to recover that amount.

The defense is that the contract upon which the claim is based is against public policy and void. The court below (Thayer, J.) sustained this defense and the intervenor appealed. There was no evidence of the rate fixed by the parties for the traffic involved in their contract and no evidence as to their mode of operating under the contract beyond what is afforded by the contract itself.

Signed before Caldwell and Sanborn, Circuit Judges.

Mr. John W. Carey for appellant.

Mr. F. W. Lehman for appellee.

Caldwell, C. J., delivered the opinion of the court:

The design of the contract on which the appellant rests its claim is not left to presumption
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or conjecture. Its purpose is apparent on the face of the instrument. Its object was not to avoid ruinous competition by entering into an arrangement to carry freight at reasonable rates, but its evident purpose was to stifle all competition for the purpose of raising rates.

By the term of the contract all the roads are to be operated as to through traffic, "as they should be if operated by one corporation which owned all of them."

These seven corporations were made one company so far as concerned their relations with each other, with rival carriers, and with the public. Between them there could be no competition nor freedom of action. To the extent of the traffic covered by this contract, and it covered no inconsiderable portion of the traffic of the continent, each company practically abdicated its functions as a common carrier and conferred them on a new creation for the sole purpose of suppressing competition. Before they entered into this contract each of these companies had the power, and it was its duty, to make rates for itself and to make them reasonable; but, by the terms of this contract, every one of the companies was divested of all its powers and discretion in this respect.

The contract removed every incentive to the companies to afford the public proper facilities and to carry at reasonable rates, for, under its provisions, the company is entitled to its full percentage of gross earnings even though it does not carry a pound of freight. The necessary and inevitable result of such a contract is to foster and create poorer service and higher rates. There is no inducement for a road to furnish good service and carry at reasonable rates when it receives as much or more for poor service or for no service, as it would receive for good service and an energetic struggle for business.

A railroad company is a quasi public corporation and owes certain duties to the public, among which are, the duty to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties, or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void. And the obvious purpose of this contract being to suppress or limit competition between the contracting companies in respect to the traffic covered by the contract, and to establish rates without regard to the question of their reasonableness, it is contrary to public policy and void. *Cleveland, C. C. & I. R. Co. v. Closser*, 3 Inters. Com. Rep. 887, 9 L. R. A. 754, 126 Ind. 148; *Gulf, C. & S. F. R. Co. v. State*, 2 Inters. Com. Rep. 835, 1 L. R. A. 849, 72 Tex. 404, 38 Am. & Eng. R. Cas. 481; *State v. Standard Oil Co.* 15 L. R. A. 145, 49 Ohio St. 137; *Texas & P. R. Co. v. Southern Pac. R. Co.* 41 La. Ann. 970; *Gibbs v. Consolidated Gas Co.* 130 U. S. 896, 82 L. ed. 979; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Stanton v. Allen*, 5 Denio, 484, 49 Am. Dec. 282; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Chicago Gas Light & C. Co. v. Peoples Gas Light & C. Co.* 121 Ill. 590; *West Virginia*

Transp. Co. v. Ohio River Pipe Line Co. 22 W. Va. 600; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781; *Sayre v. Louisville Union Ben. Assn.* 1 Duv. 143, 85 Am. Dec. 613; *United States v. Trans-Missouri Freight Assn.* 4 Inters. Com. Rep. 443, 58 Fed. Rep. 58.

But conceding that the contract is illegal and void, the appellant asserts that it has been performed and that the appellees are bound to account for moneys received under the contract according to its terms. This contention rests upon a misconception of the character of this suit. The appellants' claim is grounded on the illegal and void contract, and this suit is, in legal effect, nothing more than a bill to enforce specific performance of that contract.

The contract contemplated two modes of pooling, one by an actual division of the traffic, and the other by a division of the gross earnings.

The traffic not having been divided, this is a suit to enforce the second method of the pool—a division of the gross earnings—or in other words, a pooling of the earnings. The illegal and void contract has not been executed and the appellant invokes the aid of the court to compel the Wabash Company to execute it on its part by pooling its earnings. It may be conceded that the illegal contract has been performed on the part of the appellant though it does not appear to have done anything more than to sign the contract. The only thing it could do towards a performance of the contract was not to compete for the business. This was a violation of its duty to the public and illegal.

But a contract performed on one side only is not an executed contract. Where an illegal act is to be done and paid for the contract is not executed until the act is done and paid for. A court will not compel the act to be done even though it has been paid for. Neither will it compel payment although the act has been done, for this would be to enforce the illegal contract.

The illegality taints the entire contract and

neither of the parties to it can successfully make it the foundation of an action in a court of justice.

The Wabash Company performed the service that earned the money the appellant is seeking to recover. The appellant earned no part of it. There is nothing in the record to show that the appellant would have carried more or the Wabash Company less freight, if the contract had never been entered into. The money demanded was received by the Wabash Company for freight tendered to it by shippers themselves and carried by it over its own line. It was legally bound to accept the freight thus tendered and was entitled to receive the compensation for the carriage, and cannot be compelled to pay the money thus earned, or any part of it, to the appellant on this illegal and void contract.

The case of *Brooks v. Martin*, 69 U. S. 2 Wall. 70, 17 L. ed. 732, is not in point. In that case the defendant set up an illegal contract which had been fully performed and executed as a defense against a demand that existed independently of the contract. Whereas, in this case, the illegal contract is set up by the plaintiff as the foundation of its action. Strike this contract out and confessedly the complaint states no cause of action—leave it in, and it states an illegal and void cause of action.

Courts will not lend their aid to enforce the performance of a contract which is contrary to public policy or the law of the land, but will leave the parties in the plight their own illegal action has placed them. *Central Transp. Co. v. Pullman Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979; *Texas & P. R. Co. v. Southern Pac. R. Co.* 41 La. Ann. 970; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258.

We have not overlooked the case of *Central Trust Co. v. Ohio Cent. R. Co.* 23 Fed. Rep. 306. The opinion in that case is not supported by the authorities and is unsound in principle.

The decree of the court below is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

INTERSTATE COMMERCE COMMISSION, *Appl.*,

v.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. CO. *et al.*

1. Water competition in favor of the more distant point does not change the circumstances and conditions substantially dissimilar within the implied permission of the Interstate Commerce Act to charge less under such circumstances for a longer than for a shorter haul, where the competition is not with a carrier by a parallel water route between the points of shipment and destination but between routes from different points of shipment for the purpose of giving the shipping point the advantage in the markets of the destination point.
2. Several railroad companies which bill and carry

freight from points in one state to points in another will not be heard to say that the carriage by each is local and that they are not engaged in interstate commerce for the purpose of avoiding the requirements of the Interstate Commerce Act.

3. Decree reversing a decree of the United States circuit court refusing to enforce an order of the Interstate Commerce Commission requiring defendants to desist from making a greater charge in aggregate on freight in less than car lots from Cincinnati to Social Circle than they charge on such freight from Cincinnati to Augusta.

May 29, 1894.

A PPEAL by complainant from a decree of the Circuit Court of the United States for the Northern District of Georgia reversing the relief demanded in a proceeding by the Interstate Commerce Commission to enforce an order made by it in reference to rates over defendants' roads. *Reversed.*

The James & Mayer Buggy Company manufactured carriages and buggies at Cincinnati, Ohio; defendants were common carriers carrying freight from Cincinnati to points in Georgia, including Atlanta, Social Circle and Augusta. The rates on buggies in less than car load lots from Cincinnati to Atlanta and Augusta were \$1.07 per hundred, and the rate to Social Circle, which was on the line between Atlanta and Augusta, was \$1.87. The distance from Cincinnati to Atlanta was 474 miles; from Cincinnati to Augusta was 645 miles, and from Cincinnati to Social Circle 526 miles. The Buggy Company instituted proceedings before the Interstate Commerce Commission to have the rates corrected and equalized. The defendants claimed that the rates charged from Atlanta to Social Circle were not unreasonable, and that the transportation from Cincinnati to Augusta was performed under circumstances substantially dissimilar from that between Cincinnati and Social Circle, so as to justify a lower charge, although the distance was greater. The Commission heard evidence and rendered a decree requiring the railroads to desist from making the greater charge to Social Circle than it made to Augusta, establishing the propositions stated in the headnotes, *supra*, and it also fixed the rates from Cincinnati to Atlanta at \$1.00 per hundred pounds. 8 Inters. Com. Rep. 682.

The railroads did not obey the order, and the Commission then instituted a proceeding before the Circuit Court of the United States for the Northern District of Georgia to enforce obedience to the order. The circuit court (Newman, J.) heard further testimony in the case and finally entered a decree dismissing the bill in support of which an elaborate opinion was filed. 4 Inters. Com. Rep. 332.

The Commission appealed the case to the United States Circuit Court of Appeals.

Before **Pardee** and **McCormick**, Circuit Judges, and **Toulmin**, District Judge.

Messrs. N. J. Hammond and **George F. Edmunds**, for appellant:

Section 50 of the English traffic act of 7 & 8 Vict. chap. 8 (the full text of which is copied in a note to *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 228) provided for equal charges for the transportation of persons and property, where the service was rendered "under like circumstances," the court held that the qualifying word, "like," did not require the circumstances to be identical and from that time forward the definition given to the word "like" is fully and exactly expressed by the words, "substantially similar."

In 1868, 1869, the case of *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 228, was decided in the House of Lords, and the question of what constituted "like (substantially similar) circumstances" was the gist of the whole controversy. *Mr. Justice Blackburn*, said, as to the meaning of these words, that they applied to the "cir-

cumstances of the carriage and not to the trade of the consignor or consignee."

Under this phraseology, competition did not differentiate the circumstances, the fact that the persons who are charged less are so constituted that they could go by another road, and probably would do so, would not be a circumstance justifying an unequal charge. *Evershed v. London & N. W. R. Co.* L. R. 3 App. Cas. 1029.

Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 97, is peculiarly interesting because it discloses the element of competition of "market with market."

Mr. Justice Blackburn said: "Neither is it a difference of circumstances justifying an inequality of charge that those whom the railways charge less are seeking to develop a new trade."

In accordance with familiar principles, that definition became a necessary and constituent part of our legislation; and this principle has been distinctly recognized by the Supreme Court with reference to the Act to Regulate Commerce. *Interstate Commerce Com. v. Baltimore & O. R. Co.* 4 Inters. Com. Rep. 92, 145 U. S. 263, 36 L. ed. 699.

The transportation from Cincinnati to Social Circle, Augusta and Atlanta was on "the same line."

For nearly a generation the expression "continuous lines for transportation" has stood upon the statute books of the United States. See Act of July 1, 1862 (12 Stat. at L. 381; 18 Stat. at L. 112) and the Act of June 15, 1866 (14 Stat. at L. 66) as covered by § 5258 of the Revised Statutes. In 1873 the Supreme Court of the United States, in *Dubuge & S. O. R. Co. v. Richmond*, 86 U. S. 19 Wall. 584, 22 L. ed. 173, had held that the Act of June 15, 1866, and another of July 25, 1866 (14 Stat. at L. 219, Rev. Stat. § 259) "were designed to remove trammels upon transportation between different states interposed by state enactments or by existing laws of Congress," etc.

And so in 1887 and 1889, when dealing with interstate commerce and creating the Commission, etc., the United States, in the exercise of its constitutional power to regulate commerce among the several states, used the same expression of "continuous lines" to mean physical things, over which arrangement is made for through transportation of passengers or merchandise. The railroads interested in this litigation did form such a system.

The evidence shows that prior to this controversy buggies shipped by the complainant by these companies from Cincinnati to Social Circle had been billed on through bills of lading, and that it was only stopped, if stopped at all, by a request from the Georgia Railroad Company, dated July 3, 1891.

Judge Newman's second head note decides practically that railroad companies may make the law apply to their several parts as they please by merely varying their contracts to suit themselves. For that he relies upon *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 52 Fed. Rep. 912, decided October 17, 1892, before *Brewer, C. J.* That decision, was made under the old Act of 1887, before it was amended.

While we differ with the judge as to what makes a "line" under the fourth section, certainly there is nothing in that opinion that declares that by a series of contracts affecting interstate commerce carriers thereof may make just such line or as many lines as is agreeable to them; and yet that is necessary to sustain the opinion in this case.

Mr. Edward Baxter, for appellee, the Georgia Railroad Company:

The principles of the common law applicable to common carriers "demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service."

Interstate Commerce Com. v. Baltimore & O. R. Co. 4 Inters. Com. Rep. 96, 145 U. S. 275, 86 L. ed. 708.

In *Bazendale v. Eastern Counties R. Co.* 4 C. B. N. S. 98, decided February 11, 1858, Byles, *Judge*, said: "I know of no common law reason why a carrier may not charge less than what is reasonable to one person, or even carry for him free of all charge."

In *Branley v. South Eastern R. Co.* 12 C. B. N. S. 104, decided May 12, 1862, Wills, *Judge*, said that the obligation of a carrier at common law is "to charge reasonably, but not to charge equally."

The case of *Great Western R. Co. v. Sutton*, L. R. A. 4 H. L. 226, was decided July 13, 1869. *Mr. Justice Blackburn* said (p. 237): "At common law a person holding himself out as a common carrier was not under any obligation to treat all customers equally."

When railways came into operation it became a question for the legislature how far they would, when granting numerous persons power to make a railway and act as carriers on that line, impose on them restrictions beyond what the common law imposed on ordinary carriers.

At first the legislature, in each special act, inserted such clauses as seemed to the particular committees reasonable in each case.

Finally in 1845, the legislature embodied in a general act (8 & 9 Vict. chap. 20) those clauses which it was thought expedient should generally be inserted in railway acts, and the act was known as the Railways Clauses Consolidation Act of 1845.

Section 90, after giving the companies power to fix tolls, provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular company or person traveling upon or using the railway.

A study of the English cases will show that while Parliament intended to change the common law so as to require that rates should thereafter be impartial as well as reasonable,

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it did not intend to deprive railway companies of the right to operate their railways for profit, nor of the right to make all such arrangements as might conduce to their pecuniary interests, provided the rates charged by them were reasonable and impartial.

Parker v. Great Western R. Co. 3 Eng. R. & Canal Cas. 599; *Atty. Gen. v. Birmingham & D. J. R. Co.* 2 Eng. R. & Canal Cas. 182; *Nicholson v. Great Western R. Co.* 1 Nev. & MacN. 148; *West v. London & N. W. R. Co.* 1 Nev. & MacN. 172; *Ransome v. Eastern Counties R. Co.* 1 Nev. & MacN. 70; *Oxlade v. North Eastern R. Co.* 1 Nev. & MacN. 94; *Interstate Commerce Com. v. Baltimore & O. R. Co.* 3 Inters. Com. Rep. 198, 43 Fed. Rep. 49.

If, in considering the circumstances and conditions under which transportation is conducted, it is legitimate to regard "the pecuniary interests" of the railway company, and, if it can be shown that "the pecuniary interests" of the company will be promoted by allowing the company to compete for business at certain rates, at certain competitive points, without detriment to the interests of the public considered as a whole, then the effect of such competition upon the circumstances and conditions under which the transportation is conducted, may be legitimately regarded.

In examining the English cases which may be claimed to have held that the word "circumstances" applied exclusively to the "circumstances of the carriage," and that competition can in no case, be considered as differentiating the circumstances under which transportation is conducted, it will save time to divide said cases into classes.

In the first class will be placed those cases in which it has been held that under the English statutes a railway company has no right to discriminate against an individual on account of his occupation or personal status.

In considering whether the goods of one person have been conveyed over a railway "under the same circumstances" as the goods of another person, the English courts have invariably held that the company has no right to consider the occupation or personal status of the shippers, but must confine itself to a comparison of the services rendered by the railway to the respective shippers.

Edwards v. Great Western R. Co. 11 C. B. 588; *Pickford v. Grand Junction R. Co.* 10 Mees. & W. 899; *Parker v. Great Western R. Co.* 11 C. B. 545, 7 Man. & G. 253; *Crouch v. London & N. W. R. Co.* 3 Car. & K. 789, 9 Exch. 556, 1 Nev. & MacN. 16.

If the defendant railroad companies were to charge the Southern Express Company, which does business over their line, higher rates than the general public on shipments from Cincinnati to Augusta, the express company would under the cases, just noticed, be entitled to redress. There is competition between Cincinnati and Augusta, and competitive rates prevail at Cincinnati; and the Southern Express Company, when shipping from Cincinnati, is entitled to precisely the same competitive rates as the general public at Cincinnati.

But Social Circle is a non-competitive local station on the Georgia R. R. between Atlanta and Augusta; and if the express company should insist that it was entitled to the same

rates from Cincinnati to Social Circle as prevail between Cincinnati and Augusta, then a totally different question would be presented, and upon which the cases just noticed throw no light whatever.

The cases of *Bazendale v. Great Western R. Co.* 1 Nev. & MacN. 202, decided Nov. 15, 1856; *Garton v. Great Western R. Co.* 1 Nev. & MacN. 214, decided Jan. 29, 1859, and *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226, differ from the cases just noticed, only in this: That the discriminations, while made against intercepting carriers, were not made in favor of the general public, but were made in favor of the railway companies themselves; they being engaged as rivals of the plaintiffs in the accessorial business of intercepting or express carriers; and the point decided was that if a railway company engages in such an accessorial business it can no more discriminate in its own favor than it can in favor of another individual, or of the general public.

The next class of English cases to be considered is where the courts have held, under the Railway and Canal Traffic Act of 1854, that a railway company can not legally discriminate in favor of a traffic because of its origin and antecedents.

The Act of 1854 provides that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular description of traffic, nor shall any such company subject any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This class of cases is well illustrated by the case of *Ransome v. Eastern Counties R. Co.* 1 Nev. & MacN. 68, decided January 29, 1857.

If freight is brought to the Cincinnati, N. O. & T. P. R. Co. at Cincinnati by steamboat from Pittsburg, and similar freight is brought from Pittsburg by the Pittsburg, C. C. & St. L. R. Co. to Cincinnati, and both shipments are there tendered for the first time to the Cincinnati, N. O. & T. P. R. Co. for transportation to Augusta, that company cannot, according to the class of cases just cited, legally discriminate in favor of the freight brought by railway to Cincinnati, over that brought by steamboat.

The next class of English cases to be considered is where the courts have held, under the Act of 1854, that a railway company can not legally discriminate in favor of a traffic, because of the ultimate use to which it is to be put, after the railway transportation has been completed and ended.

This class of cases is illustrated by the case of *Manchester, S. & L. R. Co. v. Denaby Main Colliery Co.* 4 Eng. R. & Canal Traffic Cas. 437-455, decided in December, 1885, in the Queen's Bench Division and in the Court of Appeals; and in December, 1885, decided in the House of Lords. See 6 Eng. R. & Canal Traffic Cas. 133.

The most that can be claimed as having actually been decided in the Denaby case, is, that where the services performed by a railway company in respect of one local shipment, are identical with the services performed by said company in respect of another local shipment, the two shipments will be re-

garded as having been made "under the same circumstances" notwithstanding any difference that may exist between them as to the ultimate use to which they are to be put after their arrival at the place of common destination.

The case of *Oxlade v. North Eastern R. Co.* 1 Nev. & MacN. 72, decided in 1857, may be said to belong to the same class as the Denaby case.

If two merchants at Cincinnati offer to the Cincinnati, N. O. & T. P. R. Co. similar shipments consigned to Augusta, they are, under the class of cases just noticed, entitled to the same competitive rates though one of them may intend his shipment for export to Cuba, and the other may intend his for consumption at Augusta.

But where a railroad company concedes, at a competitive point, competitive rates to shippers at that point, while those shippers may have a certain advantage over shippers at non-competitive points, it is an advantage which the competitive shippers have, not by reason of the action of the railroad company, but by reason of the fact that they can secure similar rates by other competing routes.

The next class of English cases to be considered is where the courts have held that a railway company has no right to discriminate between different local shippers by depriving one of them of a natural advantage which he may have over the other, by reason of location, distance, etc. *Ransome v. Eastern Counties R. Co.* 1 Nev. & MacN. 109, known as case No. 2, and decided on February 25, 1858.

The case of *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* 3 Nev. & MacN. 426, decided in 1880 by the English Commissioners, may also be considered in this case. See 4 Eng. R. & Canal Traffic Cas. 437, and L. R. 11 App. Cas. 97, 99.

As I understand the tariffs of the defendant railway companies, in this case, they do not deprive any of their local shippers of any natural advantages which any of them may possess by reason of location, etc. On the contrary, all of them are charged reasonable rates; and on the Georgia R. R. they are charged proportionate to their respective distances from the nearest competitive points: so that at all local stations on the Georgia R. R. the indirect advantages of competitive rates are secured by the local shippers.

The next class of English cases to be considered is where the courts have held that a railway company has no right to give to some of its local shippers the benefit of competitive rates, while it refuses those rates to other local shippers, upon some ground that is capricious, arbitrary and unreasonable.

An illustration of this class of cases will be found in the case of *Budd v. London & N. W. R. Co.* which was decided June 18, 1877. See 4 Nev. & MacN. 393, 4 Eng. R. & Canal Traffic Cas. 393, Brown & Macnamara.

The defendant railway companies in this case make no such arbitrary or capricious distinction between their customers, as was made in the Budd case.

The English Railway and Canal Commissioners, as late as November, 1890, spoke of the Budd case as being "in conflict with the

subsequent Scotch case of *Murray v. Glasgow & S. W. R. Co.* 4 Nev. & MacN. 456, and with the case of *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* 7 Eng. R. & Canal Traffic Cas. 184, 185, 142; *Liverpool Corn Traders Assn. v. London & N. W. R. Co.* 1891 [1 Q. B. 120].

The next class of English cases to be considered is, where the courts have held that a railway company can not legally discriminate in favor of one local shipper against another local shipper merely to prevent the threatened construction of a competitive railway line.

The cases of *Harris v. Cockermouth R. Co.* 1 Nev. & MacN. 97, decided January 15, 1858; *Slake Co. v. Festiniog R. Co.* 2 Nev. & MacN. 73, decided in December, 1874, and the case of *Holland v. Festiniog R. Co.* 2 Nev. & MacN. 278, decided in February, 1876, all belong to that class.

If the defendant railway companies in this case were to give lower rates to certain shippers at Cincinnati than they give to other shippers at that point, in consideration that the former should agree to ship all their traffic over the defendant's line to Augusta and not aid in the construction of a competitive line from Cincinnati to Augusta, a case would be presented precisely within the class of cases just cited. But the defendant railway companies make no such discrimination between their shippers.

The next class of English cases to be considered is where the courts have held that a railway company can not legally discriminate in favor of one local shipper against another local shipper simply because the former has agreed to ship the whole or some indefinite amount of his traffic, over the defendant's line, while the other has not.

In that class may be placed the cases of *Bazendale v. Great Western R. Co.* (known as the "*Bristol Case*") 1 Nev. & MacN. 191, decided November 9, 1858, and the case of *Belladyke Coal Co. v. N—B— R. Co.* 2 Nev. & MacN. 105, decided March, 1875.

No such question is presented in this case.

The next class of English cases to be considered is where the courts have held that a railway company can not legally discriminate in favor of one shipper against another shipper, shipping the same class of freight between the same competitive points, unless there be some substantial difference in the cost of the service to the company. The case of *Garton v. Birmingham & E. R. Co.*, 1 Nev. & MacN. 218, decided June 18, 1859, will furnish one illustration of this class of cases. See also *Thompson v. London & N. W. R. Co.* 2 Nev. & MacN. 115; *London & N. W. R. Co. v. Evershed*, L. R. 3 App. Cas. 1029, *et seq.*

The note of the reporters to *Thompson v. London & N. W. R. Co.*, 2 Nev. & MacN. 121, states exactly my conception of the English law, which is, that a railway company may, in order to meet competition with other railways, or with water lines, reduce its fares or rates to the public at such competitive points, provided it makes its reductions equally and impartially to every one who offers to ship from such competitive points. But it can no more discriminate between different shippers at competitive points, than it can discriminate be-

tween different shippers at non-competitive points, unless the shippers have obligated themselves to ship definite quantities, at regular intervals, in train load lots, or have in some other way offered a regular traffic to the company which can be conducted at a less cost to the company than other traffic. Citing *Strick v. Swansea Canal Co.* 16 C. B. N. S. 245; *Ransome v. Eastern Counties R. Co.* (No. 1) 1 Nev. & MacN. 68; *Oxlade v. North Eastern R. Co.* (No. 1) 1 Nev. & MacN. 72; *Garton v. Birmingham & E. R. Co.* 1 Nev. & MacN. 218; *Harris v. Great Western R. Co.* 1 Nev. & MacN. 97; *Nicholson v. Great Western R. Co.* 1 Nev. & MacN. 121.

I have discussed every class of English cases decided before the passage of the Act to Regulate Commerce, which can be claimed as even intimating that competition can in no case be considered as a circumstance affecting transportation.

None of the cases, when examined upon their facts, are authority for so broad an assertion.

The question as to whether transportation conducted between competitive points, is conducted under substantially similar circumstances and conditions with transportation conducted between non-competitive points, was before the English Chancery Court in 1840, in the case of the *Atty. Gen. v. Birmingham & D. J. R. Co.* 2 Eng. R. & Canal Cas. 124.

The Lord Chancellor said: "The Attorney General now asks me to interfere to prevent the company carrying passengers (between competitive points) at too low a rate. . . . It is not necessary to say anything about the jurisdiction of the court, or how far I should interfere if I had the power, because I am quite clear that the 63d section has not the slightest reference to this case."

Hozier filed a petition against the Caledonia R. Co., alleging that he was aggrieved by being charged nine shillings six pence for traveling between Motherwell and Edinburgh, a distance of forty-three miles, while passengers traveling in the same train, and in the same class of carriage between Glasgow and Edinburgh, a distance of fifty-nine miles, were charged only two shillings; and that the through rates charged between Edinburgh and Glasgow amounted to an undue and unreasonable preference in favor of such through passengers over petitioner, and others, traveling between Motherwell and Edinburgh, or Motherwell and Glasgow, or intermediate places.

The petition was dismissed January 20, 1855.

Lord Curriehill said: "The complainant must satisfy us that there is something unfair or unreasonable in what he complains of, in order to warrant any interference. Now, I have read the statement in the petition, and I have listened to the argument in support of it, to find what is unreasonable in giving that advantage to through passengers. What disadvantage do Motherwell passengers suffer by this? I think that no answer was given to this, except that there was none." *Hozier v. Caledonian R. Co.* 1 Nev. & Macn. 81.

In *Jones v. Eastern Counties R. Co.*, 1 Nev. & MacN. 45, it appeared that defendant charged £45 per year for season tickets from Colchester to London, a distance of twenty miles, while it charged for such tickets only £20 per year from Harwich to London, a distance of over

seventy miles. It was insisted that this was an undue preference of the inhabitants of Harwich over those of Colchester.

The court (on January 27, 1858) refused a rule for an injunction. Williams, *Judge*, said: "For anything that appears there may be very good reasons for making such difference in the price. . . . At this moment there is active competition at Reading between the Great Western and Southwestern railways; the consequence is, that considerably less is charged for tickets from that place to London, and *vice versa*, than for intermediate stations." See also *Napier v. Glasgow & S. W. R. Co.* 1 Nev. & MacN. 292; *Foreman v. G—, E. R. Co.* 2 Nev. & MacN. 203; *Richardson v. Midland R. Co.* 4 Eng. R. & Canal Traffic Cas. 1; *Broughton Coal Co. v. Great Western R. Co.* 4 Eng. R. & Canal Traffic Cas. 191; *Strick v. Swansea Canal Co.* 16 C. B. N. S. 245; *Ransome v. Eastern Counties R. Co.* 1 Nev. & MacN. 63, 120; *Harris v. Cockermouth R. Co.* 1 Nev. & MacN. 102.

A careful examination of the cases cited will leave no reasonable doubt but that the English courts and the English Railway Commissioners have never regarded traffic conducted between competitive points as conducted "under the same circumstances" as traffic conducted between points not competitive.

The same authorities also establish the proposition that the forced concession of competitive rates between competitive points has never been regarded by the English courts or Commissioners as an "undue or unreasonable preference or advantage to, or in favor of," shippers at those competitive points, nor an "undue or unreasonable prejudice or disadvantage to, or against," shippers at points not competitive. See also *Phipps v. London & N. W. R. Co.* [1892] 2 Q. B. 229.

There is quite a difference between literal similarity, such as might technically satisfy the letter of the English "equality clause," and the "substantial" similarity which is required by both the letter and the spirit of the Act to Regulate Commerce.

Atchinson, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 668, 28 L. ed. 292, in effect, establishes—

First: That, in order to meet competition, the Cincinnati, N. O. & T. P. R. Co. the Western & A. R. Co. and the Georgia & R. Co. have the right to form a through line from Cincinnati to Augusta, and that the through rate from Cincinnati to Augusta may, lawfully, be less than the sum of the locals of those three roads.

Second: That the proportion of the through rate, from Cincinnati to Augusta, which is received by the Georgia R. Co. may, lawfully, be less than the local rate charged by said road for transportation from Atlanta to Augusta.

Third: That freight transported between the competitive points, Cincinnati and Augusta, is not transported under substantially similar circumstances and conditions as freight transported from Cincinnati to Atlanta by the Cincinnati, N. O. & T. P. R. Co. and the Western & A. R. Co. and thence by the Georgia R. Co. to Social Circle, a local station

on that road, a non-competitive point; and the fact that both shipments may be transported from Atlanta to Social Circle in the same cars and trains, is a matter of no consequence. See also *Union Pac. R. Co. v. United States*, 104 U. S. 668, 26 L. ed. 884; *Ragan v. Aiken*, 9 Lea, 619, 42 Am. Rep. 684; *Scofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 620; *Ex parte Koehler*, 28 Fed. Rep. 533, 25 Fed. Rep. 78.

In *Missouri Pac. R. Co. v. Texas & P. R. Co.* 31 Fed. Rep. 862, decided June 21, 1887, Judge Pardee said: "That competition, the life of trade, cuts an important figure in the conditions and circumstances attendant upon transportation of property and passengers, cannot well be overlooked nor denied, nor can it well be denied, that, as between the short and long haul, competition may exist to that extent that what would otherwise be similar circumstances and conditions will be dissimilar circumstances and conditions." See also *Ex parte Koehler*, 31 Fed. Rep. 319; *Junod v. Chicago & N. W. R. Co.* 3 Inters. Com. Rep. 664, 47 Fed. Rep. 298; *Osborne v. Chicago & N. W. R. Co.* 48 Fed. Rep. 54.

In one of the earliest cases decided by the Commission Judge Cooley said: "The charging or receiving the greater compensation for the shorter, than for the longer haul, is seen to be forbidden only when both are under substantially similar circumstances and conditions; and therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated." *Re Southern R. & S. S. Assn.* 1 Inters. Com. Rep. 280, 1 I. C. C. Rep. 57. See also *United States v. Mellen*, 4 Inters. Com. Rep. 247, 53 Fed. Rep. 229; *Interstate Commerce Com. v. Atchison, T. & S. F. R. Co.* 4 Inters. Com. Rep. 323, 50 Fed. Rep. 295.

Judge Jackson, in speaking of §§ 2, 3 of the Act to Regulate Commerce, said: "To come within the inhibitions of said sections the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic, under substantially the same circumstances and conditions. In respect to passenger traffic, the position of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation, and of service accompanied by irregularity and partiality, resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination." *Interstate Commerce Com. v. Baltimore & O. R. Co.* 43 Fed. Rep. 49.

The Interstate Commerce Commission in all of its decisions, has conceded that water competition, or competition with foreign railroads, or competition with lines of railroads wholly in a single state, may make out the dissimilarity of circumstances and conditions in reference to the transportation of traffic, which will authorize a railroad company, without applying to the Commission, to charge less for the longer than for the shorter distance. *Re Southern R. & S. S. Co.* 1 Inters. Com. Rep. 278, 1 I. C. C. Rep. 81; *Gerke Brew. Co. v. Louisville &*

N. R. Co. 4 Inters. Com. Rep. 272, 5 I. C. C. Rep. 607; *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 146, 5 I. C. C. Rep. 387.

In *Re Southern R. & SS. Co. supra*, the Commission said, that even as between railroads which are subject to the Act to Regulate Commerce, there might be rare and peculiar cases of competition, which would create the dissimilarity of circumstances and conditions entitling the carrier to charge less for the longer than the shorter haul. See also *Trammell v. Clyde SS. Co.* and *Gerke Brew. Co. v. Louisville & N. R. Co. supra*.

Yet the Commission holds that in all cases it must appear that the competition is actually existing and that it is of a controlling force, in respect to traffic important in amount. *Re Southern R. & SS. Co. supra*.

The real question, therefore, is, what is meant by the "actual existence" of competition?

The testimony in this case shows that there are seven rail lines which "actually compete" for traffic between Cincinnati and Atlanta; and thirteen rail lines which "actually compete" for traffic between Cincinnati and Augusta.

The testimony further shows that there are a number of other additional lines which "can practically compete" between those points.

We have, therefore, made out "a clear case of competition," not only "potential" but actual; and in respect to the entire traffic passing between those cities.

One of the defenses relied upon in this case is, that at Baltimore and other eastern cities, large manufactories of buggies, carriages, etc., exist, and that the product of those factories is transported to Augusta at such rates, that if the defendants charge a higher rate than \$1.07 per 100 pounds from Cincinnati to Augusta, no freight of that character would come over defendants' roads; for the product of the eastern factories would be delivered in Augusta at a rate which would exclude the Cincinnati product from the Augusta market.

The Commission held, in effect, that competition between market and market, or between product and product, can not be considered as affecting the circumstances and conditions under which transportation is conducted.

If the appellee railroad companies can obtain rates for carrying the traffic which are reasonably remunerative to them, and if Cincinnati shippers, after paying those rates, can sell their products in the Augusta markets at a profit reasonably remunerative to them, why should the Commission interfere with the traffic between Cincinnati and Augusta? Who is to be benefited by such interference except the city of Baltimore? And Baltimore, with the ocean and the Savannah river, is amply able to take care of herself.

If the appellees should carry freight from Cincinnati to Atlanta, for less than its cost of carriage, they would be guilty of giving to Cincinnati an undue preference, which would operate as an unjust prejudice against every other city not similarly favored. But as the rates charged by the appellees on first class freight from Cincinnati to Augusta, are reasonably remunerative, it is not giving to Cincinnati an undue preference, to allow her to avail herself of those rates.

On the contrary, it would be subjecting Cincinnati to an undue prejudice, if the appellees were to refuse to carry her traffic to Augusta at rates fairly remunerative to the carriers; and it would also subject Augusta to an undue prejudice to deprive her of the benefit of the competition afforded by the introduction of the Cincinnati products into her markets. See *Phipps v. London & N. W. R. Co.* [1892] 2 Q. B. 242.

The rates charged in this case are "reasonable and just"; and therefore not violative of the first section. *Interstate Commerce Com. v. Baltimore & O. R. Co.* 4 Inters. Com. Rep. 92, 145 U. S. 277, 36 L. ed. 703; *Killmer v. New York Cent. & H. R. Co.* 100 N. Y. 402.

The rates charged in this case do not "unjustly discriminate" against Social Circle; and therefore they do not violate the second section. *Interstate Commerce Com. v. Baltimore & O. R. Co. supra*; *Harwell v. Columbus & W. R. Co.* 1 Inters. Com. Rep. 636, 1 I. C. C. 248.

Mr. Joseph B. Cumming, also for appellee, the Georgia Railroad Company:

Social Circle is on the "line" of the Georgia Railroad, and is treated like other stations on that "line." But it is not included in any agreement between the Georgia and any other company; on the contrary there is an express refusal to make any agreement on the subject; so it is not on any "line" starting in Cincinnati or in any other place off the Georgia Railroad. *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 52 Fed. Rep. 912; *United States v. Mollen*, 4 Inters. Com. Rep. 747, 58 Fed. Rep. 229.

Messrs. Edward Colston and George Hoadly, Jr., for appellee, the Cincinnati, New Orleans & Texas Pacific Railway Company.

Messrs. Payne & Tyne, for appellee, the Western & Atlantic Railway Company.

By the Court:

This cause came on to be heard at this term, and was argued by counsel, and thereupon, and upon consideration thereof,

It is ordered, adjudged and decreed that the decree of the Circuit Court of the Northern District of Georgia, rendered on June 5, 1890, be annulled, avoided and reversed, and this cause be remanded to the said circuit court, with instructions to enter a decree in favor of the complainant, the Interstate Commerce Commission, and against the defendants, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company and the Georgia Railroad Company, commanding and restraining the said defendants, their officers, servants and attorneys, to cease and desist from making any greater charge in the aggregate on buggies, carriages and on other freight of the first class carried in less than carloads from Cincinnati to Social Circle than they charge on such freight from Cincinnati to Augusta; that they so desist and refrain within five days after the entry of the decree, and in case they or any of them shall fail to obey said order, condemning the said defendants and each of them to pay one hundred dollars a day for every day thereafter

they shall so fail, and denying the relief prayed for in relation to charges on like freight from Cincinnati to Atlanta. The said defendants to pay all costs of court.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

SAVANNAH, FLORIDA & WESTERN R. CO. *et al.*, *Appts.*,

v.

FLORIDA FRUIT EXCHANGE.

1. The increase of rates for the transportation of oranges from Florida points to northeastern markets over the line of the Savannah, Florida & Western Railway and its connections, which was made November 23, 1890, and amounted to 33½ per cent upon rates previously in effect, is unjust, unreasonable and excessive, and in violation of the Interstate Commerce Act; and it is not justified by the increased facilities which have been afforded by the carriers for handling and preserving the fruit.
2. Decree affirming a decree enjoining the violation of an order of the Interstate Commerce Commission passed November 29, 1891, which prohibited the exaction of a rate for the transportation of oranges from Florida to northeastern markets which should exceed the rates in force prior to November 3, 1890, by more than five cents per box—allowing complainant a counsel fee of \$5000—and directing defendant to pay costs of the suit, including the master's charges of \$870.50.

May 29, 1894.

A PPEAL by defendants from a decree of the United States Circuit Court for the Northern District of Florida enforcing a decree of the Interstate Commerce Commission enjoining the exaction of excessive rates for the carriage of oranges from Florida points to northeastern cities. *Affirmed.*

On December 30, 1890, the Railroad Commission of Florida filed a complaint before the Interstate Commerce Commission against the Savannah, Florida & Western Railway Co. and its connections, and other companies to the number of seventeen, in which it was alleged that during the season of 1885-86 the through rates for the transportation of oranges and lemons from points in Florida were, and are still, made up of the rates charged by the gathering railroads in Florida to certain base points, with the rates therefrom to the points of destination added thereto, and that from these base points, the carriers, by arrangements and agreements among themselves, had established certain independent lines, five in number; that during the said season of 1885-86, and for each season since, the several lines, by arrangements and agreements among themselves, established and maintained rates for the transportation of oranges and lemons by said several lines from said base points to said points of destination with but few changes until the season of 1889-90, which rates were, from the base points to New York by three of the lines, 30 cents per standard box and by the other two 37½ cents and 43 cents respectively. At the beginning of the 1889-90 season the said several carriers constituting said several lines combined and agreed to advance, and did actually advance, said rates 10 cents per standard box; that said advanced rates are unlawful and in violation of the Act to Regulate Commerce, and relief was prayed that the carriers be compelled to desist from charging more than 25 cents per standard box. The Commission, after hearing

testimony and considering briefs in the case, entered an order that an increase of 5 cents per box over rates in force prior to November 23, 1890, was justified, but that the said several lines should be prohibited from exacting more than said increase. See 3 Inters. Com. Rep. 688.

The transportation companies having neglected to comply with the order of the Commission, the Florida Fruit Exchange instituted a proceeding before the United States Circuit Court for the Northern District of Florida to compel its enforcement. The case was referred to a special master, whose finding substantially agreed with that of the Commission, and a decree was entered thereon embodying the points shown in the above headnotes. The defendants thereupon appealed to the circuit court of appeals, specifying the following errors:

1st. That the circuit court erred in rendering the decree and order on the 30th day of November, 1892, whereby it affirmed the master's report filed in this case on the 17th of September, A. D. 1892, and wherein it overruled the exceptions of the defendant to the report of said master.

2d. That the said circuit court erred in finding as a matter of fact that 35 cents per box for oranges from base points in Florida to northeastern cities of the United States was a reasonable rate.

3d. That the circuit court erred in allowing a fee of \$5000 to complainant's solicitor.

4th. (Withdrawn upon the argument.)

5th. That the court erred in allowing the fees charged by the master, said fees being excessive.

6th. That the court erred in refusing to allow the defendant its order of supersedeas and by this a bond that should operate as a supersedeas to the decree of the 30th day of November, A. D. 1892, or of any part thereof.

Argued before **Pardee** and **McCormick**, Circuit Judges.

Messrs. R. G. Erwin and John E. Hart-ridge, for appellant:

The question of reasonableness of rates involves so many considerations and is affected by so many conditions and circumstances which may seem at first blush to be foreign, that it is quite impossible to deal with it on mathematical principles or on any principles whatever without a consciousness that no conclusion that can be reached, can by demonstration be shown to be absolutely correct.

1st Annual Report of Interstate Commerce Commission (1887) pp. 312, 313.

Classification is the foundation of all rate making.

1st Annual Report of Interstate Commerce Commission, pp. 803, 313.

On the system of apportioning the charges strictly to the cost, much of the commerce of the country would have no existence at all, for the article at the place of delivery would not be worth the purchase price with the transportation added.

1st Annual Report of Interstate Commerce Commission, p. 308.

In determining what is a reasonable rate for a particular commodity, the rates charged on the same commodity by other roads situated as nearly similar as may be, the diversities between the railroad in question and such other railroad, the relative amount of through and local business, the proportion borne by the commodity in question to the rest of the local traffic, the market value of the commodity and its gradual reduction, and all other questions affecting the traffic and relating to the other considerations entering into the "charges of the carriers."

Evans v. Oregon R. & Nav. Co. 1 Inters. Com. Rep. 641, 1 I. C. C. Rep. 325.

Shippers cannot justly demand that in all cases the rate on local shipments shall not be higher than the particular division of the through rate from distant points to the point of delivery.

Rend v. Chicago & N. W. R. Co. 2 Inters. Com. Rep. 313, 2 I. C. C. Rep. 540.

The division of the through rate cannot in any way affect the reasonableness of the rate. It is not apparent how a division of the earnings of two roads can concern or affect the public, so long as the rate of transportation on them is reasonable.

Ex parte Koehler, 23 Fed. Rep. 534.

The character of the commodity is one of the elements necessary to the determination of what is a reasonable rate.

Imperial Coal Co. v. Pittsburg & L. E. R. Co. 2 Inters. Com. Rep. 436, 2 I. C. C. Rep. 618.

In determining the reasonableness of a rate the market value of the commodity in question is a fact, among other things to be considered.

Evans v. Oregon R. & Nav. Co. supra; *James v. East Tennessee, V. & G. R. Co.* 2 Inters. Com. Rep. 609, 3 I. C. C. Rep. 225; *Harvard Co. v. Pennsylvania Co.* 3 Inters. Com. Rep. 257, 4 I. C. C. Rep. 212; *Warner v. New York Cent. & H. R. R. Co.* 3 Inters. Com. Rep. 74, 4 I. C. C. Rep. 32; *Delaware State Grange v. New York, P. & N. R. Co.* 3 Inters. Com. Rep. 554, 4 I. C. C. Rep. 588; *New Orleans Cotton Exch. v. Illinois Cent. R. Co.* 2 Inters. Com. 4 INTER 8.

Rep. 777, 3 I. C. C. Rep. 534; *Beaver v. Pittsburg, C. & St. L. R. Co.* 3 Inters. Com. Rep. 564, 4 I. C. C. Rep. 733.

In determining what is a reasonable rate, the amount of risk incurred by carrier during the transportation, is among other facts, to be considered.

New Orleans Cotton Exch. v. Illinois Cent. R. Co. supra.

The expense to carrier in the transportation of freight and passengers is a fact to be considered in determining what is a reasonable rate.

Boston Chamber of Commerce v. Lake Shore & M. S. R. Co. 1 Inters. Com. Rep. 754, 1 I. C. C. Rep. 436; *Rice v. Western New York & P. R. Co.* 2 Inters. Com. Rep. 298, 2 I. C. C. Rep. 889; *Business Men's Assn. v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 48, 2 I. C. C. Rep. 73; *Thurber v. New York Cent. & H. R. R. Co.* 2 Inters. Com. Rep. 742, 3 I. C. C. Rep. 473; *Boston Fruit & Produce Exch. v. New York & N. E. R. Co.* 3 Inters. Com. Rep. 493, 4 I. C. C. Rep. 664; *New York Board of Trade & Transportation v. Pennsylvania R. Co.* 3 Inters. Com. Rep. 417, 4 I. C. C. Rep. 447.

The fact that operating expenses absorb nearly the entire earnings is to be considered in determining what is a reasonable rate, but it cannot justify excessive rates.

New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co. 2 Inters. Com. Rep. 259, 3 I. C. C. Rep. 375; *Evans v. Oregon R. & Nav. Co.* 1 Inters. Com. Rep. 641, 1 I. C. C. Rep. 325.

In determining what is a reasonable rate on a given commodity the amount of storage capacity at initial and terminal points is a fact to be considered.

Boston v. Chamber of Commerce v. Lake Shore & M. S. R. Co. 1 Inters. Com. Rep. 754, 1 I. C. C. Rep. 436.

The facts that a shipment of a given commodity demands a special train, running at a particular hour and on fast time, and that such train must return empty, are all necessary to be considered in determining what, in such case, is a reasonable rate.

Boston Fruit & Produce Exch. v. New York & N. E. R. Co. 3 Inters. Com. Rep. 493, 4 I. C. C. Rep. 664.

In considering the question what is a reasonable rate the volume of business is a fact, among other things, to be considered.

Boston Chamber of Commerce v. Lake Shore & M. S. R. Co. supra; *Rice v. Western New York & P. R. Co.* 2 Inters. Com. Rep. 298, 2 I. C. C. Rep. 889; *Warner v. New York Cent. & H. R. R. Co.* 3 Inters. Com. Rep. 74, 4 I. C. C. Rep. 32.

In determining what is a reasonable rate, the density of population along the line is a factor. *Business Men's Assn. v. Chicago & N. W. R.* 2 Inters. Com. Rep. 48, 2 I. C. C. Rep. 73.

The court will consider, among other facts, the relative amount of through and local business.

Evans v. Oregon R. & Nav. Co. 1 Inters. Com. Rep. 641, 1 I. C. C. Rep. 325.

Empty cars and the want of return loads is also a fact to be considered.

James v. East Tennessee, V. & G. R. Co. 3 Inters. Com. Rep. 609, 3 I. C. C. Rep. 225;

Boston Fruit & Produce Exch. v. New York Cent. & H. R. R. Co. 8 Inters. Com. Rep. 493, 4 I. C. C. Rep. 664; *Delaware State Grange v. New York P. & N. R. Co.* 8 Inters. Com. Rep. 554, 4 I. C. C. Rep. 588.

The fact that carriers have, or have not, return loads, is to be considered in determining what is a reasonable commodity rate.

Re Relative Tank & Barrel Rates on Oil. 2 Inters. Com. Rep. 245, 2 I. C. C. Rep. 865; *James v. East Tennessee, V. & G. R. Co. supra.*

Competition by water, when such carriers are not subject to the provisions of the Act and when such competition is of controlling force and important in amount, may justify a greater charge for a shorter distance over the same line, in the same direction, within the meaning of the fourth section of the Act.

Re Southern R. & S. S. Asso. 1 Inters. Com. Rep. 278, 1 I. C. C. Rep. 81; *King v. New York, N. H. & H. R. Co.* 8 Inters. Com. Rep. 272, 4 I. C. C. Rep. 251; *New Orleans Cotton Exch. v. Illinois Cent. R. Co.* 2 Inters. Com. Rep. 777, 3 I. C. C. Rep. 534; *Lehmann v. Southern Pac. R. Co.* 3 Inters. Com. Rep. 80, 4 I. C. C. Rep. 1; *Business Men's Asso. v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Rep. 41, 2 I. C. C. Rep. 52; *Bates v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 715, 3 I. C. C. Rep. 435, 3 Inters. Com. Rep. 296, 4 I. C. C. Rep. 281; *Rice v. Atchison, T. & St. F. R. Co.* 3 Inters. Com. Rep. 263, 4 I. C. C. Rep. 228.

Competition with other carriers by rail is also a fact to be considered.

New Orleans Cotton Exch. v. Illinois Cent. R. Co. supra.

Proof that certain rates are very profitable to the road is not conclusive on the question of the reasonableness of such rates.

Howell v. New York, L. E. & W. R. Co. 2 Inters. Com. Rep. 162, 2 I. C. C. Rep. 272; *Re Southern R. & S. S. Asso.* 1 Inters. Com. Rep. 288, 1 I. C. C. Rep. 79.

The mere fact that the carrier does not establish its rates upon a modest basis, does not make out their illegality.

La Crosse Mfrs. & Jobbers Union v. Chicago, M. & St. P. R. Co. 2 Inters. Com. Rep. 9, 1 I. C. C. Rep. 629.

A former special rate is not a fair test of the reasonableness of a present rate.

Myers v. Pennsylvania Co. 2 Inters. Com. Rep. 408, 2 I. C. C. Rep. 578.

In determining what is a reasonable rate, the dividend on the capital stock of the carrier from the total traffic is, among other things, to be considered.

Re Rates and Charges on Food Products. 3 Inters. Com. Rep. 93, 4 I. C. C. Rep. 48.

The company should be allowed to make an earning on stock.

Georgia R. & Bkg. Co. v. Smith. 128 U. S. 174, 32 L. ed. 877; *Stone v. Farmers Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636; *Chicago & N. W. R. Co. v. Dey.* 85 Fed. Rep. 866; *Chicago, M. & St. P. R. Co. v. Minnesota.* 3 Inters. Com. Rep. 209, 184 U. S. 418, 83 L. ed. 970.

Cost of production is a fact to be considered in the determination of the question of what is a reasonable rate.

Imperial Coal Co. v. Pittsburg & L. E. R. 4 INTER S.

Co. 2 Inters. Com. Rep. 436, 2 I. C. C. Rep. 618.

Transportation charges should have reasonable relation to cost of production.

Re Rates and Charges on Food Products, supra; Poughkeepsie Iron Co. v. New York Cent. & H. R. R. Co. 8 Inters. Com. Rep. 248, 4 I. C. C. Rep. 195.

If, upon considering the testimony originally taken before the Interstate Commerce Commission, the court should conclude that the judgment reached by the Commission is erroneous, the petitioner below (appellee here) is again placed in the attitude of asserting an affirmative which it is bound to prove.

Pulton v. Chicago, St. P. M. & O. R. Co. 1 Inters. Com. Rep. 375, 1 I. C. C. Rep. 104.

Mr. C. M. Cooper, for appellee:

The Interstate Commerce Commission, after full hearing of all parties in interest, and the submission by them of voluminous evidence and full argument, determined that the rates complained of were unjust, unreasonable, excessive, and unlawful. Upon rehearing and reargument the Commission affirmed this decision. These findings of the Commission are made by the statute prima facie evidence of the matters therein stated. The master came to the same conclusion after carefully considering said findings and voluminous evidence submitted to him, and after full argument. The circuit court, after full argument by counsel and full consideration, came to the same conclusion and confirmed the master's report. An appellate court will not reverse such findings even if there is conflicting testimony.

Tilghman v. Proctor. 125 U. S. 136, 31 L. ed. 664; *Callaghan v. Myers.* 128 U. S. 617, 32 L. ed. 547; *Kimberly v. Arms.* 129 U. S. 512, 32 L. ed. 764; *Welling v. La Bau.* 32 Fed. Rep. 293, 34 Fed. Rep. 40; *Bates v. St. Johnsbury & L. C. R. Co.* 32 Fed. Rep. 628.

The rates which were in effect immediately before the advance of rates which was complained of had continued in force for five years, being continued by the transportation lines from year to year by yearly agreements among themselves.

The presidents of the transportation lines, overruling the traffic managers and freight agents, suddenly advanced the rates 33½ per cent. So great an advance on long established rates on a staple article is without a precedent or a parallel in the history of transportation lines in this country, and it is submitted that it carries its own condemnation on its face.

Bates v. Pennsylvania R. Co. 2 Inters. Com. Rep. 715, 3 I. C. C. Rep. 435; *Re Rates and Charges on Food Products*, 4th Annual Report of Interstate Commerce Commission, p. 96.

Oranges are worth no more, weight for weight, than flour, if as much; they are no more difficult to handle, except as to flour in barrels—that a barrel will roll and a box will not; no more care appears to be taken of them by railroads, other than the use of cars with grated holes for ventilation; they are shipped released, so if they are perishable that merely makes them a less valuable commodity to the owner, but does not in fact affect the transportation line. The rates complained of are

far in excess of rates fixed by the Interstate Commerce Commission as reasonable rates on flour.

Evans v. Oregon R. & Nav. Co. 1 Inters.

Com. Rep. 641, 1 I. C. C. Rep. 325; *Re Rates and Charges on Food Products, supra.*

DECREE:

The decree appealed from is affirmed with costs.

INTERSTATE COMMERCE COMMISSION.

THE FREIGHT BUREAU OF THE CINCINNATI CHAMBER OF COMMERCE
v.
THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY
et al.

THE CHICAGO FREIGHT BUREAU
v.
THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY *et al.*

c.

(Nos. 322, 323.)

1. If railway companies engaged in the transportation of traffic from one territory voluntarily enter into an association with railway companies engaged in the transportation of similar traffic from another territory to a common market, for the purpose, among others, of a mutual adjustment of rates over their respective lines, and in pursuance of this purpose as members of such association agree to and maintain rates over their own lines higher than are reasonable and the relation thus established between the rates from the two territories, respectively, is unjustly prejudicial to the former and unduly preferential to the latter, this is a violation of the first paragraph of section 8 of the Act to Regulate Commerce, for which, whether or not there be a joint liability under said Act of the two systems of carriers, there is at least a several liability on the part of those serving the territory injuriously affected.
2. Where the reasonableness of rates is in question, comparison thereof may be made, not only with rates on another line of the same carrier, but also with those on the lines of other and distinct carriers—the value of the comparison being dependent in all cases upon the *degree* of similarity of the circumstances and conditions attending the transportation for which the rates compared are charged.
3. The influence of water competition *via* the Atlantic on rail rates from northeastern cities to southern territory is not so great, as appears by the proof in these cases, as to account for or justify the difference between the mileage rates from those cities and the mileage rates from Chicago and Cincinnati to such territory under the rates complained of, and the fact of that influence on rates from the former cities cannot be invoked as a justification of rates from the latter, which, after due allowance for such influence as a substantially dissimilar circumstance, still appear on comparison of the two sets of rates to be *unduly* preferential to the former and *unjustly* discriminative against the latter. In rates from different territories to a common market, "relative equality is necessary in the *degree* of the similarity" of circumstances and conditions attending the transportation in the two cases.
4. The fact which is made to appear in these cases, that rates on traffic of the numbered classes from Chicago and Cincinnati to Southern territory are made *higher* than they otherwise would be, for the purpose of securing to the lines from northeastern cities the transportation of that traffic from the territory set apart to them under the Southern Railway & Steamship Association Agreement, itself raises a *prima facie* presumption of the unreasonableness of those rates.
5. Each locality competing with others in a common market is entitled to reasonable and just rates at the hands of the carriers serving it and to the benefit of all its natural advantages, and no departure from the rule requiring rates in all cases to be reasonable in themselves can be justified on the ground that it is necessary in order to maintain existing trade relations, or to "protect competing markets," or to "equalize commercial conditions," or to secure to carriers traffic from certain territory assumed to be exclusively theirs.
6. The division of territory between the eastern and western lines provided for in the Southern Railway & Steamship Association Agreement, is without warrant in law and appears to be made for the benefit of the carriers without regard to the interests of shippers in the territory so divided, to whom it is in effect a denial of the privilege of shipping their goods or produce to market by the line or route they may prefer.
7. The "fines" or "penalties" imposed by the provisions of the agreement of the Southern Railway & Steamship Association on members for violation of association rules appear on the face of that agreement to be available as substitutes for payments which would

be exacted under a regular pooling system, and the arrangement under which they are imposed is tantamount to a combination, contract or agreement "for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof," which are forbidden by the Statute.

8. The requirement of the agreement of the Southern Railway & Steamship Association

that its members apply "full local rates upon all traffic subject to the Association Agreement coming from or going to" connecting lines which do not maintain Association rates, while to traffic from other connecting lines conforming to such rates full local rates are not applied, is repugnant to that clause of section 8 of the Act to Regulate Commerce which forbids carriers to "discriminate in their rates and charges between connecting lines."

Decided May 29, 1894.

UNREASONABLE RATES from Chicago and Cincinnati to Southern points. Southern Railway & Steamship Association agreement.

Messrs. E. P. Wilson and Mortimer Matthews for the Cincinnati Freight Bureau.

Messrs. James E. Munroe and N. G. Iglehart for the Chicago Freight Bureau.

Messrs. Edward Colston, Charles M. Oist and George Hoadley, Jr., for the Cincinnati, New Orleans & Texas Pacific Railway Company and the Alabama Great Southern Railway Company.

Messrs. Edward Colston and S. R. Knott for the Louisville & Nashville Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

Clements, Commissioner:

The complaints in these cases, which were heard and may be disposed of together, were filed, respectively, by the Freight Bureau of the Cincinnati Chamber of Commerce and the Chicago Freight Bureau. The former will hereinafter be referred to as the Cincinnati case, and the latter as the Chicago case.

In both complaints, Baltimore, Philadelphia, New York, Boston and contiguous territory, are designated "Eastern Seaboard Territory;" Knoxville and Chattanooga, Tenn., Rome and Atlanta, Ga., Birmingham, Anniston and Selma, Ala., Meridian, Miss., and contiguous territory, "Southern Territory;" and Cincinnati, Ohio, Louisville, Ky., Indianapolis and Evansville, Ind., Chicago and Cairo, Ill., St. Louis, Mo., and contiguous territory, "Central Territory." These designations will be so applied in this opinion.

The general ground of complaint in the Cincinnati case is that the rates of freight established by the defendant carriers from the Eastern Seaboard and Central territories, respectively, to Southern territory, "unjustly discriminate in favor of the merchants and manufacturers whose business is located and transacted in Eastern Seaboard territory and against the merchants and manufacturers whose business is located and transacted in Cincinnati and other points in Central territory." It is stated that "the burden of the

complaint lies against the relation which exists between the current rates of freight on *manufactured articles and merchandise*" (numbered classes) "from Eastern Seaboard territory to Southern territory, and the current rates of freight exacted upon like commodities when shipped from Central territory to the South, and against the unfair basis of general construction of the tariffs under consideration whereby the rates charged for transportation of commodities classified under 'numbered classes' bear a much higher percentage relation to the rates from New York than do the rates on commodities enumerated under the lettered classes" (food products and similar heavy traffic); and it is alleged, "that this improper relation between rates has the effect of restraining and impeding the growth of productive industries in Central territory and encouraging and promoting similar industries in eastern Seaboard territory, and is the direct result of an agreement established by convention between the officers of defendants, whereby in order to secure stability in rates and to prevent competition between the lines leading respectively from the Eastern Seaboard and Central territories to the South, it was decided to secure to the Eastern lines and Eastern territory the traffic in merchandise and manufactured articles and to the Western territory the traffic in food products and similar heavy commodities." In support of these charges as

to the alleged "improper relation" between the rates from Eastern territory and Central territory to Southern territory, and between those on the numbered and lettered classes, tabular statements are given of the distances, and class rates from leading points in the Eastern and Central territories to the points named above in Southern territory and of the percentage relation borne by rates and distances from Cincinnati to those from New York.

The complaint in the Chicago case contains similar tabular statements and charges, made applicable to Chicago, and in addition calls in question the *reasonableness in themselves* of the through rates from Chicago to Southern territory by the averments "that traffic between Chicago and the Southern territory is through traffic and it is unjust to Chicago that rates from that point should be exacted by defendants based upon unreasonably high rates between Cincinnati and other Ohio river crossings and Southern territory, to which are added substantially the local rates in effect from Chicago to Cincinnati and said other Ohio river crossings," and that "if Cincinnati rates are to be taken as a basis, the rates from Chicago to Southern territory should be some fair percentage above the rates from Cincinnati, or some other arbitraries above the Cincinnati rates as the present New York and Boston rates are above the rates from Baltimore." It is also alleged that "the same rates are charged from New York and from Boston to points in Southern territory whose distances vary more than 500 miles," and it is claimed, that if equal rates prevail from points widely separated in Eastern territory such as New York and Boston to Southern territory, the same basis should govern in rate making to the same Southern points from stations in Central territory, such as Cincinnati and Chicago, which are much nearer together than New York and Boston." The prayer of the complainants in both cases is for an order commanding the defendants to desist from the alleged violations of the Act to Regulate Commerce and requiring them to so adjust their several freight tariffs as to afford the merchants and manufacturers of Cincinnati and Chicago and other points in contiguous territory "a fair and equal opportunity to deliver their products to consumers in the South upon such terms of equality compared with their competitors in Eastern Seaboard territory, as their geographical position, commercial ability and ample transportation facilities will justify."

In the Cincinnati case answers are filed by the Cincinnati, New Orleans & Texas Pacific Railway Company (lessees of Cincinnati Southern Railroad) the Alabama Great Southern Railroad Company, the Louisville & Nashville Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, the Atlanta

4 INTER 8.

& West Points Railroad Company, the Central Railroad & Banking Company of Georgia, the Georgia Pacific Railway Company, the Norfolk & Western Railroad Company, the Port Royal & Augusta Railway Company, the Richmond & Danville Railroad Company, the Seaboard & Roanoke Railroad Company, the Western Railway of Alabama, the Baltimore, Chesapeake & Richmond Steamboat Company, the Merchants & Miners Transportation Company, the Ocean Steamship Company and the Old Dominion Steamship Company. They all deny the general charge, that the rates over the respective lines of transportation from the Central and Eastern Seaboard territories to Southern territory unjustly discriminate against Central territory in favor of Eastern Seaboard territory. It is alleged in substance that the all-rail rates from Eastern Seaboard to Southern territory are determined by the combined rail-and-water rates from Boston, New York, Philadelphia and Baltimore *via* Steamship lines to Charleston and Savannah and thence by rail to the interior, and that the rates from Cincinnati and other points in Central territory are not thus controlled by water competition. The other allegations of the complaint stated above are also denied, and it is claimed by most of the respondents that the transportation in which they, as members of through lines from their respective territories to the South, are engaged, is not "*under a common control, management or arrangement, for a continuous carriage or shipment,*" within the meaning of those words as used in the first section of the Act to Regulate Commerce.

In the Chicago case answers are filed by the following railway companies: the Louisville, New Albany & Chicago, the Chicago & Alton, the Chicago & Eastern Illinois, the Cincinnati, Hamilton & Dayton, the Cleveland, Cincinnati, Chicago & St. Louis, the Illinois Central, the Louisville, Evansville & St. Louis, the Pittsburgh, Cincinnati, Chicago & St. Louis, the Terre Haute & Indianapolis, the Cincinnati, New Orleans & Texas Pacific (lessees Cincinnati Southern) the East Tennessee, Virginia & Georgia, the Alabama Great Southern, the Atlanta & West Point, the Central of Georgia, the Georgia Pacific, the Norfolk & Western, the Port Royal & Augusta, the Richmond & Danville, the Seaboard & Roanoke, the Western of Alabama, and the following steamship companies: The Baltimore, Chesapeake & Richmond, the Merchants & Miners Transportation, the Ocean, and the Old Dominion. These answers present substantially the same issues as are raised in the Cincinnati case. It will be noted, that in addition to the railroad and steamship companies made parties defendants in the Cincinnati case, the complaint in the Chicago case is filed against a number of railroad companies running from

Chicago to Cincinnati and other Ohio river points. These roads allege that their "rates are confined to the Ohio river, and that the through rate to any point south of the Ohio river is made by adding their rates to the Ohio (exclusively made by them) to the rates established by the lines south thereof, to the point of destination, over which rates south of the Ohio they neither possess nor exercise any control whatever, either as to the making or enforcement thereof." They also affirm the reasonableness of their rates north of the Ohio.

There are many argumentative averments and allegations of facts contained in the complaints and answers, which it is unnecessary to set forth here, as such as are deemed material will be stated further on and given due consideration.

Facts.

1. The tabular statements mentioned above as being contained in the complaints purporting to show distances and class rates from Cincinnati and Chicago in Central territory and from Boston, New York, Philadelphia and Baltimore, in Eastern Seaboard territory, to the points designated as being in Southern territory, and also giving the percentage relation borne by such distances and rates from Cincinnati and Chicago to those from New York are found to be correct with a few immaterial exceptions. The following are those statements corrected and showing current rates and percentages:

TABULAR STATEMENT OF DISTANCES, CURRENT RATES AND PERCENTAGES BETWEEN CINCINNATI AND CHICAGO AND NEW YORK, PHILADELPHIA, BOSTON AND BALTIMORE AND SOUTHERN POINTS.

To KNOXVILLE, TENN.

From	Classes.													per bol.
	Dist.	1	2	3	4	5	6	A	B	C	D	E	F	H
Cincinnati,.....	290	76	65	57	47	40	80	20	26	28	19	84	88	33
Chicago,.....	560	116	99	82	64	55	42	32	38	33	29	47	58	48
New York,.....	735	100	85	70	55	48	40	36	40	36	36	48	55	72
Philadelphia,.....	645	108	92	83	71	58	47	34	46	38	37	56	74	66
Boston,.....	948	100	85	70	55	48	40	36	40	36	36	48	72	55
Baltimore,.....	549	95	80	65	50	45	37	33	37	33	33	45	66	52
Percentage														
Cinn. of N. Y.	39	76	76	81	85	88	75	56	65	64	53	71	69	46
Chic. of N. Y.	78	116	116	117	116	115	105	89	95	92	81	98	105	67

To CHATTANOOGA, TENN.

From	Classes.													per bol.
	Dist.	1	2	3	4	5	6	A	B	C	D	E	F	H
Cincinnati,.....	385	76	65	57	47	40	80	20	26	28	19	34	38	33
Chicago,.....	595	116	99	82	64	55	42	32	38	33	29	47	58	48
New York,.....	847	114	98	86	73	60	49	36	48	40	39	58	78	68
Philadelphia,.....	757	108	92	84	71	58	47	34	46	38	37	56	74	66
Boston,.....	1060	114	98	86	73	60	49	36	48	40	39	58	78	68
Baltimore,.....	661	106	90	83	70	57	46	33	45	37	36	55	72	65
Percentage														
Chic. of N. Y.	70	102	101	95	88	92	86	89	79	82	74	81	74	70
Cinn. of N. Y.	40	67	66	66	64	67	61	56	54	58	49	59	49	49

To ROME, GEORGIA.

From	Classes.													per bol.
	Dist.	1	2	3	4	5	6	A	B	C	D	E	F	H
Cincinnati,.....	418	107	92	81	68	56	46	28	33	26	22	48	44	53
Chicago,.....	678	147	126	106	85	71	58	40	45	36	32	61	64	68
New York,.....	925	114	98	86	73	60	49	36	48	40	39	58	78	68
Philadelphia,.....	835	114	98	86	73	60	49	36	48	40	39	58	78	68
Boston,.....	1188	114	98	86	73	60	49	36	48	40	39	58	78	68
Baltimore,.....	789	107	92	81	68	56	46	34	45	37	36	55	65	72
Percentage														
Chic. of N. Y.	73	129	130	123	116	118	118	111	94	90	83	105	83	100
Cinn. of N. Y.	45	94	94	94	93	93	94	78	69	65	56	88	56	78

TO ATLANTA, GA.

Classes.														
From	Dist.	1	2	3	4	5	6	A	B	C	D	E	F	H
Cincinnati,-----	475	107	92	81	68	56	46	28	35	28	24	48	48	53
Chicago,-----	733	147	126	106	85	71	58	40	47	38	34	61	68	68
New York,-----	876	114	98	86	73	60	49	36	48	40	39	58	78	68
Philadelphia,-----	786	114	98	86	73	60	49	36	48	40	39	58	78	68
Boston,-----	1069	114	98	86	73	60	49	36	48	40	39	58	78	68
Baltimore,-----	690	107	92	81	68	56	46	24	45	37	36	55	72	65
Percentage														
Chic. of N. Y.-----	84	129	128	123	116	118	118	111	98	95	87	105	87	100
Cinn. of N. Y.-----	54	94	94	94	93	93	94	78	73	70	62	83	63	78

TO MERIDAN, MISS.

Classes.														
From	Dist.	1	2	3	4	5	6	A	B	C	D	E	F	H
Cincinnati,	680	122	102	89	75	62	54	39	41	39	32	88	66	61
Chicago,	723	134	109	91	76	63	55	41	45	43	36	39	74	63
New York,	1142	124	106	93	79	65	53	36	48	40	39	58	78	66
Boston,	1855	124	106	93	79	65	53	36	48	40	39	58	78	66
Percentage														
Chic. of N. Y.	63	108	108	96	96	97	104	114	94	107	92	67	95	96
Cinn. of N. Y.	55	98	96	96	95	95	102	108	85	97	82	65	85	90

TO BIRMINGHAM, ALA.

Classes.														
From	Dist.	1	2	3	4	5	6	A	B	C	D	E	F	H
Cincinnati,-----	478	89	79	68	55	47	36	32	33	26	22	43	44	37
Chicago,-----	652	119	103	83	64	55	42	40	43	34	30	52	60	43
New York,-----	990	114	98	86	73	60	49	36	48	40	39	58	78	68
Philadelphia,-----	900	108	92	84	71	58	47	34	46	38	37	56	74	66
Boston,-----	1203	114	98	86	73	60	49	36	48	40	39	58	78	68
Baltimore,-----	804	106	90	83	70	57	46	33	45	37	36	55	72	65
Percentage														
Chic. of N. Y.-----	66	104	105	96	88	92	86	111	90	85	77	90	77	71
Cinn. of N. Y.-----	48	78	81	79	75	73	73	69	69	65	56	74	56	54

TO ANNISTON, ALA.

Classes.														
From	Dist.	1	2	3	4	5	6	A	B	C	D	E	F	H
Cincinnati,.....	476	107	92	81	68	56	46	28	38	26	22	48	44	42
Chicago,.....	715	147	126	106	85	71	58	40	45	36	32	61	64	57
New York,.....	949	114	98	86	73	60	49	36	48	40	39	58	78	68
Philadelphia,.....	859	114	98	86	73	60	49	36	48	40	39	58	78	68
Boston,.....	1162	114	98	86	73	60	49	36	48	40	39	58	78	68
Baltimore,.....	763	107	92	81	68	56	46	34	45	37	36	55	72	65
Percentage														
Chic. of N. Y.	75	129	128	123	116	118	118	111	94	90	92	105	82	84
Cinn. of N. Y.	50	94	94	94	93	93	94	78	69	65	56	83	56	62

TO SELMA, ALA.

Classes.														
From	Dist.	1	2	3	4	5	6	A	B	C	D	E	F	H
Cincinnati,.....	598	108	102	88	71	59	47	32	33	26	22	52	44	37
Chicago,.....	746	138	126	108	80	67	53	40	43	34	30	61	60	48
New York,.....	1090	114	98	86	73	60	49	36	48	40	39	58	78	68
Philadelphia,.....	990	108	92	84	71	58	47	34	46	38	37	56	74	66
Boston,.....	1295	114	98	86	73	60	49	36	48	40	39	58	78	68
Baltimore,.....	894	106	90	88	70	57	46	33	45	37	36	55	72	65
Percentage														
Chic. of N. Y.	69	121	128	120	109	111	108	111	90	85	77	105	77	71
Cinn. of N. Y.	55	95	104	102	97	98	96	89	69	65	56	90	56	54

2. The distances from the Eastern Seaboard cities in the above statements are *all rail*, while the rates are *rail and water*, or based on the rail and water rates; both the distances and rates from Cincinnati and Chicago are *all rail*. There are a number of steamship lines running from the Eastern Seaboard to Charleston, Savannah and other southern ports, namely, the Ocean Steamship, the Mallory, the Morgan, the Clyde, and the Merchants and Miners; and the above combined *rail and water* rates appear to be made by adding the rate of the steamer lines to the rate of the rail lines from the ports to interior points. The actual mile-

age by water from New York to Charleston and Savannah is estimated at about 750 miles, but the rates of the steamer lines are made on the basis of what is termed by the witnesses a "constructive mileage" of 230 miles to Charleston and 250 miles to Savannah, that is, the water rate from New York to Charleston is equal to the rail rate for 230 miles by land, and to Savannah, to the rail rate for 250 miles. The all rail distance from New York to Charleston is 799 miles and to Savannah 914 miles. The following are the distances from Charleston and Savannah by rail to the interior points named:

From Charleston,		From Savannah,	
to		to	
Knoxville,	538 miles.	Knoxville,	520 miles.
Chattanooga,	446 "	Chattanooga,	433 "
Atlanta,	303 "	Atlanta,	295 "
Rome,	367 "	Rome,	367 "
Birmingham,	475 "	Birmingham,	462 "
Anniston,	412 "	Anniston,	399 "
Selma, (Via E. T. V. & G.)	561 "	Selma, (Via S. F. R. R.)	462 "
Meridian,	671 "	Meridian, (Via E. T. V. & G.)	669 "

The sums of the "constructive" mileages of 230 miles from New York to Charleston and 250 miles to Savannah, plus the actual rail

mileages to interior points above given, are shown by the following table:

Via Charleston.		Via Savannah.	
to		to	
Knoxville,	763 miles.	Knoxville,	770 "
Chattanooga,	676 "	Chattanooga,	683 "
Atlanta,	538 "	Atlanta,	545 "
Rome,	597 "	Rome,	617 "
Birmingham,	705 "	Birmingham,	712 "
Anniston,	642 "	Anniston,	649 "
Selma,	791 "	Selma,	712 "
Meridian,	901 "	Meridian,	919 "

These are what are termed the "rate making mileages" from New York by water to Charleston and Savannah and thence by rail to the interior points named, upon which the combined *rail and water* rates from New York are based. The rail and water rates from the eastern seaboard cities to southern territory practically control the all rail rates. The all rail rates are the same as the rail and water rates to Knoxville, Chattanooga, Birmingham, Selma and Meridian, but to Rome, Atlanta, Anniston, and points east of a line drawn from Chattanooga through Birmingham, Selma and Montgomery to Pensacola, the all rail rates are higher than the rail and water rates by the following differentials.

Classes.....	1	2	3	4	5	6	A	B	C	D	E	F
Differentials in cents....	8	6	5	4	3	2	2	2	2	2	3	4

3. The lines regularly engaged in the transportation of traffic from Cincinnati, Chicago and contiguous territory, to Southern territory, are *all rail*. There appears to be no 4 INTER S.

through water or rail and water line in regular operation for the transportation of traffic in the numbered classes between those territories. There is a line by lake from Chicago to Buffalo and from that point by rail or canal to New York, which has a *direct* effect on the rail rates between Chicago and the seaboard—particularly the rates on grain and grain products. As to rates on articles of the higher classes, the influence of the water competition does not appear to be so controlling. The rates from Chicago to New York are the basis of the rates from Central and Trunk Line territory to the Northeastern seaboard, the latter being percentages of the former, and the water competition by lake and canal thus *indirectly* exerts an influence upon the rates to the seaboard from as far south as St. Louis and Cincinnati. Traffic may be transported by the lake and canal or lake and rail line from Chicago to New York and thence on the Atlantic to Charleston, Savannah and other southern ports, and thence by rail to interior points in Southern territory, and there is evidence tend-

ing to show that in the past, some shipments have been made that way, but mostly of grain and heavy articles such as are embraced in class 6 of the Official Classification and the lettered classes of the Southern Classification. The traffic shipped from Chicago by lake to Buffalo and from that point by canal or rail to New York is principally wheat, corn and other grains, which can be transferred through an elevator at Buffalo to the canal boat, or car. If the transportation be continued by ocean to a southern seaport the same process of transfer is necessary at the seaboard and these transfers add to the expense. The "navigation season" by the lake and canal line lasts from April to December. In the winter this line suspends and the rail lines appear to advance their grain rates—for example, in November during the navigation season in 1891, the all rail rate on grain (except corn) was 22½ cts. per 100 lbs. and in May, 1892, the grain rate was 20 cts. per 100 lbs., but after the season of navigation closed the normal rate of 25 cts. per 100 lbs. was resumed. The time made by the steamship lines from eastern seaboard cities to Charleston and Savannah is much less than that made by lake and canal from Chicago to New York. The distance by canal is about 450 miles and that mode of transportation is much slower than by lake and ocean. During the season of 1891, the rates on wheat by lake and rail from Chicago to New York were approximately from 14 cts. to 16½ cts. per 100 lbs., and on corn, from 11½ cts. to 17 cts., and by lake and canal, on wheat from 8 cts. to 16 cts., and on corn from 7 cts., to 15 cts. The distance from Chicago to New York is 912 miles and the present *all rail* class rates (which have been in force since Dec. 17, 1888) are as follows:

	Cents per 100 lbs.					
Classes	1	2	3	4	5	6
Rates	75	65	50	35	30	25

The class 6 rate of 25 cts., per 100 lbs., is the regular normal rate on grain and grain products.

The following are the class rates by Ocean Steamship lines from New York to Savannah:

	Cents per 100 lbs.					Per
Classes...	1	2	3	4	5	bbl.
Rates...	55	45	35	28	28	18
	18	18	18	18	28	28
	18	18	18	18	28	31

Merchandise may also be carried from Central territory by rail to Baltimore and thence by steamer to Charleston, Savannah and other southern ports for shipment by rail to the interior. The class rates from Cincinnati to Baltimore are:

	Cents per 100 lbs.					
Class	1	2	3	4	5	6
Rates	62	53½	40½	27½	23	18½

4. The rates on through shipments from Chicago *via* the Ohio river crossings, Cincinnati, Louisville and Evansville, to points in Southern territory, are not prorated the entire distance but are the sum of the regular rate to the Ohio, of the roads north of that river, plus that of those south. The shipments are almost invariably however, under a through bill of lading, quoting a total through rate (made up as above stated) and issued at Chicago by the agent of the initial carrier, and the goods when in car-loads are carried through without transfer or "breaking bulk" at the river. When shipments are in less than car loads, it is stated a transfer is generally made at the river because of the disinclination of the southern roads to pay for the use of cars of other roads. The rates both north and south of the river appear to be influenced to a large extent by competition of the various railway lines, and are not, strictly speaking, local rates. The rates of the roads north of the river are lower per mile than those of the southern roads, this being attributed to the greater volume of tonnage in the territory of the former than in that of the latter. The effect of prorating on a mileage basis the rate from Chicago to points in southern territory would be to advance the proportion of the lines North of the Ohio and to reduce the proportion of the lines South. The rates for transportation between Chicago and the Ohio are what are known as Trunk Line rates, and are governed by the Official Classification and those for transportation between the Ohio and Southern territory are governed by the Classification of the Southern Railway & Steamship Association. The class rates and distances by the short lines from Chicago to the Ohio river points, Cincinnati, Louisville, and Evansville, and to Cairo, are shown below:

To	Distances.	Rates in cents per 100 lbs.					
		1	2	3	4	5	6
Cincinnati	298 miles,	40	34	25	17	15	12
Louisville	304 "	42	36	27	19	17	14
Evansville	287 "	40	34	25	17	15	12
Cairo	364 "	45	35	25	20	15	12

(The distances and rates from Cincinnati to points in Southern territory, are hereinbefore given in the tables taken from the complaints.)

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In the tables of rates which we have given, those containing only the six numbered classes are under the Official Classification.

which is applied east of Chicago and the Mississippi and north of the Ohio and Potomac rivers, and those embracing also lettered classes are under the Classification of the Southern Railway & Steamship Association, which applies south of the Ohio and Potomac and east of the Mississippi rivers. As above stated, grain and grain products fall under class 6 of the Official Classification; in the Southern Classification, grain and its products and heavy freight are in the lettered classes. Manufactures and costly commodities are in the higher classes.

5. It appears from tariffs on file with the Commission that there were in existence when the Interstate Commerce Law was passed and up to April 17, 1893, through rates from New York *via* Cincinnati to Chattanooga, Meridan and Birmingham, less than the sum of the rates to Cincinnati and the rates thence on to those cities, and there are such rates still in effect to Nashville, Memphis, Mobile, and a number of Mississippi river points.

Those through rates to Chattanooga, Meridan, and Birmingham, were as follows:

1	2	3	4	5	6
114	98	86	78	60	49

The following are the rates from New York to Cincinnati:

1	2	3	4	5	6
65	57	44	30	26	22

6. The tables below show the average receipts per ton per mile, the estimated cost of carrying a ton a mile and the number of tons hauled per mile of line, as reported for the years ending June 30, 1890, and 1891, by the roads named therein, being (1) certain of the roads north of the Ohio engaged in transportation of traffic from Chicago to the Ohio, (2) certain of the roads north of the Potomac forming parts of lines from the Eastern seaboard to Southern territory, and (3) certain of the roads south of the Ohio and Potomac rivers continuing the transportation to Southern territory from the Central and Eastern Seaboard territories respectively.

I.

Roads North of the Ohio.

Name of road.	1890.		1891.		Tons carried per mile of line.	
	Average receipts per ton per mile	Estimated cost of carrying one ton one mile	Average receipts per ton per mile	Estimated cost of carrying one ton one mile		
	Cents.	Cents.	Cents.	Cents.	1890.	1891.
L. N. A. & C. Ry.	.917	.578	.868	.541	2831	2521
C. & A. R. R. ....	.898	.521	.980	.569	4830	3855
C. & E. I. R. R. ....	.601	.352	.588	.288	6626	8067
C. H. & D. R. R. ....	.873	.491	.858	.527	10967	7702
C. C. C. & St. L.	.674	.489	.688	.470	5083	4779
P. C. & St. L. Ry. 3	.669	.499	1) .657	1) .489	19199	1) 5104
P. C. C. & St. L.			2) .786	2) .565		2) 7818

1) For 3 months ending Sept. 30, 1890.

2) For 9 months ending June 30, 1891.

3) On Oct. 1st, 1890, consolidated into Pittsburg, Cincinnati, Chicago & St. Louis Ry.

II.

Roads North of the Potomac.

Name of Road.	1890.		1891.		Tons carried per mile of line.	
	Average rec'pts per ton per mile	Estimated cost of carrying one ton one mile	Average rec'pts per ton per mile	Estimated cost of carrying one ton one mile		
	Cents.	Cents.	Cents.	Cents.	1890.	1891.
Penn. R. R. ....	.661	.462	.656	.459	27132	19466
B. & O. R. R. ...	.686	.426	.643	.450	7964	8123

III.

Roads South of Ohio and Potomac.

L. & N. R. R.	.972	.590	.968	.614	6647	6387
C. N. O. & T. P.	.921	.581	.876	.626	5725	5967
E. T. V. & G. Ry.	.870	.560	.905	.609	2697	2722
C. R. R. & B. Co.						
of Ga.	1.902	1.428	1.529	1.012	1295	no data
N. & W. R. R.	.523	.829	.569	.883	5900	5008
R. & D. R. R.	1.810	1.090	1.416	.951	1163	1071

7. The "revenue per ton of freight per mile" and average cost of carrying one ton one mile on all roads in Southern territory (Group V.) and on roads in Central territory (Groups III. and VI.) as shown in the reports of the Statistician of this Commission for the years ending June 30, 1890, 1891 and 1892, are given below:

	1890.		1891.		1892.	
	Revenue per ton per mile.	Cost per ton per mile.	Revenue per ton per mile.	Cost per ton per mile.	Revenue per ton per mile.	Cost per ton per mile.
Roads in Southern territory	Cts. 1.061	Cts. .705	Cts. 1.018	Cts. .690	Cts. .958	Cts. .660
Roads in Cen- } Group 3	.695	.470	.690	.477	.674	.470
tral territory } Group 6	.961	.593	.858	.582	.983	.597

(NOTE.—Group 3 embraces that portion of Central territory east of Illinois and Group 6, that portion west of Indiana.)

The "revenue per ton of freight per mile" and "average cost of carrying one ton one mile" on all the roads in the country, according to the same authority, for those years, are as follows:

	1890.		1891.		1892.	
	Revenue per ton per mile.	Cost per ton per mile.	Revenue per ton per mile.	Cost per ton per mile.	Revenue per ton per mile.	Cost per ton per mile.
Roads in United States.	Cts. .941	Cts. .604	Cts. .895	Cts. .588	Cts. .898	Cts. .582

8. The carriers' made parties defendant in the Chicago case may be divided into three classes: (1), those north of the Ohio participating in the transportation of traffic to that river; (2), those south of the Ohio and continuing the transportation from that river to Southern territory, and (3) those participating in the transportation from Eastern to Southern territory. The defendants in the Cincinnati case embrace the two classes last named.

The roads of the defendants north of the Ohio, except the Illinois Central, do not extend south beyond the river and are distinct in their organization and ownership from their southern connections. The Illinois Central crosses the river at Cairo and runs south *via* Holly Springs (near Memphis) to New Orleans. At Cairo it connects and forms through lines with roads to Southern territory. The roads constituting through lines from Chicago to Cincinnati, Louisville and Evansville (Ohio river points) respectively, appear to be principally the following: to Cincinnati, the Cleveland, Cincinnati, Chicago & St. Louis; the Pittsburg, Cincinnati, Chicago & St. Louis; the Louisville, New Albany & Chicago, and 4 INTER S..

the Cincinnati, Hamilton & Dayton; to Louisville, the Pittsburg, Cincinnati, Chicago & St. Louis and the Louisville, New Albany & Chicago; to Evansville, the Chicago & Eastern Illinois and the Evansville & Terre Haute.

The defendants mainly engaged in the transportation of traffic from Cincinnati to Southern territory appear to be the Louisville & Nashville and the Cincinnati, New Orleans and Texas Pacific; and those constituting parts of the principal rail lines from Eastern to Southern territory appear to be the East Tennessee, Virginia & Georgia, the Norfolk & Western and the Richmond & Danville. The Norfolk & Western extends north east to Hagerstown and the Richmond & Danville, to Washington. None of the defendant railroads, except the two last named, cross the Potomac and the roads over which the traffic from the Eastern seaboard cities, Boston, New York, Philadelphia, and Baltimore, is transported to connecting lines leading to Southern territory *are not made defendants*. The ocean steamship companies having lines from northeastern cities to southern ports and forming parts of the combined rail and water lines *via* those ports to in-

terior points in Southern territory are made defendants, and also the roads leading from the ports to the interior.

9. All the defendants (including the steamship lines) in the Cincinnati case are also defendants in the Chicago case and are for the most part members of the Southern Railway & Steamship Association. The latter case, as before stated, embraces as defendants, in addition to those in the former, roads north of the Ohio participating in the transportation of traffic from Central territory to that river. *None of these are members of the Southern Railway & Steamship Association except the Illinois Central Railroad*, which, as we have seen, extends into territory south of the Ohio. This Association is composed of transportation lines (including the steamship lines from Northeastern cities to southern ports) engaged in the traffic of the territory South of the Potomac and Ohio rivers and east of the Mississippi, and the rates involved in these cases from both Eastern and Central to Southern territory are established and maintained under its rules and regulations. As to the origin of this Association, it is set forth in a report of March 4, 1891, by Commissioner Wilson to the Cincinnati Freight Bureau (which report was put in evidence), that "subsequent to the close of the war and closely following the re-establishment of transportation lines and through rates into the south, there arose lively competition between what are known as Eastern Coastwise Lines and the Western lines which reached the south from the west *via* Ohio and Mississippi river gateways. Each commenced operations in the territory of the other, and while corn from Chicago was carried *via* Boston and Charleston to Atlanta and Chattanooga, the manufactured products of the East were not infrequently brought west *via* Cincinnati and Louisville, or Chicago and Cairo, for delivery to southern destinations. Rate wars were much more fierce and frequent than they are now. It was to check competition of this character and to protect the revenues of transportation lines generally that the Southern Railway & Steamship Association was established."

The records of proceedings of the Association from as far back as 1878 and up to January 14, 1892, have been introduced in evidence. From these records, it appears that in 1878, the roads leading South from Chicago, St. Louis, Cincinnati, Louisville and other western cities (then combined in an organization known as the "Green Line") met in convention with the steamer lines from eastern cities and the roads South of the Potomac engaged in the transportation of eastern traffic. At this meeting its object was disclosed to be "to protect to the Green Line Roads the business which is peculiar to the northwest and to the

eastern lines, the business peculiar to their territory, and to maintain equal rates on business common to the two sections." The Green Line rates appear to have then been advanced and the rates of the two systems of carriers adjusted with a view to the transportation by western lines of *western products* (that is, products from territory west of Pittsburg and East of the Mississippi and between the Ohio and the lakes) and the transportation by Eastern lines of *eastern manufactures*.

Up to 1885 this adjustment of rates appears to have been the means employed to carry out the above stated object of the convention of 1878. In 1885 a division of territory was established and a provision was inserted in the agreement for that year requiring the exaction of local rates by the Eastern and Western lines, with a view to the protection to those lines, respectively (so far as it was possible in that way), of what is termed "the revenue derived by them from transportation."

By a resolution adopted by the Executive Committee of the Association in April, 1885, it was provided in connection with the division of territory above referred to that "in case Eastern Lines take Western business or Western Lines take Eastern business, they are to pay the *pool* the entire revenue accruing thereon from points of junction with Association roads, to be given to the lines composing the Eastern or Western Lines as the case may be." The agreement of that year and those of subsequent years up to at least as late a date as that of the agreement which terminated July 1, 1887, make provision for such pooling or as it is termed "actual apportionment." In those agreements two methods of apportionment are provided for—namely, apportionment of *tonnage* and apportionment of *revenue*. Subsequent agreements do not so distinctly provide for pooling, but in the last agreement introduced in evidence (that of January 14, 1892), it is declared that "the principle of an apportionment of business subject to arbitration shall be recognized in the operation of the Association so far as this can be *lawfully* done." Provision is, also, made in that and the last agreement entered into since the hearing in these cases, for raising a fund for payment of what are termed fines for violations of the agreement, as will hereinafter appear.

The provisions as to division of territory and the exaction of local rates have been carried forward in the various agreements entered into from 1885 to the present time. The last agreement introduced in evidence is that dated, January 14, 1892, and it is substantially the same as those of preceding years as far back as 1885. Its clauses as to the exaction of local rates and division of territory are as follows:

"Art. II., sec 2. For the mutual protection of the various interests, and for the purpose of

securing the greatest amount of net revenue to all the companies parties to this agreement, it is agreed that what are termed western lines shall protect the revenue derived from transportation by what are known as eastern lines, *under the rates as fixed by this Association*, so far as can be done by the exaction of local rates, and that eastern lines shall in like manner protect like revenue of western lines."

"Sec. 3. That a line from Buffalo through Salamanca, Pittsburg, Wheeling and Parkersburg, to Huntington, West Virginia, be made the dividing line between eastern and western lines for the territory hereinafter outlined. That the western lines shall not make joint rates from points east of that line for any points east of a line drawn from Chattanooga through Birmingham, Selma and Montgomery to Pensacola."

"Sec. 4. The eastern lines, including the Richmond & Danville railroad *via* Strasburg or points east of Strasburg, and the East Tennessee, Virginia & Georgia Railway *via* Bristol, shall not make joint rates on traffic from points west of that line (Buffalo, etc.) to any points on or West of a line drawn from Chattanooga through Athens, Augusta and Macon, to Live Oak, Florida."

"Sec. 5. The traffic from Buffalo through Salamanca, Pittsburg, Wheeling and Parkersburg to Huntington, West Virginia, and points on that line, to and east of Chattanooga, Calera and Selma, shall be carried by either the eastern or western lines only at such rates as may be agreed upon."

"Sec. 6. It is understood that the eastern and western lines will co-operate in the enforcement of the 8d and 4th sections of this second article."

The objects of the Association as alleged in the preamble to this agreement, are "the establishment and maintenance of tariffs of uniform rates, to prevent unjust discrimination such as necessarily arises from the irregular and fluctuating rates which inevitably attend the separate and independent action of transportation lines" and the securing as to business in which the carriers have a common interest "a proper co-relation of rates, such as will protect the *interests of competing markets* without unjust discriminations in favor of or against any city or section."

The traffic embraced in the agreement is defined in § 1 of art. 2, as follows:

"The traffic subject to this agreement shall be (a) all business for which two or more of the parties hereto compete, having origin and destination with the territory of this Association, that is, south of the Virginias and south of the Ohio river and east of the Mississippi river; and (b) all traffic between territory on or north of the southern boundaries of the Virginias and on or north of the Ohio river and 4 INTER S.

west of the Mississippi, and the territory south of such southern boundaries of the Virginias and the Ohio river, and east of the Mississippi river, *except*, that traffic to or from a local point on any line shall be considered local to that line, and so far as that line may be concerned, shall not be subject to this agreement, and further *except*, that traffic between points on the Ohio and Mississippi rivers, or between points on the Ohio and Mississippi rivers and points north of the Ohio and west of the Mississippi shall not be subject to this agreement."

The agreement provides for an annual convention of the representatives of the several companies, members of the Association, at which each company shall have one vote, two-thirds of the whole vote of the members present being required to make the action of the convention binding. At this meeting, among other business to be transacted, there are to be elected a President, a Commissioner, a Secretary and three Arbitrators. The members of the Association are each required to designate a representative, authorized "to represent them in all matters of business with the Association or its members," and the representatives so designated constitute an "Executive Board." The "Executive Board," it is provided, "shall have jurisdiction over all matters relating to traffic covered by the agreement, but shall act only by *unanimous consent* of all its members' and "in the event of failure to agree, the questions at issue shall be settled by the Board of Arbitration." The "Executive Board" are authorized "at their discretion to appoint *Rate Committees* and other sub-committees, either of their own number or from among the officers and agents of the Companies; members of the Association." It is provided that, "with a view to a proper relative adjustment of all rates, and especially a proper relative adjustment of rates on similar articles from the East and West to common territory, the *Rate Committees* shall have *sole authority to make all rates and classifications on all traffic covered by the agreement*, subject to decision of the Commissioner, the Executive Board or Board of Arbitration in case such Rate Committees cannot agree." If the "Rate Committees" fail or omit to make rates, the Commissioner is given authority to make such rates, so that, it is stated, "there shall be properly authenticated tariffs of rates on all traffic covered by the agreement." The sub-committees appointed by the "Executive Board" can "only act by *unanimous consent*, and failing to agree, the questions at issue may, upon demand of any member, be referred to the Executive Board for action at their next meeting, and such questions may be submitted direct to the Board of Arbitration, when so authorized by a majority of the Executive Board. The decisions of

the "Board of Arbitration" are made "final and conclusive on all questions which may be submitted to them under the agreement or by consent of the parties." The Commissioner is Chairman of the Executive Board, and also of the sub-committees and is authorized to represent absent members of sub-committees as well as of the Executive Board, and "during the interim between the reference of any matter of difference from a sub-committee to the Executive Board and the final determination of such matter," he is given authority "if he deem it a matter requiring prompt action, to decide it temporarily" and his decision is made "binding on all parties until reversed by the Executive Board or by arbitration;" he is declared to be "the chief executive officer of the Association, and as a representative of its members, both *severally and jointly*," is empowered to "act for them in all matters which come within the jurisdiction of the Association, in conformity with the requirements of the agreement and the instructions of the Executive Board and sub-committees, but *exercising his discretion in all cases* which are not provided for either by the agreement or by the Executive Board and committees acting under its authority and sanction;" and he is also authorized "to reduce the rates when necessary to meet the competition of lines or roads not parties to the agreement and at the same time to make corresponding reductions from other points from which relative rates are made," and is given "such authority over the traffic officers and their subordinates and over the accounting departments of the parties to the agreements as may be necessary to enforce its terms relative to the maintenance of rates." When rates have been fixed under the provisions of the agreement by the Rate Committees, the Commissioner, the Executive Board or by arbitration, there is to be "no reduction from such rates without the consent of the Commissioner" and in all cases changes therein are to be made by the Rate Committees or the Commissioner. The agreement declares "that the maintenance of rates as established under the rules of the Association is of its very essence and that the parties thereto pledge themselves to require all their connections to maintain such rates, and in the event of any company or line, or its connections, not members of the Association, failing to conform to this obligation, the other parties in interest *pledge themselves to increase their proportion of through rates sufficiently to protect the authorized rate whenever required by the Commissioner, to do so*;" and further, that it is "one of the fundamental principles of the agreement that no party thereto shall take *separate* action in any matter affecting the interests of one or more of the other parties, contrary to the spirit and intent of the agreement," and that "all measures necessary to carry out the purpose of the agreement shall be taken

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jointly by the parties thereto." In cases of violation of the agreement, the Board of Arbitration, after hearing, is required to "impose such penalties therefor as it may deem proper and necessary to secure the maintenance of the rates of the Association." These penalties are to be enforced by the Commissioner, and "in order to provide for the prompt payment of any fines that may be assessed against any member of the Association for violating its rules, each company is required to deposit with the Commissioner an amount equivalent to five dollars (\$5.00) for each mile of the road operated by said company under the provisions of the agreement, or in case a company operates a water line, five dollars (\$5.00) for each mile allowed as a prorating distance in the division of through rates—provided such amounts shall not exceed the sum of five thousand dollars (\$5000.00) for any one company." Of this fund thus raised it is provided, that "any surplus over and above the *amount that may be awarded by the Board of Arbitration to indemnify any members for losses sustained* shall be applied to the payment of the expenses of the Association."

The agreement now in force (made July 14, 1898, since the hearings in these cases) extends the territorial line commencing at Buffalo and terminating at Huntington to "Toronto on the north shore of Lake Ontario, through Lewiston and Niagara Falls," and provides that points on this line (from Toronto to Huntington) "shall be common to lines through the Eastern and Western gateways, together with such points adjacent thereto from which the rates shall be the same as from the points above named" (points on said line) "through the gateways of Cincinnati and Louisville, the Rate Committees to agree upon the common points adjacent to said line." To the clause requiring members of the Association "to increase their proportions of through rates sufficiently to protect the authorized rates" in the event of any company or line or its connections not members of the Association failing to conform to the rates established by the Association, it adds the further requirement, that they (members of the Association interested) shall "*apply full local rates upon all traffic subject to the Association Agreement coming from or going to such offending lines, when required by the Commissioner to do so*." The clause requiring the Board of Arbitration in cases of violations of the Agreement by any member, to impose "such penalties therefor as it may deem proper and necessary to secure the *maintenance of the rates of the Association*," is altered so as to read "such penalties therefor as it may deem proper and *commensurate with the injuries inflicted upon the Association and of competing lines parties to this Agreement*." The other material terms of this agreement are substantially the same as those

of the agreement of January 14, 1892, above given.

The agreements of the Association appear to be made as a general rule, annually, to terminate on the 31st day of the July following the date of their taking effect. They purport to be renewals or reorganizations of the Association from year to year and to be binding only on the carriers signing them. That of January 14, 1892, was signed by the Illinois Central and all the defendants common to the two cases, except the South Carolina Railway Company, the Clyde New York Steamship Lines and the Wilmington, Columbia & Augusta Railroad Company. The present agreement is signed by the Illinois Central and all the defendants common to the two cases except the Norfolk & Western and Wilmington, Columbia & Augusta Railroad Companies and the Merchants & Miners Transportation Company. The agreement preceding that of

January 14, 1892, was made July 25, 1888, to take effect August 1 of that year. The Western roads, namely, the Cincinnati, New Orleans & Texas Pacific (Lessees of the Cincinnati Southern) the Alabama Great Southern, the Louisville & Nashville and the Illinois Central, did not sign this agreement and ceased to be members of the Association from the date of its taking effect, August 1, 1888, to January 14, 1892, when they entered into the agreement of that date. During this period of about three years and a half, the eastern lines alone were members of the Association, but the rates maintained by the western lines appear to have remained substantially as they were when those lines suspended their connection with the Association. In the following tables are given the class rates from Chicago and Cincinnati to points in Southern territory in force on December 31, of each year from 1887 to 1891, both inclusive:

From Chicago, Ill. To	Rates in cents per 100 pounds.												Per Bbl.
	1	2	3	4	5	6	A	B	C	D	E	H	
Knoxville, Tenn.	1887	116	99	82	65	55	45	82	88	84	29	47	58
	1888	"	"	"	"	"	"	"	"	"	"	"	52
	1889	"	"	"	64	"	42	"	"	85	31	"	48
	1890	"	"	"	"	"	"	"	"	83	29	"	58
	1891	"	"	"	"	"	"	"	"	"	"	"	"
Chattanooga, Tenn.	1887	116	99	82	65	55	47	82	88	84	29	47	58
	1888	"	"	"	"	"	45	"	"	"	"	"	52
	1889	"	"	"	64	"	42	"	"	85	31	47	48
	1890	"	"	"	"	"	"	"	"	83	29	"	58
	1891	"	"	"	"	"	"	"	"	"	"	"	"
Rome, Ga.	1887	147	126	106	85	71	58	40	44	42	37	61	74
	1888	"	"	"	"	"	"	"	"	"	"	"	"
	1889	"	"	"	"	"	"	45	41	"	"	"	"
	1890	"	"	"	"	"	"	"	"	"	"	"	"
	1891	"	"	"	"	"	"	"	87	33	"	"	66
Atlanta, Ga.	1887	147	126	106	85	71	58	40	48	42	37	61	74
	1888	"	"	"	"	"	"	"	"	"	"	"	"
	1889	"	"	"	"	"	"	45	41	"	"	"	"
	1890	"	"	"	"	"	"	48	"	"	"	"	"
	1891	"	"	"	"	"	"	47	38	34	"	"	68
Birmingham, Ala.	1887	188	126	108	80	67	58	40	48	41	36	61	72
	1888	119	108	88	64	55	42	40	48	35	30	52	48
	1889	"	"	"	"	"	"	"	"	38	34	"	68
	1890	"	"	"	"	"	"	"	"	34	30	"	60
	1891	"	"	"	"	"	"	"	"	"	"	"	"
Anniston, Ala.	1887	147	126	106	85	71	58	40	44	42	37	61	74
	1888	"	"	"	"	"	"	"	"	"	"	"	"
	1889	"	"	"	"	"	"	45	41	"	"	"	"
	1890	"	"	"	"	"	"	"	"	"	"	"	"
	1891	"	"	"	"	"	"	"	87	38	"	"	66
Selma, Ala.	1887	124	118	87	69	59	45	32	48	37	32	61	68
	*1888	138	126	108	80	67	58	40	48	35	30	"	60
	1889	"	"	"	"	"	"	"	"	38	34	"	68
	1890	"	"	"	"	"	"	"	"	34	30	"	60
	1891	"	"	"	"	"	"	"	"	"	"	"	"
Meridian, Miss.	1887	146	133	118	89	74	54	41	45	48	37	55	66
	1888	134	109	91	76	61	55	41	48	48	36	35	68
	1889	"	"	"	"	68	"	"	45	"	"	39	"
	1890	"	"	"	"	"	"	"	"	"	"	"	"
	1891	"	"	"	"	"	"	"	"	"	"	"	"

(*Effective Feb'y 29th 1888.)

From Cincinnati, O., To Knoxville, Tenn.	Rates in cents per 100 pounds.												Per Bbl.
	1	2	3	4	5	6	A	B	C	D	E	H	F
Dec. 1887	76	65	57	48	40	33	20	26	23	19	34	38	38
" 1888	"	"	"	"	"	"	"	"	"	"	"	37	"
" 1889	"	"	"	47	"	30	"	"	25	21	"	38	42
" 1890	"	"	"	"	"	"	"	"	23	19	"	"	38
" 1891	"	"	"	"	"	"	"	"	"	"	"	"	"
Chattanooga, Tenn.													
Dec. 1887	76	65	57	48	40	33	20	26	23	19	34	38	38
" 1888	"	"	"	"	"	"	"	"	"	"	"	37	"
" 1889	"	"	"	47	"	30	"	"	25	21	"	38	42
" 1890	"	"	"	"	"	"	"	"	23	19	"	"	38
" 1891	"	"	"	"	"	"	"	"	"	"	"	"	"
Rome, Ga.													
Dec. 1887	107	92	81	68	56	46	28	33	31	27	48	53	54
" 1888	"	"	"	"	"	"	"	"	"	"	"	"	"
" 1889	"	"	"	"	"	"	"	33	"	"	"	"	"
" 1890	"	"	"	"	"	"	"	"	"	"	"	"	"
" 1891	"	"	"	"	"	"	"	"	27	23	"	"	46
Atlanta, Ga.													
Dec. 1887	107	92	81	68	56	46	28	36	31	27	48	53	54
" 1888	"	"	"	"	"	"	"	"	"	"	"	"	"
" 1889	"	"	"	"	"	"	"	"	"	"	"	"	"
" 1890	"	"	"	"	"	"	"	"	"	"	"	"	"
" 1891	"	"	"	"	"	"	"	35	28	24	48	"	48
Birmingham, Ala.													
Dec. 1887	108	102	88	71	59	47	32	33	32	28	52	57	56
" 1888	"	"	"	"	"	"	"	"	26	22	48	37	44
" 1889	89	79	68	55	47	33	"	"	30	26	43	"	32
" 1890	"	"	"	"	"	36	"	"	26	22	"	"	44
" 1891	"	"	"	"	"	"	"	"	"	"	"	"	"
Anniston, Ala.													
Dec. 1887	107	92	81	68	56	47	28	32	31	27	48	53	54
" 1888	"	"	"	"	"	46	"	"	"	"	"	"	"
" 1889	"	"	"	"	"	"	"	33	"	"	"	"	"
" 1890	"	"	"	"	"	"	"	"	"	"	"	"	"
" 1891	"	"	"	"	"	"	"	"	27	23	"	"	46
Selma, Ala.													
Dec. 1887	94	89	72	60	51	39	23	33	29	24	52	57	50
" 1888	108	102	88	71	59	47	32	"	26	22	"	37	44
" 1889	"	"	"	"	"	"	"	"	30	26	"	"	52
" 1890	"	"	"	"	"	"	"	"	26	22	"	"	44
" 1891	"	"	"	"	"	"	"	"	"	"	"	"	"
Meridian, Miss.													
Dec. 1887	184	123	106	84	70	56	39	41	39	32	54	64	66
" 1888	122	102	89	75	62	54	45	49	42	37	34	61	32
" 1889	"	"	"	"	"	"	39	41	39	32	54	"	66
" 1890	"	"	"	"	"	"	"	"	"	"	38	"	"
" 1891	"	"	"	"	"	"	"	"	"	"	"	"	"

In a "Report on Changes in Railway Transportation Rates" to the Senate Committee on Finance prepared by the Auditor of this Commission from data furnished by the roads, are given the rates on classified traffic and important commodities from Chicago and Cincinnati to Atlanta and Chattanooga in 1879 (the year after the Convention of 1878) and in 1891. Those rates and the differences between them are shown in the following tables.

CHICAGO TO ATLANTA.

Date.	Cents per 100 lbs.											Cents per bbl.		
	1	2	3	4	5	6	Bagging and cotton ties.	Lard, meats, bacon, pork, and packed and loose meats, (C. L.)	Flour in sacks.	Grain.	Ale and Beer in wood.	Whiskey in wood.	Flour in barrels.	Beef and Pork in barrels.
1879.	150	129	108	88	73	58	53	58	58	53	68	88	106	195
1891.	147	126	106	85	71	58	40	47	38	34	61	68	68	*47
Differences.	3	3	2	3	2	—	18	11	20	19	2	—	38	

*Cents per 100 lbs.

CHICAGO TO CHATTANOOGA.

Date.	Cents per 100 lbs.											Cents per bbl.		
	1	2	3	4	5	6	Bagging and cotton' ties.	Lard, meats, bacon, pork, and packed and loose meats, (C. L.)	Flour in sacks.	Grain.	Ale and Beer in wood.	Whiskey in wood.	Flour in barrels.	Beef and Pork in barrels.
1879.	115	100	86	58	51	48	46	50	48	45	50	58	90	187
1891.	116	99	82	64	55	42	32	38	33	29	47	48	58	*88
Differences.	†1	1	4	†6	†4	6	14	12	15	16	3	10	32	

*Cents per 100 lbs.

†Excess of latter rate.

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CINCINNATI TO ATLANTA.

Date.	Cents per 100 lbs.										Cents per bbl.			
	1	2	3	4	5	6	Bagging and cotton ties.	Lard, meats, bacon, pork, and packed and loose meats, (C. L.)	Flour in sacks.	Grain.	Ale and Beer in wood.	Whisky in wood.	Flour in barrels.	Beef and Pork in barrels.
1879.	180	112	94	76	68	49	46	50	51	46	55	76	92	170
1891.	107	92	81	68	56	46	28	35	28	24	48	53	48	*35
Differences.	23	20	13	8	7	3	18	15	23	22	7	23	44	

*Cents per 100 lbs.

CINCINNATI TO CHATTANOOGA.

Date.	Cents per 100 lbs.											Cents per bbl.		
	1	2	3	4	5	6	Bagging and cotton ties.	Lard, meats, bacon, pork, and packed and loose meats, (C. L.)	Flour in sacks.	Grain.	Ale and Beer in wood.	Whiskey in wood.	Flour in barrels.	Beef and Pork in barrels.
1879.	95	88	72	46	41	39	37	42	41	38	42	46	76	115
1891.	76	65	57	47	40	30	20	26	28	19	34	33	38	*26
Differences.	19	13	15	41	1	9	17	16	18	19	8	13	38	

*Cents per 100 lbs.

†Excess of latter rate.

10. At the convention of the eastern and western lines in 1878, it was announced by Mr. Peck, General Manager of the Southern Railway & Steamship Association, that the western lines "concede that the transportation of manufactured articles into the territory embraced by the Association should be left to the eastern lines and undertake by *prohibitory* rates to prevent such articles from eastern cities reaching Association points over their lines." Accordingly a basis of rates was then adopted, by which rates on the western lines for "articles peculiar to the east" were to be at least 10 cts. higher than the rates on the eastern lines and rates on eastern lines for "western products" were to be at least 10 cts. higher than the rates on western lines. At the time of this adjustment it appears that the west (or Central territory) contributed "principally food products in the solid and liquid forms of corn, bacon, flour, whiskey, etc.," for Southern consumption, while "manufactured articles and notions" came for the most part from the Eastern Seaboard. These conditions have, however, materially changed; "the centers of food production have moved Westward" and Central territory has engaged much more extensively in manufacturing enterprises. In the Annual Report made to the Southern Railway & Steamship Association by its Commissioner,

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July 6, 1889, he says: "Formerly, agricultural products constituted a large excess of the western business, but the proportion of miscellaneous commodities—traffic formerly from the east—is steadily growing from the west. Especially is this true in all manufactured articles of wood, such as furniture, wagons, carriages of all kinds, etc., and manufactures from the cheap grades of iron from the south, such as stoves, agricultural implements, etc." Central territory has also entered upon the manufacture on a large scale and shipment south of boots, shoes, clothing, saddlery, harness and other articles of general merchandise. It is estimated that manufactures in Central territory have increased 100 per cent in twenty years.

These manufactured articles are shipped south from Central territory under the rates applied to the numbered classes in the Southern Railway & Steamship Association Classification, and bagging, ties, grain (and its products including liquors) and packing house products are shipped under the rates applied to the lettered classes. The testimony is to the effect that articles falling within the lettered classes are of more general consumption in the Southern territory than those in the numbered classes. No reliable data is furnished as to the proportion the south bound tonnage of the former bears to that of the latter, but it appears to be much larger. In their reports on file with the Commission the railways do not give separately the south-bound and north bound tonnage, but it appears that boots, shoes, clothing, woodenware, furniture, saddlery, harnesses, groceries and "everything that goes under the head of general merchandise" constituted in 1891 not quite 25 per cent of the total southbound tonnage of the Cincinnati, New Orleans & Texas Pacific Road, and that bagging, ties, grain (and its products) and packing house products, "covered the bulk of the business south bound."

Articles in the numbered classes manufactured in Wisconsin, Michigan, Illinois, Indiana and Ohio, are sold as far east as Rochester and Albany, New York, as far west as the Pacific coast, and to a greater or less extent over the south from Texas and Arkansas to the Virginias. The testimony tends to show that in the southeast, in the territory embracing Alabama, East Tennessee, Florida, Georgia, the Carolinas and Virginias, and particularly at points near the Atlantic Coast, the merchants and manufacturers of Central territory meet with strong competition in the sale of these goods from New York and the other eastern seaboard cities. They do not appear to be driven out of this territory altogether by this competition, but their business and the profit on it are not so great as a general rule as in

other markets reached by them. In some instances they are required by their customers to "equalize the rates," or in other words, to refund the excess of the rates on their goods over those on goods of the same kind and class from eastern seaboard territory.

11. L. R. Brockenborough, General Freight Agent of the Chicago & Eastern Illinois Railway Company (whose road runs from Chicago to the Ohio at Evansville) stated that "his impression (is) that the general impression seems to be that the rates from Central territory into Southern territory are out of line with those from the seaboard," and that his road "would be willing to reduce its rate to bring the through rate in line with the New York rate." John C. Gault, General Manager of the Queen & Crescent System (in which are defendants, the Cincinnati, New Orleans & Texas Pacific and the Alabama Great Southern Companies) stated that he "always thought rates from Chicago to southern points on higher classes ought to be the same as those from Boston and New York;" and that this "would not harm New York and hardly be enough in favor of the west." He also, under date of August 14, 1888, wrote to the Commissioner of the Chicago Board of Trade, that "the roads interested in Chicago business ought in my (his) judgment to take such action as is necessary to insure a reduction of the rates" from the west. M. C. Markham, Assistant Traffic Manager of the Illinois Central R. R. Co., testified that he had made an effort to have the Southern Railway & Steamship Association reduce the rates from Central territory, and said, "Looking at the disparity between the rates from eastern and central territories, it appears there might be in them an element of unfairness to the latter. If it is true, that rates from Eastern territory into the southeast were made on account of water competition along the Atlantic seaboard, and if all rail lines leading from the East into that territory can afford to carry the goods for those rates made by water lines, then the western through lines *could afford to carry for the same rates a less distance*, provided all conditions governing the matter were equal." S. R. Knott, Traffic Manager of the Louisville & Nashville Road in a letter to G. J. Grammar of April 14, 1890, wrote that "While the adjustment may be *unfair, as we think it is*, yet it can hardly be said to be arbitrary or wholly unreasonable;" and that his company, "together with other lines interested in western traffic, then members of the Southern Railway & Steamship Association, urged a modification of the difference" (between eastern and western rates) "and succeeded in having the matter brought under the rules of the Association before the Board of Arbitration;" and that "the question was fully presented from both sides of the case and

the decision of the Board at that time (May, 1888) was that the best protection of *all interests* did not warrant the change in the adjustment of rates which we, with the other western lines, had requested, that is, changing the adjustment from Ohio river points and points north as compared with the rates from eastern cities." B. E. Hand, Assistant General Freight Agent of the Michigan Central Road, stated that he had made "repeated efforts with railroads operating in Southern territory for a reduction of rates on manufactures from the west to the southeast." G. J. Grammar, Chairman of the Central Traffic Association's Committee on relations with southern roads, in a letter to N. G. Iglehart, of April 2, 1890, says "All our efforts thus far have been unavailing to get the southern roads to more justly equalize the rates. You doubtless understand southern roads' rates from the Ohio river are arbitrary, their rates on all classes south bound being from 50 to 100 per. ct. greater per mile than by lines north of the River on similar traffic." In a letter, dated April 8, 1890, to S. R. Knott, he says, "The injustice of the present basis of rates" (from the Ohio) "must of necessity be apparent."

Conclusions.

The principal charge in both cases it is stated is based on the first paragraph of section 3 of the Act to Regulate Commerce, which declares,

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The specific ground of complaint under this charge is in substance that the rates on *manufactured goods* from Eastern Seaboard territory to Southern territory, and those on the same classes of goods from Central territory to Southern territory, are so fixed or adjusted with reference to each other as to give to merchants and manufacturers in Eastern Seaboard territory an "undue or unreasonable preference or advantage" over those in Central territory, and consequently subject the latter to "an undue or unreasonable prejudice or disadvantage" with respect to the former, when they meet in competition in the southern markets.

The defendants embrace two groups of carriers, operating under distinct tariffs of rates different systems or lines of transportation, leading, respectively, from initial points and

through territories widely separated to common destinations. As establishing the joint liability of these two sets of carriers, the complainants contend that the relation created between them (or such of them as are parties thereto) by the provisions of the Southern Railway & Steamship Association Agreement constitutes a "common control, management or arrangement" in the sense in which those words are used in the first section of the Interstate Commerce law. From the view we take of these cases, it is unnecessary to determine this question of *joint liability*. The injury, which it is claimed results from the relation between the rates from Eastern Seaboard and Central territories, is injury to merchants and manufacturers in, and shippers from, the latter; the complaints are in their behalf alone. This injury could not proceed from rates from Eastern Seaboard territory unreasonably *high*, in themselves or relatively, as the tendency of such high rates would be to give an advantage to dealers in Central territory. There is no claim—and if there were, there is no proof to sustain it—that the eastern rates are *in themselves* unreasonably low. Those rates stand unchallenged as to their reasonableness in themselves and for the purpose of this argument must be considered as reasonable and just. If the roads serving Central territory voluntarily entered into an agreement with the Eastern Seaboard lines, in carrying out which they made their rates higher than was reasonable and than they otherwise would have made them, and the relation thus established between the rates of the two sets of carriers was unduly preferential to Eastern territory and unjustly prejudicial to Central territory, this was a violation on their part of the above clause of section 3 of the Act. Whether or not there be a *joint liability* on the part of the eastern lines, there is unquestionably a *several liability* on the part of the lines serving Central territory for the unreasonableness of their own rates. By entering into an agreement such as that of "The Southern Railway & Steamship Association," a carrier does not merge its separate corporate existence and cease to be a distinct entity, responsible as such under the Interstate Commerce Law for the rates over its own road or line. In becoming parties to this agreement, the defendants act separately and voluntarily, they each have a representative on the "Executive Board" (which is given full jurisdiction over the matter of rates), and this Board can act only by "unanimous consent of *all* its members." The rates thus established for each road or line are to be considered the result of its own voluntary *several* action, so far as amenability to the law is concerned. Furthermore, the defendants north of the

Ohio (except the Illinois Central) and the roads north of the Potomac and reaching northeastern cities as parts of the all rail eastern lines, are not members of the Southern Railway & Steamship Association, and the latter roads are not made parties defendant though interested in the eastern rates. In view of the foregoing considerations, we deem it proper to treat these cases from the standpoint of the several liability of the defendants serving Central territory both as to the rates over their lines, and the relation between those rates and the rates over eastern lines.

The defendant carriers north and south of the Ohio, serving Central territory, form through lines of connecting roads from Chicago, and those south of the Ohio, from Cincinnati, to Southern territory, and are engaged in the continuous carriage over those lines of interstate traffic under through bills and joint through rates. They are, therefore in respect to such traffic and rates, subject to the provisions of the Act to Regulate Commerce, as we have repeatedly held. *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 120, 5 I. C. C. Rep. 324; *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 8 Inters. Com. Rep. 682, 4 I. C. C. Rep. 744; *Board of Trade of Troy v. Alabama M. R. Co.* 4 Inters. Com. Rep. 348.

The reasonableness in themselves of the rates from Central territory is a matter ma-

terial to the issue raised by the charge in both cases, that the relation between those rates and the eastern rates is *unjustly* prejudicial to Central territory, and the question is directly presented in the Chicago case by the allegation that the rates from Cincinnati and other Ohio river crossings to Southern territory are "unreasonably high." Where the reasonableness of rates is in question, comparison may be made, not only with rates on another line of the same carrier, but also with those on the lines of other and distinct carriers—the value of the comparison being dependent in all cases upon the *degrees* of similarity of circumstances and conditions attending the transportation for which the rates compared are charged. It appears from the tabular statements in our findings of fact, giving *all-rail* distances and class rates from Cincinnati and Chicago in Central territory and from New York and other northeastern cities, to points in Southern territory, that on a *mileage* basis the rates from the former (particularly, those on the higher or numbered classes) are largely in excess of those from the latter. For the purpose of illustration the following table is given, which shows the current rates on goods of *Class 1* from Cincinnati and Chicago and from New York to points named in Southern territory, and what the rates from Cincinnati and Chicago would be on the basis of the (all-rail) mileage rates from New York:

To	Current Class 1 Rates.			Rates on basis of mileage rates from New York.	
	From Cincinnati.	From Chicago.	From New York.	From Cincinnati.	From Chicago.
Knoxville,	76	116	100	39	78
Chattanooga,	76	116	114	45	79
Rome,	107	147	114	51	88
Atlanta,	107	147	114	61	95
Meridian,	122	134	124	62	71
Birmingham,	89	119	114	54	75
Anniston,	107	147	114	57	85
Selma,	108	138	114	62	78

The excess of the Class 1 rates in the above table from Cincinnati and Chicago over the New York rates from a mileage standpoint is, as follows:

To	From Cincinnati.	From Chicago.
Knoxville,	37	38
Chattanooga,	31	37
Rome,	56	64
Atlanta,	46	52
Meridian,	60	63
Birmingham,	35	44
Anniston,	50	62
Selma,	46	60

As to the other *numbered* classes and the other northeastern cities, the relation or difference between the two sets of rates is to a large extent substantially the same as shown in the above tables.

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Many striking disparities in rates will be observed on an inspection of the tabular statements of rates and distances in our findings of facts, and particularly, in the Class 1 rates from Chicago, on the one hand, and Boston and New York, on the other—the latter two cities being given for the most part the same rates. For example, while the distance from Chicago to Chattanooga is 595 miles, and from Boston and New York, respectively, 1060 and 847 miles, the rate from Chicago is 116 cts. and from Boston and New York, 114 cts., and while the distance from Chicago to Meridian, Miss., is 723 miles and from Boston and New York, respectively, 1355 and 1142 miles, the rate from Chicago is 134 cts., and from Boston and New York, 124 cts. Under the rate last named, a ship-

per of a car load of 25000 lbs., of *Class 1* goods from Boston and New York to Meridian would pay \$25.00 less than a shipper of a like car load from Chicago, notwithstanding the relative proximity of the latter city to the common point of destination. (Up to March 16, 1894, the rate from New York and Boston to Meridian was 114 cts.) Further examples of similar import might be taken from the tabular statements of rates and distances, but the above are deemed sufficient.

A comparison of rates on one road or line with those on another for the purpose of determining the reasonableness of either, is, as before stated, valuable only to the extent of the similarity of circumstances and conditions attending the transportation in the two cases and relative equality in rates is only necessary in the *degree* of such similarity. *Manufacturers & J. Union v. Minneapolis & St. L. R. Co.* 3 Inters. Com. Rep. 115, 4 I. C. C. Rep. 79. Distance or mileage is by no means the only, or in many cases the most important, factor in rate making, but, *other things being equal*, it is a circumstance of great, if not controlling, weight. In *Logan v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 431, 2 I. C. C. Rep. 604, the Commission hold that, "a departure from the rule of equal mileage rates as applied to the several branches of a road or system of roads is not conclusive of the unlawfulness of rates, but the company making such departure should have satisfactory reasons for such variance of rates and must show them to be reasonable when disputed. This burden is by the Act to Regulate Commerce put on carriers when they 'charge or receive as great compensation for a shorter as for a longer distance.' The same burden is on the company making a greater charge for one of two hauls." In *McMorran v. Grand Trunk R. Co. of Canada*, 2 Inters. Com. Rep. 604, 3 I. C. C. Rep. 252, it is said, "Due regard to distance proportions should be observed in connection with the other considerations that are material in fixing transportation charges;" and, in reference to the burden of proof, where a carrier sets up dissimilarity of circumstances and conditions in the matter of expenses in justification of a disparity in mileage rates, it is said, "The evidence does not show with any precision what these several expenses (terminal and others) are . . . The defendants assume in their brief that the burden of showing these expenses was upon the petitioner; but this assumption is altogether erroneous. It would impose on persons conceiving themselves aggrieved by carriers a difficult and onerous rule of evidence. It would be impossible for the petitioners to show such facts otherwise than by defendants' agents, and it was clearly the province

of the defendants to make them appear. No presumption arises that a rate is reasonable from the mere fact that it has been put in effect; and when it is *prima facie* disproportionate or relatively unequal the *onus* is on the carrier to justify its charges when challenged on these grounds. The knowledge of the justifying circumstances and conditions is peculiarly in the possession of the carrier."

The above, it is true, are cases where the rates compared were made by the same carrier for one or more branches of its own road or system, and not by distinct carriers for their respective roads or lines. This distinction, however, is material only as to the question of *joint responsibility*, and, while, as the defendants contend, the eastern carriers may not be liable under a strict construction of the interstate commerce law jointly with the western for the rates from central territory, this fact does not under the circumstances showing a community of origin of the two sets of rates, affect the propriety or lessen the value of a *comparison* of them in an investigation (like the present) as to the reasonableness of the western rates. The rule laid down as to the burden of proof is peculiarly applicable to the present cases, in view of the fact that the relation between the eastern and western rates was fixed by mutual agreement between the two systems of carriers and, as the evidence tends to show, *for the accomplishment of a particular object* as hereinafter appears. The disproportion between the rates being so large, the burden was upon the defendants serving central territory to justify the relatively high rates over their lines, or, in other words, to show the substantial dissimilarity of circumstances and conditions necessitating or authorizing such disproportionately high rates. The defendants, while disclaiming that it was upon them, nevertheless assumed the burden of proof and set up in justification of the comparatively high rates from central territory the fact that the eastern rates are affected by water competition from the northeastern cities *via* the Atlantic to southeastern ports—particularly, the ports of Charleston and Savannah. No other dissimilar circumstance or condition explaining or authorizing the lower mileage rates from the east is alleged or proven. If there was anything in the way of fixed charges, operating expenses, or other matter proper to be considered in this connection and peculiarly within their own knowledge, they should have made proof of it. It did not devolve upon the complainants to negative the existence of such circumstances in the absence of evidence tending to make them affirmatively appear.

The plea that the all rail lines from north-

eastern cities to southern territory are subjected to water competition *via* the Atlantic and that this competition has naturally a controlling influence on their rates, is sustained by the proof. In an argument filed in behalf of the Cincinnati, New Orleans & Texas Pacific, the Alabama Great Southern and the Louisville & Nashville Companies (the only defendants who appeared at the hearing) it is contended that the fact of this water competition "takes the whole situation entirely out of the operation of the third section of the Act and makes inapplicable any further comparison." On this point it is said:

"But it may be urged that although an inequality of charge may be so justified" (by water competition), "yet the inequality of condition and diversity of circumstances is not sufficient to warrant so great a disparity as is exhibited between the rates from Cincinnati, Ohio, to points in southern territory, and the rates from New York, Boston and other eastern cities to these points. This objection, however, is invalid, for the law is that when once a substantial dissimilarity of circumstances and conditions appears, that fact takes the whole situation entirely out of the operation of the third section of the Act, makes inapplicable any further comparison, and forbids any attempt at a compulsory adjustment of the rates so as to allow for such dissimilarity. The section itself immediately ceases to apply."

This position is manifestly untenable. It is in effect a claim that a substantial dissimilarity of circumstances and conditions is, even after due allowance has been made therefor, a license to a carrier to go further and give *undue* preferences and practice all the other forms of *unjust* discrimination denounced by the statute. In *Raworth v. Northern Pac. R. Co.* 8 Inters. Com. Rep. 357, 5 I. C. C. Rep. 284, it is held that the law forbidding unjust discrimination "applies even in cases where a departure from the 'long and short haul rule' of the statute is shown to be authorized, and the right, if established, of making the greater charge for the shorter haul, does not justify a disparity in rates so great as to result in *unjust* discrimination;" and in the case of the *Manufacturers & J. Union v. Minneapolis & St. L. R. Co.*, 3 Inters. Com. Rep. 115, 4 I. C. C.

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Rep. 79, the rule is laid down that "relative equality is necessary in the degree of similarity."

The defendants in their proof have furnished a measure or given *their estimate* of the influence of the water competition from the northeastern cities to the southeastern ports. It is that, while the distance by water from New York to Charleston and Savannah is approximately 750 miles, the rates by the steamer lines are made on the basis of what is termed a "constructive mileage" of 230 miles to Charleston and 250 miles to Savannah, or, in other words, the water rate from New York to Charleston is equal to the rail rate for 230 miles by land, and to Savannah, to the rail rate for 250 miles by land. These "constructive mileages" plus the actual distances by rail from those ports to interior points in Southern territory are called the "rate making mileages," upon which the combined rail and water rates from New York to the interior points are based. As is claimed by defendants, the proof tends to show that the rail and water rates regulate the all rail rates, and the rail and water and all rail rates are the same to all the points named in Southern territory except *Rome, Anniston and Atlanta*, to which the all rail rates are higher than the rail and water by certain differentials ranging from 2 to 8 cts. per 100 lbs. as appears from our findings of facts. A comparison of these "rate making mileages" (rail and water) with the all rail distances from New York to Southern points may be instructive as indicating the *estimate by the roads* of the extent of the influence of water competition on the eastern rates. Those "mileages" (*via* Charleston) and all rail distances are given in the following table:

To	FROM NEW YORK.	
	All-rail distances.	"Rate making mileages" <i>via</i> Charleston—rail and water.
Knoxville,	785 miles.	768 miles.
Chattanooga,	847 "	676 "
Rome,	925 "	597 "
Atlanta,	876 "	588 "
Meridian,	1142 "	901 "
Birmingham,	990 "	705 "
Anniston,	949 "	642 "
Selma,	1080 "	791 "

From the table below a comparison may be made of the "rate making mileages," rail and water, from New York to Southern points, with the actual all-rail distances from Cincinnati and Chicago to the same.

To	From New York.	From Chicago.	From Cincinnati.
	"Rate making mileages" via Charleston—rail and water.	All-rail distances.	All-rail distances.
Knoxville,	763 miles	560 miles	290 miles
Chattanooga,	676 "	595 "	385 "
Rome,	597 "	673 "	413 "
Atlanta,	538 "	788 "	475 "
Meridian,	901 "	723 "	680 "
Birmingham,	705 "	652 "	478 "
Anniston,	642 "	715 "	476 "
Selma,	791 "	746 "	598 "

It will be seen from the above table that the "rate making mileages" from New York, which are arrived at by an allowance for the estimated effect of water competition—the estimate being that of the defendants, are greater than the actual all rail distances from Chicago, as follows: to Knoxville, by 203 miles; to Chattanooga, by 81 miles; to Meridian, by 178 miles; to Birmingham, by 53 miles; and to Selma, by 45 miles. They are less to Rome by 76 miles, to Anniston by 73 miles and to Atlanta by 195 miles. They are in every instance much greater than the distances by rail from Cincinnati. The all rail distances from Cincinnati and Chicago are the following percentages of the "rate making mileages" from New York:

From.	To						
	Knoxville	Chattanooga	Rome	Atlanta	Meridian	Birmingham	Anniston
Cincinnati	pr.c. 88	pr.c. 50	pr.c. 69	pr.c. 88	pr.c. 70	pr.c. 66	pr.c. 74
Chicago	78	88	112	186	80	92	111

On the above basis—that is, making the rates from Cincinnati and Chicago the same percentages of the current New York rates as the distances by rail from the former cities are of the "rate making mileages" from the latter—the rates from Cincinnati will be materially less than they now are on the numbered classes in all cases and also from Chicago, except those to Atlanta and those on classes 4, 5, and 6 to Birmingham and 4 and 6 to Chattanooga. They will also be less to a large, but not so great an extent, on the lettered classes. It thus appears that, giving full weight to the claim of defendants that water competition via the Atlantic necessitates rates from the east relatively lower than those from the west and as a consequence rates from the west relatively higher than those from the east, it does not with the exceptions above named account for or justify the existing disparity between them.

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The evidence shows that the rates from Eastern Seaboard and Central territories, respectively, were adjusted with reference to each other by mutual agreement between the eastern and western carriers through the medium of the Southern Railway & Steamship Association and that in making this adjustment other considerations than those of water competition, or other dissimilarity of circumstances or condition affecting transportation, had a controlling influence. It appears that lively competition resulting in rate wars had arisen between the eastern and western lines in the transportation into the south by each of traffic from territory claimed by the other. This led to the convention in 1878 (referred to in our statement of facts) of the carriers interested, the object of which was stated to be the establishment of such a co-relation of rates as would "protect to the eastern lines the business peculiar to their territory" and to the western lines (then known as the "Green Line Roads") the business relating to "their peculiar commodities"—in other words, to secure to the eastern lines the transportation of "articles manufactured in the east, and in other countries and imported into eastern cities, embraced under the general terms of dry goods, groceries, crockery and hardware" and classified for the most part under the first four of the numbered classes, and to the western lines, the transportation of "articles of western produce, comprising the produce of animals and the field" and embraced principally in the lettered classes. The only way to accomplish this result through the agency of rate adjustment or manipulation was to place relatively high rates on manufactured articles and relatively low rates on food products shipped from or via the West, and vice versa, as to such shipments from or via the east; and at the opening of the Convention, Mr. Peck, the General Manager of the Association, being called on by the chairman to state its object, said, among other things, that the western lines conceded that the transportation of manufactured articles "into the territory em-

braced by the Southern Railway & Steamship Association should be left to the eastern lines, and undertake by prohibitory rates to prevent such articles from eastern cities reaching the Association points over their lines." A basis of rates, at least ten cents higher by the eastern lines than the western on western products and at least ten cts. higher by the western lines than the eastern on "articles peculiar to the east," was then adopted, with a view to effecting the announced object of the convention. It is manifest that at that time the influence of water competition on the eastern rates was not regarded as a controlling factor in determining what the excess of the western should be over the eastern rates on manufactured goods and the reasonableness in themselves of those western rates was a matter of secondary, if any, consideration. While there have since been fluctuations and changes in the two sets of rates, the principle regulating their co-relation or adjustment with reference to each other has remained practically the same to the present time. The leading idea of securing to each system of carriers the traffic of what is termed its territory by the adjustment and manipulation of rates and in other ways, is prominent throughout all the Association Agreements. In the last, as in those preceding, it distinctly appears, and the provisions, among others, for a geographical division of territory, for the exaction of local rates to protect Association rates, and for penalties, all look to this end. It is, also, apparent on an inspection of the current rates themselves, which disclose the broad distinction made between the rates on the numbered and lettered classes—the relation between the two sets of rates on the former being advantageous to the east, while that between the rates on the latter are not nearly so favorable to that territory. As a fair illustration, the rates from Chicago to Chattanooga on the lettered classes are from seventy to eighty nine per cent of the New York rates, while on the numbered classes 1, 2 and 3,—they are respectively, 102, 101 and 95 per cent. It is true, rates upon the heavy and cheap articles in the lettered classes should be less than rates upon the comparatively light weighted and valuable articles in the numbered classes, because, as respects the latter, the value of the service to the shipper and the risk to the carrier are greater. These considerations, however, apply equally to shipments of traffic from both territories, and do not, therefore, justify or account for the distinction to which we have just adverted. The fact, that the tonnage of traffic in the lettered classes from Central territory is larger than of traffic in the numbered classes, and doubtless, also, larger than the tonnage of traffic in the lettered classes from

Eastern territory is not in our opinion sufficient to authorize or account for the great difference apparent on the face of the tariffs. This difference finds a natural solution in the avowed purposes of the Southern Railway & Steamship Association to secure, by an adjustment of rates calculated to bring about that result, the transportation by the Eastern lines of goods in the numbered classes from the territory set apart as theirs and to the western lines the transportation of traffic in the lettered classes from the territory apportioned to them.

The relation established between the eastern and western rates in 1878 was, doubtless, suggested by, and found a plausible pretext in, the fact that at that time the west contributed principally articles in the lettered classes for southern consumption, while goods in the numbered classes came for the most part from the east. The situation in this respect has, however, as appears from our statement of facts, materially changed, and it is estimated that the manufacture in Central territory of goods in the numbered classes has increased 100 per cent in twenty years. If, therefore, the condition as to manufactures and products in 1878 could have been set up in justification of the adjustment of rates then made, that justification no longer exists and the change in those conditions is an argument in favor of a corresponding change in the rate adjustment. We are of opinion, however, that the situation in 1878 in the respect named constituted no justification. The tendency of such an adjustment of rates was to encourage and build up manufactures in the east and discourage and retard them in the west and thus maintain the *status quo*. In this connection may be noticed the claim of the defendants, that the great growth in Central territory of the manufacture and sale of articles in the numbered classes shows that the rates in question to Southern territory have not been prejudicial to manufacturers and shippers in Central territory. This does not appear to be a legitimate inference in view of the fact that Central territory is not limited to southern territory as a market, but also sells its manufactures and products as far west as the Pacific coast, as far east as Rochester and Albany, and in the southwest. The proof is that the shipments of goods in the numbered classes from Central to Southern territory (the southeast) are small in comparison with those of goods in the lettered classes and this may be, in part at least, due to the rate adjustment complained of. If the fact, that one section is a large producer and another a small producer of certain classes of traffic, is a factor to be considered in fixing rates from them to a common market, which is not conceded, it would

seem that it should operate to give more favorable rates to the latter with a view of stimulating and increasing its production. Considerations of this character, however, if they are to be allowed any weight by carriers in fixing rates from rival territories, should always be held in strict subordination to the invariable rule, that in all cases rates shall be reasonable in themselves. No departure from this rule can be justified on the ground, that it is necessary in order to maintain existing trade relations, or to "protect the interests of competing markets," or to "equalize commercial conditions," or to secure to carriers traffic from certain territory assumed to be exclusively theirs. It is not the duty of carriers, nor is it proper, that they undertake by adjustment of rates or otherwise to impair or neutralize the natural commercial advantages resulting from location or other favorable condition of one territory in order to put another territory on an equal footing with it in a common market. Each locality competing with others in a common market is entitled to reasonable and just rates at the hands of the carriers serving it and to the benefit of all its natural advantages. *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 683, 4 I. C. C. Rep. 744; *Raworth v. Northern Pac. R. Co.* 3 Inters. Com. Rep. 857, 5 I. C. C. Rep. 234; *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.* 4 Inters. Com. Rep. 65, 5 I. C. C. Rep. 264; *Chamber of Commerce of Minneapolis v. Great Northern R. Co.* 4 Inters. Com. Rep. 230, 5 I. C. C. Rep. 571. If this result in prejudice to one and advantage to another, it is not the *undue* prejudice or advantage forbidden by the statute, but flows naturally from conditions beyond the legitimate sphere of legal or other regulation. "Carriers," moreover, "in making rates cannot arrange them from an exclusive regard to their own interests, but must respect the interests of those who may have occasion to employ their services, and subordinate their own interests to the rules of relative equality and justice which the Act prescribes." (Second Annual Report.) The provision in the Association Agreements for the "exaction of local rates" to "protect" to each system of carriers the revenue which would come to them, respectively, under a strict enforcement of Association rates and under the division of territory between them, is stated to be for "the purpose," among others, "of securing the greatest amount of net revenue to all the companies parties to the agreement." This is, doubtless, the controlling consideration. The interests of the public, certainly, cannot be subserved in this way. The division of territory is wholly without warrant in law and is practically a denial to shippers in such territory of the right to ship their goods or produce to market by the line or

route they may prefer. The exaction of higher rates on certain articles shipped from Central to Southern territory *than would otherwise prevail*, for the purpose of securing to eastern lines the transportation of that traffic from territory apportioned to them, is manifestly unlawful, and results in injury to both Central and Southern territory.

The fact, which clearly appears, that rates on the numbered classes from Central territory are made *higher than they otherwise would be*, for the purpose of securing to the eastern lines the transportation of that traffic from the territory set apart to them under the southern Railway & Steamship Association Agreement, itself raises a *prima facie* presumption of the unreasonableness of those rates. In the Cincinnati case, the complainant does not directly question the reasonableness of the rates from Cincinnati, but in the Chicago case it is charged, that the rates on through traffic from Chicago to Southern territory are made up of "substantially the local rates in effect from Chicago to Cincinnati and other Ohio river crossings" and "*unreasonably high rates*" from the Ohio on to Southern territory. It appears that the Chicago rates are made up of the two rates as charged—the rates from that city to the Ohio being the regular Trunk Line rates and from the Ohio southward, the Southern Railway & Steamship Association rates. The shipments being through shipments, under a through bill of lading quoting a total through rate, and without breakage of bulk at the river, this method of making up the rates is a departure from the general rule under which through rates established by two or more connecting carriers *are less than the sum of their separate rates*. The Trunk Line rates per ton per mile from Chicago to Cincinnati and the Association rates per ton per mile from Cincinnati to Southern territory are given in the following tables:

Rates per ton per mile on the numbered classes from Chicago to Cincinnati.

	1	2	3	4	5	6
	cts.	cts.	cts.	cts.	cts.	cts.
	2 68	2 28	1 68	1 14	1 00	80

Rates per ton per mile on the numbered classes from Cincinnati.

To	1	2	3	4	5	6
	cts.	cts.	cts.	cts.	cts.	cts.
Knoxville,	5 24	4 48	3 93	3 24	2 75	2 06
Chattanooga,	4 53	3 88	3 40	2 80	2 38	1 79
Rome,	5 18	4 45	3 92	3 29	2 71	2 22
Atlanta,	4 50	3 87	3 41	2 86	2 35	1 93
Meridian,	3 87	3 23	2 82	2 38	1 96	1 71
Birmingham,	3 72	3 30	2 84	2 30	1 96	1 50
Anniston,	4 49	3 86	3 40	2 85	2 35	1 93
Selma,	3 61	3 41	2 94	2 37	1 97	1 57

From these tables it will be seen that the rates per ton per mile from Cincinnati south are in all cases much higher, and in many instances a hundred per ct. or more higher, than those from Chicago to Cincinnati.

The averages of the rates per ton per mile

on all the classes, lettered as well as numbered, from Cincinnati, are approximately:

From Cincinnati.	Average of rates per ton per mile on all classes.
To	Cents.
Knoxville,	2 70
Chattanooga,	2 33
Rome,	2 62
Atlanta,	2 31
Meridian,	2 00
Birmingham,	1 96
Anniston,	2 27
Selma,	1 85

By reference to the tables in our statement of facts giving freight revenue per ton per mile and cost per ton per mile, it will be seen that the above averages are largely in excess of that revenue and cost on the roads taken as whole in, respectively, Southern territory, Central territory and the country at large.

It appears from tariffs on file with the Commission that, up to April 17, 1893, and for a series of year's running as far back at least as 1887, and how much anterior to that time we are not advised, through rates were in existence from New York *via* Cincinnati to Chattanooga, Meridian and Birmingham, *less* than the sum of the Trunk line rate to Cincinnati plus the Association rate from Cincinnati on to those cities, and that such rates are still published to Nashville, Memphis, Mobile and a number of Mississippi river points. The proportions of these through rates left for the hauls from Cincinnati south to Chattanooga, Meridian and Birmingham, after deducting the Trunk line rates from New York to Cincinnati, and the extent to which the regular Association rates from Cincinnati exceed those proportions are shown below:

	1	2	3	4	5	6
Through rates from New York <i>via</i> Cincinnati to Chattanooga, Birmingham and Meridian	114	98	86	73	60	49
Trunk Line rates from New York to Cincinnati	65	57	44	30	26	22
Proportions for hauls from Cincinnati, South	49	41	42	43	34	27
Association rates from Cincinnati to Chattanooga	76	65	57	47	40	30
Deduct proportions of through rate	49	41	42	43	34	27
Excess of Association rates	27	24	15	4	6	3
Association rates from Cincinnati to Birmingham	89	79	68	55	47	36
Deduct proportions of through rates	49	41	42	43	34	27
Excess of Association rates	40	38	26	12	13	9
Association rates from Cincinnati to Meridian	122	102	89	75	62	54
Deduct proportions of through rates	49	41	42	43	34	27
Excess of Association rates	73	61	47	32	28	27

Under these through rates from New York, goods on reaching Cincinnati from New York would take thence on to the south a much lower rate, as shown above, than goods of the same class from Chicago—the rates from Cincinnati being dependent upon the question whether the shipment originated in New York or Chicago. Although they were withdrawn in April, 1893, it does not seem unfair to presume from the fact that they were so long in existence (and that similar rates are still published to Nashville, Memphis and other points) that they were not entirely unremunerative to the roads south of the Ohio, and may be taken as a circumstance, among others, indicating that the rates of those roads on traffic from Central territory would be lower than they are but for their agreement with the eastern lines to maintain the present standard of rates.

The weight of the testimony of railroad officials connected with the roads and lines leading from Central territory to the south, as appears from our findings of facts, tends to show that the idea is prevalent in western railroad circles, that the adjustment of rates from Central and Eastern territories is unjustly prejudicial to the former, and that those roads and lines, south as well as north of the Ohio, are disposed to favor a readjustment of their rates on a basis more favorable to Central territory, but that they have not done so on account of their alliance with the eastern lines as members of the southern Railway & Steamship Association—the latter lines not being willing to agree to such readjustment.

Our conclusion upon the whole is, that, as charged in the complaint in the Chicago case, the rates on the numbered classes from Cincinnati and the Ohio river crossings to the south are "unreasonably high," and as they enter into the through rates from Chicago, that those through rates, as well as the rates from Cincinnati, are excessive. There is no complaint that the rates from Chicago to Cincinnati and the other crossings are unreasonable in themselves and no evidence authorizing us to so find. They are the regular Trunk line rates and are *not* subject to the objection, as in the case of the Association rates south of the river, that they are made higher than they otherwise would be for the purpose of securing to the Eastern Seaboard lines traffic from territory set apart to them. The cost on freight in general per ton per mile on the roads south of the river appears to have been for the years named in the tables heretofore given about 25 per cent on an average greater than the cost per ton per mile on the roads from Chicago to the river. The tonnage of the latter roads is also greater than that of the former as shown in the tables.

Rates from Cincinnati to Southern territory from 35 to 50 per cent higher per ton per mile than those from Chicago to Cincinnati and other Ohio river crossings will, in our opinion, make full allowance for these differences in cost and tonnage, and be at least not unreasonably low as maximum rates. The rates in cents per 100 lbs. given below are approximately upon this basis.

From Cincinnati.						
To	1	2	3	4	5	6
Knoxville,	53	45	37	27	22	20
Chattanooga,	60	54	40	30	24	22
Rome,	75	64	54	44	34	24
Atlanta,	88	73	60	45	35	27
Meridian,	114	98	80	62	49	38
Birmingham,	87	74	60	48	38	28
Anniston,	98	73	60	45	35	27
Selma,	108	82	78	60	48	36

Rates from Chicago to Knoxville, Chattanooga, Rome, Atlanta and Anniston are made *via* Cincinnati; those from Chicago to Birmingham and Selma, *via* Louisville; and those from Chicago to Meridian, *via* Cairo, on the Illinois Central. The rates in the following table, accordingly, to the five cities first named are combinations of the above rates to those cities with the existing rates from Chicago to Cincinnati; to the two cities next named, they are combinations of rates from Louisville constructed on the same basis as the rates in the above table with the existing rates from Chicago to the river; and to Meridian, they are combinations of rates from Cairo constructed on the same basis as rates in the above table with the existing rates from Chicago to Cairo.

From Chicago.						
To	1	2	3	4	5	6
Knoxville,	93	79	62	44	37	32
Chattanooga,	100	88	65	47	39	34
Rome,	114	97	79	61	49	38
Atlanta,	126	107	85	62	50	39
Meridian,	114	98	82	60	47	38
Birmingham,	111	95	72	52	44	34
Anniston,	126	107	85	62	50	39
Selma,	128	112	89	66	53	38

(Note. The rates from Chicago and Cincinnati to Meridian are made substantially the same, because the larger portion of the haul from Chicago is in Central territory where rates are lower.)

An order will be issued directing the defendants engaged in transporting traffic from Chicago and Cincinnati to Southern territory to desist from charging higher rates on the traffic embraced in the numbered classes from those cities, respectively, than those in the two preceding tables and to make all the necessary readjustments of their tariffs. These rates are a conservative reduction of the existing rates and, while it is believed they will go far to do away with the "undue prejudice" to which Central territory is now subjected, they are, probably, not so low as they might be made if fuller and more accurate

data were accessible. If the rates by the Eastern Seaboard lines be taken as the standard of comparison, the rates in these tables will be found to make in the main due allowance for the estimated effect on those rates of water competition *via* the Atlantic. They are also higher than the proportions of the through rates from New York *via* Cincinnati to Chattanooga, Birmingham and Meridian, allowed for the hauls from Cincinnati to those points, and which were in effect for a long period of years; and they yield a rate per ton per mile largely in excess of the reported cost per ton per mile of freight on the roads from the Ohio south (and in other sections of the country) and much above the average of their receipts per ton per mile. (See tables in statement of facts.) They are, it seems scarcely necessary to add, prescribed as maximum rates and are not intended to be prohibitory of such lower rates as the carriers interested may find to be just and reasonable.

We are not unmindful that a compliance with the order in these cases may and probably will necessitate a readjustment of rates from Central territory to other points in Southern territory than those named, but as we took occasion to say in the case of the *Board of Trade of Troy v. Alabama M. R. Co.* 4 Inters. Com. Rep. 848, 6 I. C. C. R. 1, "it cannot be held to be a valid objection to the correction of unlawful rates to one locality, that it involves a like correction to other localities."

Even pecuniary embarrassment of a road by reason of insufficient receipts from all sources is not a fact that will warrant making rates on a portion of its traffic unreasonably high for the accomplishment of a purpose such as is disclosed in these cases. Excessive rates on certain classes of traffic may be made the basis of proportionately low rates on other classes, and thus shippers of the former are taxed with burdens which in justice should be borne by the latter and without any addition to the general aggregate revenue of the carrier. It is believed, moreover, that the reduction in rates ordered in these cases will result in a corresponding increase in the tonnage of the roads in the traffic affected, and that the revenue therefrom will be augmented rather than lessened. This, at any rate, will be the natural tendency of the change.

The further claim is made in the Chicago case, that, in the language of complainant's brief, "As Boston is given the same rates to Southern points as New York, by the tariffs fixed by defendants through the agency of the Southern Railway & Steamship Association, Chicago should have the same rates to Southern points as may prevail between Cincinnati and Southern points, the distance between New York and Boston being 213 miles and the distance between Chicago and Cincinnati

being not substantially greater." No sufficient reason appears for sustaining this proposition. In the first place the short line distance from Chicago to Cincinnati is 298 miles, which is 85 miles or about 40 per cent greater than the distance from New York to Boston—a material difference in our opinion; and, in the second place, the transportation between Chicago and Cincinnati, is all rail, while between Boston and New York there is water transportation *via* the Atlantic at small cost as compared with that by rail.

As will be seen from our statement of facts, unmistakable provisions for pooling are found in the Association Agreements from 1885 up to and including that which terminated July 1, 1887. In those agreements in addition to the sum required to be paid monthly into the pool, each member is assessed \$300.00 for the payment of salaries of officers and other "general expenses" of the Association. Subsequent agreements omit these provisions, but in lieu thereof require the payment by each member of an amount equivalent to \$5.00, for each mile of road operated, not to exceed \$5000.00 for any one company. The sum thus to be raised, it will be observed, is many times larger than the \$300.00 assessment in prior agreements for payment of expenses. It is to be applied in the first place to the payment of "any fines that may be assessed by the Board of Arbitration against any member of the Association for violating its rules" and the *surplus* is to be applied to the expenses of the Association. As to what is meant by term "fines," the language of the agreement of 1892 and that now in force in reference to this surplus is significant, namely, "any surplus over and above the amount that may be awarded by the Board of Arbitration to indemnify any member for losses sustained shall be applied to the payment of the expenses of the Association." In the agreement of 1892, it is declared that the fines or penalties imposed for violations of the agreement shall be such as the Board of Arbitration "may deem proper and necessary to secure the maintenance of the rates of the Association," but in the present agreement, they are to be such as the Board "may deem proper and commensurate with the injuries inflicted upon the Association and of competing lines parties to this Agreement." The "losses sustained" by, and the "injuries inflicted" on, any member of the Association by a violation of the agreement by another member, would be the traffic or revenue therefrom, lost by reason of such violation. For example, if a Western road or line should haul traffic assigned to an Eastern road or line under the territorial clauses of the agreements, the loss sustained by or injury inflicted on the Eastern road or line would be the revenue which

would have been earned by the latter on such traffic under Association rates. This, it seems, would be the amount which the "injured" road or line would be entitled to receive credit for under a pooling arrangement. As the fines or penalties provided for are, in the words of the agreement of 1892, intended "to indemnify any member for losses sustained" by reason of any violation of the agreement, and by the subsequent agreement, are to be "*commensurate with injuries*" thus inflicted, it appears clear that they are available as substitutes for balances or amounts which would be due under a regular pooling arrangement and the system under which they are imposed is—if not expressly, at least in legal effect—a combination, contract or agreement for (in the language of the Act) "the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof." The money paid to the "injured" road would be that "portion" of the "offending" road's earnings, which it had received by reason of its violation of the Association rules and which the "injured" road presumably, would have earned and received but for such violation. Ample provision, furthermore, is made in these agreements for the detection of any violation of their rules by requiring the rendition to the Commissioner by all the members of the Association of *tonnage and revenue* reports and the furnishing to him "copies of all manifests for traffic covered by the Agreements (such copies to be forwarded at the time the shipments to which they appertain are made and to show the original shipping point and through rates and divisions thereof)" and also monthly "abstracts of all such manifests." These monthly abstracts, if not for the purpose, at any rate enable the Association to impose at the end of each month the so-called "penalties" for violations of its rules, just as under prior agreements with avowed pooling arrangements monthly balances were struck and clearing-house settlements had. The law has regard to the substance, rather than the form or name of things, and whatever it prohibits from being done directly cannot legally be effected indirectly.

We also deem it our duty to call attention to sec. 2 of Article 28 of the Agreement of July 31, 1893 (now in force) which is as follows:

"It is distinctly understood and agreed that the maintenance of rates as established under the rules of the Association is of the very essence of this Agreement, and the parties hereto pledge themselves to maintain them and to require all their connections to maintain such rates, and in the event of any company or line or its connections not mem-

bers of the Association failing to conform to this obligation, the other parties in interest pledge themselves to increase their proportions of through rates sufficiently to protect the authorized rates, and to *apply full local rates upon all traffic subject to the Association Agreement coming from or going to such offending lines*, when required by the Commissioner to do so."

Whatever obligation there may be on the part of members to maintain Association rates is the result of their *voluntary* action in entering into the Association Agreement. One carrier has no authority to dictate the rates which another shall charge for the service of transportation over its own road or line; and, whether or not members of the Association are justified in "increasing their proportions of through rates sufficiently to protect the authorized rates" of the Association, it seems clear that they cannot lawfully resort to discrimination against their connections, not members of the Association, as a punishment for failure on their part to conform to those rates or for the purpose of compelling such conformity. Among other things prohibited in section 8 of the Act to Regulate Commerce, is discrimination by

carriers subject to the Act "in their rates and charges between connecting lines." Applying "full local rates upon all traffic subject to the Association Agreement coming from or going to" connecting lines which do not maintain Association rates, while to traffic from other connecting lines conforming to such rates full local rates are not applied, would be, in our opinion, an unlawful discrimination against the former under the above clause of Section 8 of the Act. The mere combination or agreement to thus discriminate is not, however, made an offense under the Act and no actual discrimination of this kind has been shown in these cases. As to whether such combination or agreement alone, in the absence of an overt act, would be indictable at common law or under some other statute, it is unnecessary and, perhaps, improper for this Commission to express an opinion. We can only say, that the agreement in this particular is an agreement to do an act forbidden by the Interstate Commerce Law, and, if in any instance it should be put in practice, the carriers involved would be liable to be proceeded against, under that law.

UNITED STATES CIRCUIT COURT, DISTRICT OF NEBRASKA.

OLIVER AMES, 2d *et al.*,

v.

UNION PACIFIC R. CO. *et al.* (No. 1).

1. When a court of equity undertakes, through a receiver, the conduct and operation of a railroad, the men engaged in conducting the business and operating the road become the employes of the court, and are subject to its orders in all matters relating to the discharge of their duties and entitled to its protection.
2. When the schedule of wages in force at the time a court assumes the management of a railroad is the result of mutual agreement between the company and its employes which has been in force for years, the court will presume the schedule to be reasonable and just, and any one disputing that presumption must overthrow it by satisfactory proof.
3. The recommendation of the majority of the receivers of a railroad will not be accepted by the court as conclusive upon the question of wage schedules, when such majority is not composed of practical railroad men.
4. The court will take judicial notice that for the first \$36,000,000 of stock issued by the Union Pacific Railroad Company it received less than two cents on the dollar, and that the profit on construction represented by outstanding bonds was nearly \$44,000,000.
5. Wages of the employes of a railroad in the hands of a receiver will not be reduced below 4 INTER S.
- what is reasonable and just in order to pay dividends on stock for which practically no value was paid, and interest on bonds which represent profit in construction.
6. Receivers in possession of a railroad will not be permitted to reduce the wages of employes without giving them notice and an opportunity to be heard as required by the contract between the men and the company, although an opportunity is given to protest against the new schedules after they are prepared.
7. Wage schedules are not within the class of executory contracts which receivers can renounce while relying on the power of the court to compel the employes to continue in service.
8. A contract to render personal service cannot be specifically enforced.
9. It is not unlawful for employes to associate, consult or confer together with a view to maintain or increase their wages by lawful and peaceful means.
10. A court will not approve the action of its receiver in reducing the wages of employes or discharging them in a body without giving them an opportunity to be heard.
11. Receivers must give employes an opportunity to be heard before fixing wage schedules.

12. Wage schedules recommended by receivers will not be adopted when the only practical railroad man among the receivers says they should not be put in force without modifications.
13. The allowance of excess mileage by railroad receivers to employes will be approved by the court for portions of the road running through mountains and desert country, where competent men cannot be kept at regular rates, but where such course was entirely successful as employed by the company.
14. The diminished opportunity to earn wages induced by the same conditions which forced the railroad into the hands of a receiver should be considered when deciding the question of reduction or maintenance of the old wage schedules.
15. It is a contempt of court to interfere with property in the hands of a receiver, or with men in their employ.
16. An injunction will not be granted to prevent the employes of a railroad in the hands of a receiver from interfering with the property or other employes, since such action is punishable as a contempt.

ON PETITION by the receivers of the Union Pacific System for leave to put into force reduced wage schedules over the railroad system in their charge. *Petition denied.*
The facts sufficiently appear in the opinion.

The Receivers appeared by John M. Thurston, solicitor; the Brotherhood of Locomotive Engineers by George W. Vroman, chairman; the Brotherhood of Locomotive Firemen by C. A. M. Petrie, chairman; the Order of Railway Conductors by John L. Kissick, chairman; the Order of Railway Telegraphers by F. E. Gilliland, chairman; The Union Pacific Employes' Association by Henry Breitenstein, chairman; the Brotherhood of Railway Trainmen by Samuel D. Clark, chairman. Said several labor organizations and the members thereof further appeared by T. Fulton Gantt, Geo. L. Hodges, McClanahan & Halligan and T. W. Harper, their solicitors.

Caldwell, C. J., delivered the opinion of the court:

On the 18th day of October, 1893, on a bill filed for that purpose, this court took into its possession, control and management, The Union Pacific Railway System, embracing The Union Pacific Railway proper, and some fourteen other constituent and allied roads, which together constitute what is known as The Union Pacific System.

Whether the bill states a case of equitable cognizance justifying the appointment of receivers has not been mooted on this hearing, and we, therefore, express no opinion upon that question.

The system of which the court assumed the management and control comprised 7700 miles of railroad, and about 8000 miles of water communication, and had in its employ over 22,000 men. The great body of these men had been in the employ of the company for a considerable length of time, some of them for as much as a quarter of a century. The relation of these men to the company, and their rate of wages, were determined in the main by certain written rules, regulations and schedules, some of which had been in force for more than a quarter of a century, and all of which had been in force, substantially as they stand to-day, for a period of eight years and more. These rules, regulations and schedules were the result of free and voluntary conferences, held from time to time, between the managers of the railroad and the officers and representatives of the several labor organizations representing the men in the different subdivisions or

branches of the service, viz: The Brotherhood of Locomotive Engineers, The Brotherhood of Locomotive Firemen, The Order of Railway Conductors, The Order of Railway Telegraphers, The Union Pacific Employes' Association, and the Brotherhood of Railway Trainmen. These labor organizations, like the rules, regulations and schedules, had become established institutions on this system many years before the appointment of the receivers. Two of the ablest railroad managers ever in the service of this system, and probably as able as any this country has ever produced—Mr. S. H. H. Clark and Mr. Edward Dickinson, now general manager of the road—testify that these labor organizations on this system had improved the morals and efficiency of the men and had rendered valuable aid to the company in perfecting and putting into force the rules and regulations governing the operation of The Union Pacific Railway, which, confessedly, have made it one of the best managed and conducted roads in the country. The managers of this great transcontinental line testify that it has been their policy to bring it up to the highest standard of efficiency and to afford to passengers and property transported over it all the security and protection attainable by the exercise of the highest degree of intelligence on the part of those engaged in the operation of its trains, and they cheerfully bear testimony to the fact that their efforts in this direction have been seconded and materially aided by the labor organizations which are represented in this hearing. The good opinion of the men entertained by the managers seems to be shared by the receivers, for in their petition to the court in this matter, they declare: "That the employes, generally, upon The Union Pacific System are reasonable, intelligent, peaceable and law-abiding men."

Among the rules and regulations referred to and in operation when the receivers were appointed was one to the effect that no change should be made in the rules and regulations and rate of wages without first giving to the labor organization whose members would be affected by such change, thirty days' notice, or other reasonable notice. On the 27th day of January, 1894, the receivers, without giving the men, or the officers of the labor organizations representing them, any notice, filed in

this court a lengthy petition, stating, among other things: "That, as receivers herein, they have, from the time they entered upon their duties as such, as far as consistent with the proper discharge of their duties to the public, and with justice to their employes, inaugurated economies in every department, with a view to reduce the operating expenses as far as possible, and produce results fair to all those parties having liens upon and interests in the properties confided to the care of your receivers." "Your petitioners further represent that they conceive it to be their duty to make and carry into effect such reductions and such reforms of the rules, regulations and schedules without application being first made to the court in that behalf;" and, stating further that they had "revised the schedules aforesaid, upon principles which have seemed to them just, right and proper." With this petition, the receivers filed what they termed rules, regulations and schedules, which they asked the court to approve and order that they be put into effect on the 1st day of March, 1894, and the "employes directed to conform thereto." The petition also prayed for a very extended injunction against the employes. On the day the petition was filed the court entered an order declaring that the rules, regulations and schedules prepared by the receivers and filed with their petition, were "prima facie reasonable and just," and directed that they become operative on the first day of March, 1894, and ordered an injunction to issue as prayed for in the petition. Upon the presentation of this petition, and the order made thereon, to the United States circuit courts for the districts of Wyoming and Colorado, those courts declined to give effect to the order in those districts, for the reason that the employes had had no notice of the proposed change.

Thereupon the receivers applied to the circuit judges at their chambers in St. Louis to put the order made by the United States circuit court in Nebraska in force in the districts of Colorado and Wyoming. This the circuit judge declined to do, but directed the receivers to annul their orders adopting the new rules, regulations and schedules, and this having been done, they made the following order:

"In the matter of the petition for rehearing before the circuit judges of the application of the receivers for authority to place in effect new and reduced wage schedules."

"Since the action of the courts in the different districts in this circuit on the petition filed by the receivers for leave to revoke the schedules of wages of the employes in force when they were appointed, and to adopt new and reduced schedules has not been uniform and harmonious; and since it is desirable and necessary that any order made on said petition should have a uniform operation upon the lines of railway operated by said receivers throughout the circuit; and since the receivers have revoked and annulled their action heretofore taken, ordering new wage schedules into effect on the first day of March, 1894, and have resolved that the entire matter of new wage schedules be held in abeyance to await further action of the court, it is now here ordered as follows:"

4 INTER S.

"First. That the petition of the receivers for leave to set aside and annul the schedules of wages of the employes on The Union Pacific System in force when they were appointed, and to adopt new schedules equalizing and in some cases reducing the wages of the employes, be set down for hearing before the circuit judges at Omaha, Nebraska, on the 27th day of March, A. D. 1894."

"Second. That the receivers forthwith, or as soon as may be practicable, invite the proper representatives of the employes on said system to attend a conference at Omaha, Nebraska, commencing on the 15th day of March, 1894, for the purpose of conferring with S. H. H. Clark, receiver (who is hereby specially designated and selected to conduct said conference on behalf of the receivers) and such other person or persons as he may select to act with him, at which conference the entire matter of proposed changes in wage schedules shall be taken up and as far as possible, agreed upon between the said Clark and said representatives of the employes. Such conference to continue from day to day until such agreement is reached."

"Third. That in case there are any matters in difference remaining unadjusted, such matters of difference shall be clearly and specifically stated and presented to the court in writing on or before said 27th day of March, 1894, and the hearing herein shall proceed as to such matters in difference before the circuit judges holding the court, and after hearing the parties and their witnesses and counsel the circuit judges will make such order in the premises as may be right and just."

"Fourth. That the receivers grant to such representatives of the employes leave of absence to attend said conference and hearing, and furnish them transportation to Omaha and return."

Henry C. Caldwell,

Walter H. Sanborn,

Circuit Judges.

In compliance with the terms of this order, a conference between Mr. Clark and his assistants, and the officers of the several labor organizations representing the employes of the court was held in Omaha. At this conference an agreement was reached as to the rules, regulations and schedules relating to the train dispatchers and operators, which have been reported to the court and confirmed. This was one of the most difficult schedules in the whole list to adjust, and the satisfactory agreement reached in the conference shows the great value of a good-tempered, calm and intelligent inquiry in which both sides are represented, and in which both sides learned, perhaps for the first time, the ground on which the demand is made by the one and resisted by the other. The receivers had declared to the court, in their petition filed on the 27th day of January, 1894, "that after careful consideration of the matter, and consultation with the managing officials of the Union Pacific System, they are of the opinion that the so-called rules, regulations and schedules of pay for train dispatchers and operators are entirely unnecessary, and they have, therefore, not only decided to disaffirm the same, but they have also decided that they will not prepare or establish any

rules and regulations in lieu thereof; and with respect thereto your receivers further advise your honors that all of said train dispatchers and telegraph operators are employed on monthly salaries which are determined in consideration of all the circumstances of each particular case, and are intended to cover all the services and all the time necessary in which to perform the service required from each of said train dispatchers and operators at the several respective stations on the lines of the Union Pacific System."

And yet at the conference held, under the order of the circuit judges, the position assumed by the receivers in their petition to the court was found to be untenable and was abandoned, and rules and regulations governing telegraphers' wages adopted.

It would serve no useful purpose here to state the causes which in the opinion of the court prevented an agreement between the conferees upon rules, regulations and schedules for the other branches of the service. It is sufficient to say that they were of a character which do not in any degree militate against the usefulness or efficiency of conferences or the ability or fairness of the conferees. Freed from the state of things brought about by the erroneous proceedings of a majority of the receivers in the beginning of this business, it is highly probable that the conferees would have agreed upon all the schedules. Failing to agree, the matter was brought before the court, in accordance with the order made by the circuit judges. At the appointed time the receivers appeared in person and by attorney, and the employes by the officers of the several labor organizations to which they belong, and by their attorneys. Upon calling the case for hearing the court directed an order to be entered setting aside and vacating the order of the court made on the 27th day of January, 1894, approving the rules, regulations and schedules framed by the receivers without notice to or conference with the employes affected thereby, and also setting aside and vacating the order of injunction entered at the same time. The court then announced to counsel that the rules, regulations and schedules in force when the receivers were appointed were still in force and would be held and treated as *prima facie* just and reasonable, and that the burden was cast upon the receivers to show that the wages received by the court's employes under the existing regulations were in excess of a fair, just and reasonable compensation for the service performed, taking into consideration all the circumstances and in view of the existing conditions.

The hearing proceeded on these lines, and the court listened for a week to the testimony of witnesses.

Before stating the conclusions we have reached upon the facts, it will be well to state the leading principles which courts of equity must keep in view in this class of cases. When a court of equity takes upon itself the conduct and operation of a great line of railroad, the men engaged in conducting the business and operating the road become the employes of the court, and are subject to its orders in all matters relating to the discharge of their duties, and entitled to its protection. The first and

supreme duty of a court when it engages in the business of operating a railroad is to operate it efficiently and safely. No pains and no reasonable expense are to be spared in the accomplishment of these ends. Passengers and freight must be transported safely. If passengers are killed or freight lost through the slightest negligence to provide all the means of safety commonly found on first class roads, the court is morally and legally responsible. An essential and indispensable requisite to the safe and successful operation of the road is the employment of sober, intelligent, experienced and capable men for that purpose. When a road comes under the management of a court on which the employes are conceded to possess all these qualifications—and that concession is made in the fullest manner here—the court will not, upon light or trivial grounds, dispense with their services or reduce their wages—and when the schedule of wages in force at the time the court assumes the management of the road is the result of a mutual agreement between the company and the employes which has been in force for years, the court will presume the schedule is reasonable and just, and any one disputing that presumption will be required to overthrow it by satisfactory proof.

It is suggested that upon this question the court ought to be governed by the recommendation of a majority of the receivers. The suggestion is without merit in this case for several reasons: Four of the five receivers are not practical railroad men, and are not familiar with the subject; two of them are lawyers residing in New York, one a merchant residing in Chicago, and one a railroad accountant having, doubtless, a thorough knowledge of the books of the company, but knowing nothing about the wage schedules. These four gentlemen are eminent in the line of their professions and pursuits, and entirely capable of managing the financial affairs of this great trust, for which purpose they were, doubtless, selected, but their opinions upon the subject of wage schedules is confessedly of little value. The court shares in their anxiety to have an economical administration of this trust to the end that those who own the property and have liens upon it may get out of it what is fairly their due. But to accomplish this desirable result the wages of the men must not be reduced below a reasonable and just compensation for their services. They must be paid fair wages, though no dividends are paid on the stock and no interest paid on the bonds. It is a part of the public history of the country, of which the court will take judicial notice, that for the first \$36,000,000 of stock issued this company received less than two cents on the dollar, and that the profit of construction represented by outstanding bonds was \$43,929,828.34. These facts are disclosed by the report of the "commission of the United States Pacific Railway Company," 1887, of which Mr. Anderson, one of the receivers in this case, was a member. See Report, pp. 51, 137. There would seem to be no equity in reducing the wages of the employes below what is reasonable and just in order to pay dividends on stock and interest on bonds of this character. The recommendation of the receivers to adopt

their schedules cannot be accepted by the court for another reason. That schedule was adopted without affording to the men or their representatives any opportunity to be heard. This was in violation of the agreement existing between the company and the men, by the terms of which no change of the schedules was to be made without notice to the men and granting them a hearing. This was a fundamental error. The receivers should have given notice and invited the men to a conference even if there was no contract requiring it. In answer to this objection to their mode of proceeding, it is said the order of the receivers and the order of the court extended an opportunity to the men to protest against the new schedules after their adoption. The men could have small hopes of a fair and impartial hearing after the receivers had prepared new schedules behind their backs which were declared by the receivers and the court to be "prima facie just and reasonable." This was very much like first hanging a man and trying him afterwards. It is small consolation to the victim of the mob to be told he shall have a trial after he is hanged. It is further said that the receivers had the right to renounce the old schedules and adopt the new ones because the old ones were mere executory contracts. There are some executory contracts which receivers may renounce, but they cannot claim the benefit of such contracts and at the same time renounce their burdens. This is precisely what was attempted to be done by the receivers in this matter: they renounced the old schedules and adopted new ones reducing wages, but seemingly with no idea of absolving the men from the duty of continuing to work and operate the road, for in their petition they ask that their schedules be confirmed by the court, "and all of the said employes directed to conform thereto." The receivers were the first to break the contract between the court and its employes, but if the converse had been the case the court could not have directed or enjoined the men to continue in its service. Specific performance of a contract to render personal service cannot be enforced by injunction, by pains and penalties or by any other means. For a breach of such a contract the only redress the law affords is a civil action for the damages.

The court is asked to apply to the employes in its service the principles of the early English statutes, which, by the imposition of heavy pains and penalties, forced laborers to work at fixed wages, and made it an offense to seek to increase them, or to quit the service of their employer. The period of compulsory personal service, save as a punishment for crime, has passed in this country. In this country it is not unlawful for employes to associate, consult and confer together with a view to maintain or increase their wages, by lawful and peaceful means, any more than it was unlawful for the receivers to counsel and confer together for the purpose of reducing their wages. A corporation is organized capital; it is capital consisting of money and property. Organized labor is organized capital; it is capital consisting of brains and muscle. What it is lawful for one to do it is lawful for the other to do. If it is lawful for the stockholders and officers of a corporation to associate and confer together

for the purpose of reducing the wages of its employes, or of devising other means of making their investments profitable, it is equally lawful for organized labor to associate, consult and confer with a view to maintain or increase wages. Both act from the prompting of enlightened selfishness, and the action of both is lawful when no illegal or criminal means are used or threatened.

It is due to the receivers and to the managers of this property to say that they have not questioned the right of the labor organizations to appear and be heard in court in this matter, and that what they have said about these organizations has been in commendation of them and not in disparagement. Men in all stations and pursuits in life have an undoubted right to join together for resisting oppression or for mutual assistance, improvement, instruction and pecuniary aid in time of sickness and distress. Such association commonly takes place between those pursuing the same occupation and possessing the same interests. This is particularly true of men engaged in the mechanical arts, and in all labor pursuits where skill and experience are required. The legality and utility of these organizations can no longer be questioned.

The action of the receivers is objectionable upon another ground. It would be difficult to devise any action better calculated to provoke a "strike." The method of adopting the new schedules was calculated to arouse resentment in the breast of every self-respecting, intelligent and independent man in the service. While they might have been willing to acquiesce in the reduction of their wages, they were quite sure to revolt against the manner of doing it. Whatever may be the legal right of a railroad corporation to reduce the wages of its employes or discharge them in a body without giving them an opportunity to be heard, a court of equity will not act in that manner or approve the action of its receivers who have acted in that manner. The receivers, no more than the court, should have undertaken to determine what wages were just and reasonable without giving the men an opportunity to be heard. It is fundamental in the jurisprudence of this country that no court can rightfully make an order or render a judgment affecting the rights of one who is absent and who has had no notice. The requirement that the court or any other tribunal shall hear before it decides is much older than Magna Charta or our Constitution. It was written in the Book three thousand years ago that "He that answereth a matter before he heareth it, it is folly and shame unto him."

A further and conclusive answer to the contention in favor of putting the receivers' schedules in force is found in the fact that Mr. Clark, the only one of the receivers who is a practical railroad man, testifies that they ought not to be put into force without "some modifications."

As a result of the old code of rules and schedules this company has been able to bring into every branch of its service, at reasonable cost, intelligent and capable men who have carefully guarded and protected its property and business interests until the train service upon The Union Pacific is to-day equal to any

of the great railway systems of the country. Upon the question of the reasonableness of the old schedules we have had no trouble in coming to a satisfactory conclusion.

The record shows that all that portion of railroad mileage, where excess mileage has been allowed, runs through either a mountainous or desert country, where the men engaged in the operation of trains have to contend with heavy grades, and where the winters are long and often severe, and where the hazard of operating is necessarily greatly increased. There is practically no agriculture, and the cost of living is much greater than in an agricultural region. As stated by Mr. Dickinson, "it is a pretty tough place to live." The system of paying excess mileage, Mr. McConnell testifies, has been in vogue ever since the road was built, and was allowed because the company had difficulty in obtaining men who would stay in that region of country. If this system was a good thing for the company when operating the road, it is a good thing for the court when operating the road. As a result of this system men of intelligence and character have been induced to enter the service and to establish permanent homes in regions of country where there is practically no business except the business in which they are engaged, and where, for many reasons disclosed by the evidence, it is not desirable to live. A system of rules and regulations by which the company has been able to bring into its service and retain for twenty-five years, in some instances, the class of men who have appeared before the court at this hearing, is certainly commendable, and meets the entire approval of the court.

In the opinion of the court the allowances made by the schedules now in force are just and equitable when all the conditions are considered. The employes, under the present system, share the burdens of diminished business. They make less mileage and get less pay per month. The rate now paid is not higher than the rate paid on other lines operated through similar country and under like conditions, and, in the opinion of the court is not higher than it should be for the service rendered.

Some of the employes with large families to support are seldom more than a few days' wages in advance of want, and if their present wages were materially reduced they could not live. The highest and best service cannot be expected from men who are compelled to live in a state of pinch and want.

It is a gratifying fact that the officers and representatives of labor organizations of which the men interested in this hearing are members have unanimously assured the court that whatever judgment is rendered in this case will be

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accepted by the men as a settlement of the dispute, and that in no event, after such a hearing as has been accorded to them in court, will they "strike." We are confident these assurances will be kept.

When property is in the custody of receivers the law declares it to be a contempt of the court appointing them for any person to interfere with the property or with the men in their employ. No injunctive order can make such unlawful interference any more of a contempt than the law makes it without such order. Such orders have an injurious tendency because they tend to create the impression among men that it is not an offense to interfere with property in the possession of receivers or with the men in their employ unless they have been specially enjoined from so doing. This is a dangerous delusion. To the extent that a special injunction can go in this class of cases the law itself imposes an injunction. For this reason no injunctive order will be entered in this case.

In conclusion, we may be indulged in giving expression to the hope that in future differences about wages between courts and their employes, at least, and we would fain hope between all employers and employes, resort may be had to reason, and not to passion, to the law and not to violence, to the courts and not to a "strike." It is a reproach to our civilization that such differences should result, as they often have, in personal violence, loss of life, destruction of property, loss of wages to the men, and loss of earnings to the employer, and when they occur on great lines of railroad, great damage and inconvenience to the public.

An order will be entered in the district of Nebraska continuing the present schedules (subject to the modification as to delayed or overtime) in full force and effect and setting aside the order made by this court on the 27th day of January, 1894.

Also an order directing the receivers to cause 500 copies of a complete record of this cause, including the pleadings, evidence, opinions and orders entered in the several districts, printed and distributed as provided in the order.

Also an order requiring the receivers to pay the expenses of the employes attending the conference ordered by the circuit judges and while attending this hearing.

An order will be entered in the districts of Colorado and Wyoming modifying the orders entered in those districts on the 26th and 27th days of February, 1894, to conform to the order now entered in the district of Nebraska, relating to the rules, regulations and schedules of pay.

Riner, J., concurs.

UNITED STATES CIRCUIT COURT, DISTRICT OF NEBRASKA.

OLIVER AMES, Second ET AL.,

v.

UNION PACIFIC R. CO. ET AL. (No. 2.)

1. An order relative to wages of employ  es of a receiver should be for the benefit of all parties similarly situated, whether belonging to any of the labor organizations applying for it or not.
2. If employ  es of receivers do not receive enough compensation for the work they do they have the right to apply to the receivers or to the court to have their wages increased, and on a proper showing made, justice will be done.
3. The rate of wages to be paid to employ  es of receivers must be left mainly to the receivers to manage.

ON PETITION by a committee of the American Railway Union for an order directing the restoration of a wage schedule formerly in force, but which had been changed, to the detriment of the petitioners. *Relief granted.*

The facts are stated in the opinion.

Dundy, J., delivered the following opinion:

I very much disliked to enter upon the hearing of the matters involved in this application, for reasons hereafter to be stated, but under the peculiar circumstances surrounding the petitioners, and the difficulty under which they labored in presenting their claims to the court, resulting in their being completely ignored, after they had, as is alleged, been promised a hearing, I have thought it no more than fair to hear them rather than to send them to their distant homes unrecognized and unheard. Whilst *Judge Caldwell* was here holding court for the purpose of hearing the alleged grievances of some of the labor organizations (I had nothing whatever to do with hearing them) I positively declined to hear the complaints of these parties, as it seemed to me that under orders theretofore made by the circuit judges, the complainants ought to have been heard before one or both of those judges. But after the hearing before *Judges Caldwell* and *Riner* had been completed, and after *Judge Caldwell* had left the city, application was again made to me, praying for a hearing, which had theretofore been denied them. At this time an affidavit was filed and presented to me stating, in substance, that the petitioners had been promised a hearing, that they had been waiting for days to have the promise carried out, and finally, that they had been absolutely refused the hearing theretofore promised. These petitioners were present in person and were represented by *Judge Duffie* and *Hon. John D. Howe*, two reputable and distinguished lawyers. They were not "suppressed" or turned away without permission to state the character of the application they desired to make. After hearing the statements of the applicants, and their attorneys, and reading the affidavit before referred to, I concluded to entertain the application and to fully hear the merits and demerits of the claims made in the petition now under consideration. Finally the 11th day of April was fixed as the time of hearing, which has resulted in the orders to be made herein. I am not fully advised of the reasons leading to the refusal to hear these petitioners. I do not know whether it was because of their supposed poverty or because they received but small wages for their daily toil, or because of their having less influence, or being less numerous

than their more favored friends who succeeded in gaining a hearing, that the court refused to accord them a hearing as well as the others.

This much I have thought is due to myself to state in explanation of the refusal to hear the application when it was at first presented to me therefor.

A week or so ago the train men in the employ of the Union Pacific Company had a hearing before *Judge Caldwell*, where the wage question was under consideration. That case in all essential particulars was the same as this one. A written opinion was filed in the case. Some facts are stated in the opinion—one or two important facts are misstated, and some important facts are omitted entirely.

I propose to give a history of the case and the reasons that lead to the making of the order that has been so extensively criticised and denounced. This I do here and now because it is the only opportunity I have had for stating the reasons on which action was based. Much of the opinion is devoted to the occupation and business qualifications of the Receivers, who happened to be appointed without consultation with the senior circuit judge. Much of it is devoted to the alleged character of the injunction allowed, and which was under consideration by the court, and much of it is devoted to that part of the order which authorized the Receivers to put the wage schedule in force on the first day of March, 1894. The author of the opinion seems to have taken great, if not malicious pleasure, in passing his strictures on what had been done in connection with the matters then under consideration. No one, probably, questions the right to do so, but many, very many, have questioned the good taste and decency of the manner in which the hearing was had and the opinions prepared.

Now for the history of this litigation.

This suit was commenced on the 9th day of October, 1893, and about the same time receivers were appointed to take possession of and operate the several roads named as defendants. These numerous defendant roads constitute what is known as "The Union Pacific System," and were, at the time the suit was commenced, operated as one harmonious whole.

Mr. S. H. H. Clark, E. Ellery Anderson and

Oliver W. Mink were at first appointed Receivers. These persons were agreed on, and were entirely satisfactory to all parties named in the suit. Afterwards, on the 18th day of November, 1893, General John C. Cowin, who represented the Attorney General, and on behalf of the general government, came into open court and asked and obtained leave for the government to intervene as a defendant so that it might be in better position to protect the vast claims held against The Union Pacific Railway. The railways and other Receivers were represented by Mr. Thurston, and then and there all parties in interest asked to have Mr. Frederic Coudert and J. W. Doane appointed additional Receivers, which was done. This was done not only by consent, but at the request of all parties in interest, including the government.

Now, who are these men so held up to ridicule as wanting the necessary qualifications for Receivers of a railroad? Mr. Clark has spent the greater part of his life in connection with the railroad business. A well merited eulogy was pronounced on him, so that little more need be said, so far as he is concerned. Mr. Mink came up from the ranks as a railroad telegraph boy. Many years ago he became the comptroller of the Union Pacific and its branches, and continued to act as such until he was appointed one of these Receivers; he was also, at the time of his appointment, vice president of the road, and is still such. He is well known to be one of the best accountants the country affords, and is the only man living who is thoroughly conversant with the financial history and standing of the several defendant roads.

Mr. Anderson is a distinguished lawyer of New York city, but has had much to do with railroad business. He has been, and I think is still, a receiver of another road. He was several years ago a member of the government commission which was created for the purpose of investigating the management and affairs of the Union Pacific road. He is now and has been for some time past, one of the government directors of the road, and knows very much about its business and condition. Mr. Doane is a man of commanding influence, and is known to be highly successful in whatever he undertakes. He too, is a government director, and still continues to act as such. Mr. Coudert is a distinguished lawyer of New York. Is well known as one of the leading lawyers of the United States. He stands well with the present administration, and with the country, as well, perhaps, as any other man in it. These are the men sneered at in the manner and for the reasons stated. But they are well known in the greater part of this country. They need no defense here or any other place. The high character and standing of each and every one of them blunts the criticisms intended for them, as well as the one that appointed them. I will dismiss this branch of the subject by saying that these receivers will not suffer by a comparison between them and the receivers appointed for the great Santa Fé system, not one of whom, it is understood, was ever a practical railroad man, but not for that reason, or any other so far as known, unfit for railroad receivers. Whether the repu-

tation of the receivers, or either of them will suffer more from the unjust and unwarranted criticism passed upon them and their doings in the premises, than will the reputation of the author of the criticism, is a debatable question.

It seems to me that all their efforts down to this time have been made in the right direction. Their duties are multifarious and difficult. Their responsibilities are simply enormous. The several roads operated by them extend into numerous states and territories. They have been required to give bond in about fourteen states and territories. The aggregate amount of the bonds so given approximate the sum of \$———. Until they do more than to make an honest effort to reduce the operating expenses of the roads under their charge they ought not to be stigmatized as ignoramuses in this court, nor in any other place. Then, again, if the four receivers last named are so incompetent, it would strike even a careless and casual observer as somewhat peculiar that Mr. Clark should be banished from his post of duty, and directed to stay away from the headquarters of the roads for five months at one time. Some things seem to be inexplicable, and this is one of them.

The next important step taken in connection with this litigation was the presentation by the Receivers of a petition in which it was shown that a new wage schedule had been prepared by them to take effect on the 1st day of February then following. On the 27th day of January, 1894, an order was made approving the schedule so prepared and presented by the receivers for approval. They were then authorized to put the same in force on the first day of March, if in their judgment the same was fair and reasonable. They were at the same time authorized to establish new rates and new schedules as circumstances might thereafter require. No written notice of any intention to reduce wages of any of the employes seems to have been given. This is the part of the said order which seems to have aroused so much indignation in some quarters, and the part which seems to have been taken as such an excellent text on which to base a sermon, which, it was supposed, would obliterate the author of the order. Portions of this order will appear hereafter.

This order expressly provided for any one or more of the employes having a hearing in court, if any such happened to feel aggrieved. One person or many, as the case might be, was guaranteed this right. The aggrieved had the right under this order to come into court in person, or by agents, representative or attorney, and there to have his or their complaints heard, and their wrongs redressed. This is the first order and notice to men so far as I know, ever made in a court, where the right of the employes to go into court was recognized and provided for. But this order containing this wholesome provision—a provision made therein for the exclusive benefit of the men, has been revoked by Judge Caldwell. If the order was without authority of law on which to base it then manifestly it ought to have been revoked. But if sanctioned by law then it ought to have been let alone. The reasons for revoking it are not made known to us. It

cannot well be contended that the portion of the order in question was contrary to law or justice or reason, and that it was revoked for such reasons. The only reason thought to exist for its revocation is the source from which it emanated. Hereafter if any of these poor men have a grievance they want heard in court it may be somewhat expensive for them to travel eight or ten hundred miles from here to hunt up the "source of power," the "fountain head of justice," before whom an application might be made for leave to file a petition asking to have the wrong redressed, which right was fully accorded to all such by the order in question until it was revoked.

The part of this order under consideration is as follows:

"The court further finds and holds: That the said Receivers are fully authorized and empowered under and by virtue of the original orders of their appointment, to put into force and effect from time to time, such rules, regulations or schedules aforesaid, when so determined upon and formulated in accordance with the best judgment of the said Receivers after due investigation and consideration of all the conditions affecting the trust property in their charge. It is also by the court further held and found: That each and every of the employes of this court, acting under said Receivers, and engaged in the transaction of the business and the operation of the railway and telegraph lines, and properties for the said Receivers, having cause of complaint against the putting into effect or enforcement of any such rules, regulations, or schedules, are entitled, either individually or collectively, in person or by duly authorized representatives, to come into this court by proper petition and have their complaints fully heard and considered, to the end, that any such rules, regulations, and schedules so put into effect in the first instance by the said Receivers, may be by order of the court so changed and modified as to do equal and exact justice to each and every of the employes of this court under the said Receivers. And leave is hereby given to each and every employe of this court engaged in operating the railway and telegraph lines, and conducting the business in charge of the said Receivers, to intervene in this cause by petition and to move for such modification, change or abrogation of such rules, regulations, and schedules, or this or any other made herein, or for such further order or direction in the premises as may be just and equitable, and said employes may so appear by petition, either individually or collectively in proper person or by or through their duly authorized representative or representatives. It is by the court further held and found that the revised rules, regulations and schedules prepared, adopted and formulated by the said Receivers, and more specifically described and set forth in the petition herein, and the exhibits thereto attached, and which said revised rules, regulations and schedules are by the direction of the said Receivers, to become operative on the 1st day of March, 1894, are prima facie reasonable and just, and appear to provide for fair compensation to all of the employes therein specified for the character and value of their services to be rendered by each and every of

them. It is therefore, by the court ordered, adjudged and decreed that the said Receivers be, and they are hereby authorized and empowered to put the said revised rules, regulations and schedules into full force and effect upon the date aforesaid, if in their judgment the same are fair and reasonable, and continue and maintain the same upon all the railway and telegraph lines, and with respect to the management and operation of all the property of each and every of the defendants herein, so far as the same apply thereto, except as the same may be changed, revised or abrogated by the said Receivers, or by further orders of the court herein. And the said Receivers are further authorized and empowered from time to time, without any additional or other order of the court in the premises, to prepare, adopt, formulate, and to put into force and effect upon any of the lines of railway under their charge or with respect to any of the business transacted by them, such additional or revised rules, regulations and schedules as they may determine are for the best interests of the trust estate and are just and reasonable towards their employes. The action of the said Receivers in electing to discontinue all former rules, regulations and schedules in force as to those classes of employes referred to and described in said petition, and in preparing, adopting and promulgating all those certain rules, regulations and schedules set forth in the said petition and the exhibits thereto attached is hereby approved and confirmed."

It is by the court further held and ordered: That an employe of this court acting under the said Receivers, who does not wish to continue his employment as such under the rules, regulations and schedules so put into force and effect, or any such rules, regulations and schedules as may from time to time be put in force and effect by the said Receivers, or by further order of the court herein, may terminate his employment at any proper time and fit place, and in such a manner as he may elect, but so as not to impede, obstruct or interfere with the business of the said Receivers or the use and operation of any of the railway and telegraph lines, or properties in charge of this court through its said Receivers."

So much for this provision in the order which was revoked, and for which nothing but a "vacuum" has been substituted.

The portion of the said order of the 27th of January at which the heavy artillery is aimed in the said opinion, is that part which authorizes the Receivers to put in force the wage schedule on the first of last March.

In the opinion it is stated on the sixth page as follows:

The petition also prayed for a very extended injunction against the employes. On the day the petition was filed the court entered an order declaring that the rules, regulations and schedules prepared by the Receivers and filed with their petition, were "prima facie reasonable and just," and directed that they become operative on the first day of March, 1894, and ordered an injunction to issue as prayed for in the petition. Upon the presentation of this petition, and the order made thereon, to the United States Circuit Courts for the Districts of Wyoming and Colorado,

those courts declined to give effect to the order in those districts for the reason that the employes had had no notice of the proposed change.

It is here stated that the court "directed that they become operative on the first day of March, 1894, and ordered an injunction to issue as prayed for in the petition." I feel bound to interpose here in behalf of truth and the correctness of history. The court did no such thing. It simply authorized the Receivers to put in force the schedule on the first of March, if in their judgment they considered the same fair and reasonable. Nor was there any injunction ordered "to issue as prayed for in the petition." Nor was any injunction in fact ever issued from the clerk's office in connection with this suit for this or any other purpose.

The portion of the order here referred to will be found interesting reading matter when placed side by side of certain other orders made in another case by another judge. Reference is made, and attention is particularly directed thereto.

Most lawyers, and many others who care to know, are fully advised of the fact that the district judges usually follow the decisions, rulings and orders of the circuit judges in the circuit where they belong. I know of no exceptions to the rule. It is supposed to be a safe rule to follow. It is the rule here or at least it has been the rule here. But from recent events I am thoroughly convinced that I did that once too often. In my childlike innocence I really thought it right to make the order authorizing the Receivers to put in force the wage schedule, either by first giving notice or without it. But it seems I was too unsophisticated, I could not see far enough into the future to know what was in store for the obnoxious order, nor to see the strictures to be passed on its author for making it. The officers and agents of any railroad corporation who have the right to prescribe rules and regulations for the government and operation of the road also have the right to say to all persons, including employes, that we will pay so much per day, or per month, or per year, or per trip, as the case may be. If the offer is satisfactory, agreements can be based thereon which will be satisfactory to all parties concerned. If no agreement is made for any particular length of service, then either party can terminate the employment at will. At least that is the general rule. Here the Receivers gave over thirty days' notice of their intention to reduce and equalize wages. The employes were not bound to stay in the service of the Receivers if it did not suit them to do so. But if they saw proper to remain in the service after a notice of the reduction of the wages, then there is no law by which they could recover any sum over and above the amount fixed by the reduced schedule. After notice to the employes that the pay had been reduced, it would not do for him to say that "I will remain in your service and compel you to pay a greater rate of wages than you have fixed in your new schedule." "That we have had no agreement between us by which you can reduce my wages." His remedy, under such circumstances, would be to sever his con-

nection with his employers. That he could lawfully do without restraint, and no injunction or other order could lawfully prevent him from doing so. What is said here applies as well to other corporations and individual employers as to railroads. I thought at the time, and still think, that the order was properly made. It seemed to be a matter of expediency only. Precedent and authority seemed not to be wanting, and such precedents, too, as any judge or court might think it perfectly safe to follow. In the justly celebrated case of the Farmers' Loan & Trust Company against the Northern Pacific Railroad Company, a similar order was made in the circuit court in Wisconsin. Judge Jenkins, one of the ablest, and as I think one of the best judges in this whole country, made the order in that case. Other judges have made similar orders before the case above referred to was brought.

The order in question was issued on or about the 19th of December last. It was more comprehensive in its terms, and went further in one direction than the order issued in the Union Pacific case. Such a precedent, coming from such a court, and such a distinguished and able judge seemed to be sufficient authority on which to base action in this case. But this is by no means *all* the authority, nor the only precedent for making the order in this case, as we shall presently see. On the 21st day of December last, more than a month before the making of the order in the Union Pacific case, another judge had made an order in a case pending in the United States Circuit Court of Minnesota, and on the 27th day of the same month another order of similar import was made in the same case. The title of that suit is "Farmers Loan & Trust Company *versus* Northern Pacific Railroad Company *et al.*" Receivers had been appointed in this last named case, the same as in the case in the Wisconsin court. The Receivers prepared a new wage schedule, the same as the Receivers did in the Union Pacific case, and presented the same to a judge for approval. No notice, so far as appears, was previously given to any labor organization, or any person, of any change in schedule, or of any intention to reduce wages. This new schedule was to take effect on the first day of January, only five days after making the last order, yet no notice of the adoption of the new schedule had been given to the men to be affected by the change and reduction of wages.

This application was granted. A judge made the orders referred to and ordered an injunction to issue, which was done, not only against the employes of the road, but against many individuals who had no connection with it. *All this was done without notice to any of the parties to be affected by the orders.* And the judge who made these orders is the senior Circuit Court Judge of this Judicial Circuit, Judge Caldwell. That seems to have been all right when applied to the employes of the Northern Pacific, but all wrong when applied to the men connected with the Union Pacific. One rule to apply to one road and altogether a different one to apply to the other. It was thought safe to follow the circuit judge at all times, which has

been done usually down to the time of the promulgation of the recent "enactment." These orders *authorize* and *instruct* the Receivers to put the new schedule in force at the time before stated. The orders so made in the said case, together with the injunction issued pursuant thereto, are as follows:

(Copy.)

No. 86.

Order of United States Circuit Court for District of Minnesota granting injunction against employes of Northern Pacific Railroad Company and others from interfering with property of Receivers.

In the Circuit Court of the United States for the District of Minnesota.

Farmers Loan & Trust Company,	}
Complainant,	
<i>v.</i>	
Northern Pacific Railroad Company <i>et al.</i> ,	
Defendants.	

On reading and filing the petition of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, Receivers of the Northern Pacific Railroad Company, appointed by this court, as in said petition set forth, said petition being verified by Henry C. Payne, one of said Receivers, and it appearing that the Circuit Court of the United States for the Eastern District of Wisconsin, the court of primary jurisdiction in this cause, has made an order on a similar petition filed in said court, and after considering said petition and the order of the court of primary jurisdiction and being fully advised in the premises, this court adopts the order so made by said court of primary jurisdiction;

Now therefore, It is ordered, adjudged and decreed that the said Receivers, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, are entitled to a writ of injunction, and the clerk of this court is hereby directed to issue the same (in the form given below) under the seal of this court, and to deliver the same to the marshal for execution who is hereby ordered to protect the Receivers of the Northern Pacific Railroad Company in their possession of the property of the Northern Pacific Railroad and in their operation thereof.

Dated December 21, 1893.

Henry C. Caldwell,
United States Circuit Judge.

Endorsed: Filed December 21, 1893.

Oscar B. Hillis,
Clerk.

Injunction Issued Pursuant to said Order.

In the Circuit Court of the United States for the District of Minnesota.

United States of America, }
District of Minnesota. } ss.

The President of the United States of America,

To the officers, agents and employes of Thomas F. Oakes, Henry C. Payne and

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Henry C. Rouse as Receivers of the Northern Pacific Railroad Company, and to the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen and all other employes of said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse as Receivers of the Northern Pacific Railroad Company and to each and every one of you, and to all persons, associations, and combinations, voluntary or otherwise, whether employes of said Receivers or not and to all persons generally, and to each and every one of you, greeting:

Whereas, it has been represented to the United States Circuit Court for the District of Minnesota, on the part of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, as by their certain verified petition filed in said cause on December 21, 1893, and that said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, ought to be relieved touching the matters in said petition more particularly described;

And whereas, the United States Circuit Court for the District of Minnesota, in a certain cause there pending, in which the Farmers' Loan & Trust Company is complainant, and the Northern Pacific Railroad Company, Phillip B. Winston, William C. Sheldon, Jr., and Thomas F. Oakes, and Henry C. Payne and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, are defendants, did make an order directing that the writ of injunction issue as prayed for in said petition of said Receivers,

Now therefore, In consideration thereof and of the matters in said petition set forth, you, the officers, agents and employes of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, and the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all other employes of said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, and each and every one of you, and all persons, associations and combinations, voluntary or otherwise, whether employes of said Receivers or not, and all persons generally, and each and every one of you, in the penalty which may ensue, are hereby strictly charged and commanded that you and each and every one of you do absolutely desist and refrain from disabling or rendering in any wise unfit for convenient and immediate use, any engines, cars, or other property of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, and from interfering in any manner with the possession of locomotives, cars or other property of the said Receivers or in their custody, and from interfering in any manner, by force, threats or otherwise, with men who desire to continue in the service of the said Receivers, and from interfering in any manner by force, threats or otherwise with men employed by the said Receivers to take the places of those who quit the service of said Receivers, or from interfering with or obstructing in anywise the operation of the railroad or any portion thereof, or the running of engines

and trains thereon or thereover, as usual, and from any interference with the telegraph lines of said Receivers, or along the lines of railways operated by said Receivers, or the operation thereof, and generally from interfering with the officers and agents of said Receivers or their employes, in any manner, by actual violence or by intimidation, threats or otherwise, in the full and complete possession and management of the said railroad, and of all the property thereunto pertaining, and from interfering with any and all property in the custody of the said Receivers, whether belonging to the Receivers or shippers or other owners, and from interfering, intimidating or otherwise injuring or inconveniencing or delaying the passengers being transported or about to be transported over the railway, or by interfering in any manner by actual violence or threats or otherwise preventing or endeavoring to prevent the shipment of freight or the transportation of the mails of the United States over the road operated by said Receivers, until further orders of this court.

This process is directed to the marshal for the District of Minnesota, who is hereby commanded to execute the same within his jurisdiction and to make due return thereof without delay.

Witness:

The Honorable Melville W. Fuller,
Chief Justice of the Supreme Court of the
United States, at the City of St. Paul, Min-
nesota, this 26th day of December, in the
year of our Lord one thousand eight hun-
dred and ninety-three.

Oscar B. Hillis,
Clerk of said Court.

[Seal of U. S. Circuit Court.]

A true and correct copy.

Attest: Oscar B. Hillis,
Clerk.

United States of America, }
District of Minnesota, }
Third Division. } *Sct.*

I, Oscar B. Hillis, Clerk of the Circuit Court of the United States for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writing with the original thereof, which is in my custody as such clerk, and that such copy is a correct copy of such original, and of the whole thereof, in the cause therein named.

Witness my hand as clerk, and the seal of said court, done in my office in St. Paul, Minnesota, this 9th day of January, A. D. 1894.

Oscar B. Hillis,
Clerk.

By Louise B. Trott,
Deputy.

Supplemental Order for Injunction, etc.

United States Circuit Court for the District of
Minnesota.

Farmers Loan & Trust Company, }
Complainant, }

vs.

Northern Pacific Railroad Com- }
pany *et al.*, }
Defendants. }

On reading and filing the supplemental petition of Thomas F. Oakes, Henry C. Payne and
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Henry C. Rouse, Receivers of the Northern Pacific Railroad Company, with supplemental petition being verified by Henry C. Payne, one of said Receivers, and it appearing that the Circuit Court of the United States, for the Eastern District of Wisconsin, the court of primary jurisdiction in this case, has made an order on a similar supplemental petition filed in said court, and after considering said supplemental petition, and the order of the court of primary jurisdiction, and being fully advised in the premises, this court adopts the order so made by said court of primary jurisdiction.

Now, therefore:

It is ordered, adjudged and decreed that the said Receivers, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, be and they are hereby authorized and instructed to put in operation and maintain upon the said Northern Pacific Railroad the revised schedules and the rates in said petition ordered by said Receivers, to take effect January 1st, 1894, and to that purpose and end their action in abrogating schedules in force on said railroad at the time of their appointment as said Receivers, August 15th, 1893, is hereby confirmed.

It is further ordered, adjudged and decreed that said Receivers, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, are entitled to a writ of Injunction, and the clerk of this court is hereby directed to issue the same in the form given below under the seal of this court, and to deliver the same to the marshal for execution, who is hereby ordered to protect the Receivers of the Northern Pacific Railroad Company in their possession of the property of the Northern Pacific Railroad, and in their operation thereof.

Dated December 27 1893. By the Court.
Henry C. Caldwell,
United States Circuit Judge.

Form of writ to be issued:

United States of America—*ss.*

United States Circuit Court, District of
Minnesota.

The President of the United States of America,

To J. Horan, S. P. Olsen, C. Barrett, E. S. Johnson, Jos. Wood, H. L. Porter, John Collins, M. Vetter, J. W. Gribble, J. J. Foster, J. B. Quimby, Jesse W. Rees, O. S. Humes, E. J. Shea, J. M. Rapelje, F. E. Bradbury, F. J. Woodward, John Dowdell, A. D. Jenkins, F. A. Ressor, J. B. W. Johnston, J. Mackey, C. N. Dorsey, P. T. Boleyn, D. Goodall, T. F. Hagan, R. B. Kelley, H. L. Shepard, J. S. Burns, J. W. Mapleson, W. Y. Pheal, J. R. Benham, Bart Hines, F. G. Kellogg, Thomas A. Leeson, M. O. Graves, E. E. Moyer, F. J. Becker, G. Olsen, John Ryan, P. H. Miller, D. McClelland, Edward C. Rust, R. Reed, P. H. Campbell, J. K. Porter, W. J. Gillispie, C. E. Baker, Harry Raffley, S. E. Garrett, D. D. McInnis, O. O. Wichard, Con Keefe, T. N. Gleason, Patrick Harty, Matt Conlin, L. C. Mann, P. Schmidt, L. F. Hare, M. H. Williams, W. G. Hogg, S. Craig, S. J. Grouthwaite, J. Moriarity, H. N. Shupert, P. M. Arthur, — Youngsen, E. E. Clark, T. P. Sargent, D.

G. Ramsey, S. E. Wilkinson, F. H. Morrison, A. E. Brown, George W. Newman, and each and every and all of you and all your agents, sub-agents, representatives and employes, and all persons generally, whether employes of the Receivers of the Northern Pacific Railroad or not, and to the officers, agents and employes of Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, and to the engineers, firemen, train dispatchers, telegraphers, conductors, and all other employes of said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, and to each and every one of you, and to all persons, associations and combinations, voluntary or otherwise, whether employes of said Receivers or not, and to all persons generally, and to each and every one of you. Greeting:

Whereas, It has been represented to the United States Circuit Court for the District of Minnesota, on the part of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, as by their certain verified petition filed in said cause on December 21, 1893, and by their supplemental verified petitions filed in said cause on December 27, 1893, that said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, ought to be relieved touching the matters in said petition more particularly described. And,

Whereas, The United States Circuit Court for the District of Minnesota, in a certain cause there pending in which the Farmers Loan & Trust Company is the complainant and the Northern Pacific Railroad Company, Philip B. Winston, William C. Sheldon, George R. Sheldon, William S. P. Prentiss, William C. Sheldon, Jr., and Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company are defendants, did make orders directing that a certain writ of injunction issue.

Now therefore, In consideration thereof and of the matters in said petition set forth, you, J. Horan, S. P. Olsen, C. Barrett, E. S. Johnson, Joseph Wood, M. L. Porter, John Collins, J. K. Bingham, Bart Hines, F. G. Kellogg, Thomas A. Leeson, P. H. Miller, D. McClelland, Edward C. Rust, R. Reed, Henry Raffley, S. E. Garrett, D. D. McInnis, A. C. Wishard, M. Vetter, J. W. Dribble, J. J. Foster, J. B. Quimby, Jesse W. Reese, O. S. Humes, E. J. Shea, J. M. Rapelje, F. E. Bradbury, F. J. Woodward, John Dowdel, A. D. Jenkins, F. A. Ressor, J. B. W. Johnston, J. Mackey, C. F. Dorsey, P. T. Boleyn, D. Goodall, T. F. Hagan, R. B. Kelley, R. L. Shepard, J. S. Burns, J. W. Mapleson, W. Y. Theal, M. O. Graves, E. E. Moyer, F. J. Becker, G. Olsen, John Ryan, P. H. Campbell, J. K. Porter, W. J. Gillispe, C. E. Baker, Con Keefe, T. N. Gleason, Patrick Harty, Matt Conlin, L. C. Mann, P. Schmidt L. F. Hare, M. H. Williams, W. G. Hogg, S. Craig, S. J. Grouthwaite, J. Moriarity, H. L. Shupert, F. M. Arthur, Youngsen, E. E. Clark, T. P. Sargent, D. G. Ramsey, S. E.

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Wilkinson, F. H. Morrison, A. E. Brown and George W. Newman, and each and every and all of you, and all your agents, sub-agents, representatives and employes, and all persons generally whether employes of the Receivers of the Northern Pacific Railroad Company or not, and the officers, agents and employes of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse as Receivers of the Northern Pacific Railroad Company, and the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors and all other employes of said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse as Receivers of the Northern Pacific Railroad Company, and each and every one of you, and all persons, associations and combinations, voluntary or otherwise, whether employes of said Receivers or not, and all persons generally and each and every one of you in the penalty which may ensue are herewith strictly charged and commanded that you and each of you do absolutely desist and refrain from disabling or rendering in any wise unfit for convenient and immediate use, any engines, cars or other property of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, and from interfering in any manner with the possession of locomotives, cars or property of the said Receivers or in their custody, and from interfering in any manner by force, threats or otherwise, with men who desire to continue in the service of the said Receivers and from interfering in any manner by force, threats or otherwise, with men employed by the said Receivers and from interfering with or obstructing in anywise the operation of their railroad or any portion thereof or the running of engines and trains thereon and thereafter, as usual, and from any interference with the telegraph lines of said Receivers, or along the lines of railways operated by said Receivers, or the operation thereof, and generally, from interfering with the officers and agents of said Receivers, or their employes in any manner, by actual violence or by intimidation, threats or otherwise, in the full and complete possession and management of said railroad and of all the property thereunto pertaining, and from interfering with any and all property in the custody of the said Receivers, whether belonging to the said Receivers, or to shippers, or to other owners, and from interfering, intimidating or otherwise injuring or inconveniencing or delaying the passengers being transported, or about to be transported over the railway of said Receivers, or any portion thereof, by said Receivers, or by interfering in any manner, by actual violence or threats, and otherwise preventing or endeavoring to prevent the shipment of freight or transportation of the mails of the United States over the road operated by said Receivers, until the further order of the court.

This process is directed to the marshal for the District of Minnesota, who is hereby commanded to execute the same within his jurisdiction, and to make due return thereof without delay.

In testimony whereof, Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, has caused the seal of said circuit court to be hereunto affixed, this

.....day of.....A. D. 189.. and in the 118th year of our independence.

Attest:

Clerk.

Now, as comparisons are in order, I am willing to submit the said orders side by side to the candid reader so that he may determine which is the more preferable, the one which *authorized* The Union Pacific Receivers to put in force the new schedule, if in their judgment the same were *fair and reasonable*, or the order made in the Northern Pacific case in which the Receivers were "*authorized*" and *instructed* to put in force the new schedule, and that too within five days after making the last order. It was a "*fundamental error*" as stated in the opinion, to put in force a new schedule, no previous notice of which had been given before making the order, but of which more than thirty days notice had been given before the change was to take effect, what sort of "*error*" was it to make the orders in the Northern Pacific case, putting in force new schedules no notice of which had been given, and which schedules were to take effect in five days after the last order adopting them and directing their enforcement. The answer will probably suggest itself. Much is said in the opinion in denunciation of issuing injunctions in such cases, as they are calculated, as it is claimed, to induce strikes. This may be true, but it seems that this matter must have been overlooked in the Northern Pacific case, as there the injunction issued against all mankind generally as well as against a very large number by name. The trouble here seems to be in following what may possibly be a very bad precedent set by another judge, whose rulings it has heretofore been customary to follow.

After the making of the order of the 27th of January, Judge Riner, the United States District Judge for Wyoming, made an order, and it is understood issued, or ordered issued, an injunction restraining the Receivers of the Union Pacific from carrying the new wage schedule into effect in Wyoming and Colorado. This had the effect of nullifying, to some extent, the order made the 27th of January. These adverse orders resulted in the hearing recently had in this court, where the order last named was revoked. When the hearing came on, Judge Riner, who had heretofore enjoined the enforcement of the order of the 27th of January, as was understood, was called here from another state to hear the case with Judge Caldwell, whilst I was excluded and entirely ignored. This may have been judicial courtesy, but other names would describe it more correctly.

That afforded me no opportunity whatever to defend or justify, or give reasons for what had been done in the premises. I thought then, and still think, that ordinary fairness, independent of any question of judicial courtesy, ought to have afforded an opportunity to explain the reasons for making the order, more especially so because of so much adverse criticism of the same.

At the very beginning of the hearing of this application I found that it was "a condition and not a theory that confronted me." Hence the preceding history and explanation of

things is thought necessary and proper to show the reasons for making the order of the 27th of January, which I have heretofore had no opportunity to explain or defend. To save any misapprehension I desire to say that no exceptions are taken to any part Judge Riner has been required to take in connection with any matter growing out of this litigation.

The petition presented and now under consideration shows, in substance, that the committeemen before named represent about four thousand employes of the railroad who are members of the American Railway Union. That the men they represent have been in the employ of the company from six months to twenty years. That the wages usually paid to the men for a great length of time had been reduced on the first day of last September, and that the wages paid before the reduction were only fair and reasonable. The prayer of the petition is for a restitution of the old schedule as it stood before the change which took effect on the first of September last. It is claimed on the one side and admitted on the other, that eight or ten thousand of the men are affected by the reduction, a large part of whom were common laborers, such as the ones who wield the shovel and pick or handle the freight and heave the coal. Some of the men so employed belong to other organizations, including the Knights of Labor, whilst some of them belong to no organization of the sort.

If it should be thought proper to make any order whatever in the direction asked, then any such order ought to be for the benefit of all parties similarly situated, whether belonging to any of the associations or not. In such a matter all should be treated fairly, and, so far as practicable, alike. There is no particular question of law to be considered here. It is simply a question of expediency and fair dealing. Of course, when by order of court the Receivers take possession of a railroad for the purpose of operating it there is an implied authority on their part to employ and pay for all necessary force to carry out the object of appointment. It would need no special order of a court to authorize that to be done. It would follow, as a necessary consequence, that the Receivers would have the right to pay a just and reasonable compensation for the services to be performed in the operation of the road. It is necessary for the Receivers to have a large number of men to operate the road successfully. It cannot be done without it. If necessary men cannot be employed at just and reasonable rates, as viewed from the Receivers' standpoint, then they would be fully justified in applying to the court for leave to pay more than the usual and ordinary rates. If the men in the employ of the road think they do not receive enough compensation for the work they do, they have the right to apply to the Receivers or the court to have their wages increased.

And on a proper showing made, justice will be done.

This case is no exception to the rule as here stated, several thousand of these men, it is claimed, receive but small pay, many of them not more than \$1.25 per day. They are entitled to great consideration, much more than those who receive the high rate of wages. But the

wages they are at the present time receiving were fixed by the railroad officers long before the Receivers were appointed. The compensation then fixed was supposed to be fair and reasonable and as much as other railroads were paying for similar services. Considerable testimony was taken which tended to show that a part of the employes were not at the present time receiving living wages. Many of them doubtless are, whilst some of them are certainly not. After the testimony had all been presented, the Receivers presented a petition, through their attorney, Mr. Thurston, asking leave to restore the schedule in force before the first of September last. These and similar matters ought, as a general proposition, to be left mainly to the Receivers to manage. On their judgment, it may be stated, it is safe to rely. It is there where these matters, at least in part, must be left. The Receivers manifest a dis-

position to do what is fair with the employes. They must have a chance to do voluntarily, at least in part, what the petitioners ask herein to have done. Authority will be given them to do as requested if in their judgment it ought to be done.

An order will be entered directing the Receivers to restore the old wage schedule in force before the first day of September last, so far as it relates to the men represented by these petitioners, and others similarly situated. And in cases where the men receive less than \$60.00 per month the increased pay shall commence on the first of March last.

And in all cases where the men received \$60.00 per month or over the increase pay shall commence on the first of the present month.

This order shall remain in force until otherwise ordered.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

SWIFT & CO.

v.

PHILADELPHIA & READING R. CO.

SAME

v.

CENTRAL VERMONT R. CO.

SAME

v.

FITCHBURG R. CO.

SAME

v.

NEW YORK, CHICAGO & ST. LOUIS R. CO.

SAME

v.

DELAWARE, LACKAWANNA & WESTERN R. CO.

1. In the absence of some prohibition or restraint, common law or statutory, a common carrier may lawfully demand or contract for such compensation for carriage as he may be able to obtain, without regard to its unreasonableness.
2. Congress has not adopted the common law of England as a national municipal law. The enforcement of the common law by the courts of the United States has in every instance been as the municipal law of the state by which the subject-matter was affected.
3. Outside of the Interstate Commerce Act there is no law of the United States, as a distinct sovereignty, imposing any restraint upon the imposition by a carrier of unreasonable rates.
4. A state law prohibiting the exaction by carriers

of unreasonable rates is, as applied to a contract for shipment from one state to another, an interference with interstate commerce and cannot be so applied.

5. A contract for interstate shipment does not come within a state law regulating rates because made in that state so that such law will introduce a new term into the contract, but its utmost effect would be to forbid a contract for an unreasonable rate and make the contract unlawful, leaving the transaction open to adjustment under the laws of the United States.
6. A United States court in a case removed from a state court on the ground of diverse citizenship has no jurisdiction over a question as to the reasonableness of an interstate commerce rate.

(November 27, 1895.)

ON DEMURRER to complaints in actions at law to recover back the amounts of unreasonable freight rates alleged to have been exacted of plaintiff for the carriage of commodities shipped over the defendant roads. *Demurrer sustained.*

The facts are stated in the opinion.

Messrs. Albert H. Veeder and Mason B. Loomis for complainants.

Messrs. Walker & Eddy, for defendants Fitchburg R. Co., New York, C. & St. L. R. Co., and Delaware, L. & W. R. Co.

Messrs. Ullman & Hacker and Osborn & Lynde for defendant Philadelphia & R. R. Co.

Messrs. Schuyler & Kremer, for defendant Central Vermont R. Co.

Grosscup, D. J., delivered the opinion of the court:

The declarations in these cases are substantially alike. The first three counts with some variations, aver that the plaintiff is a corporation engaged in the business of shipping dressed beef and other provisions from the Union Stock Yards, in Chicago, to New York, Montreal, and other points in the eastern states and Canada; that after the 4th day of April, 1887, (the date the interstate commerce law went into effect) and until April, 1888, the plaintiff, from time to time, delivered and the defendant accepted for transportation to such terminal points certain of its manufactured products; that the defendants were common carriers, engaged with other common carriers, in transporting continuously from Chicago to the eastern terminal points at certain rates established and then in force as the rate between such points; that the plaintiff was compelled to pay these defendants, according to the schedule rates the sum of 65 cents per 100 pounds from Chicago to New York for Boston, and other rates in like proportion to other points; and that the rates so taken and exacted were unjust and unreasonable. Two of these counts allege that these rates were established by combination between defendant and other corporations, and that the plaintiff paid the same under protest. The other special counts, except the fifth and seventh, are substantially the same, except that they aver that the defendants, and the other common carriers engaged with them in transporting the goods, used bills of lading for such shipments in the name and style of the Great Eastern Fast Freight Line, or other fast freight lines. The fifth and seventh counts are substantially the same as the others, except that they proceed expressly under the Interstate Commerce Act. Most of the defendants demurred to all the special counts, one of them, the Delaware, Lackawanna & Western Railroad Company, in place of a demurrer, filed a plea to the jurisdiction to the fifth and seventh counts. The cases are removed here, on the petition of the defendants, from the state courts, on the ground of diverse citizenship.

The general question raised by the demurrer is whether there is any law, common or statutory, applicable to the transactions set forth, which prohibits the exaction of unreasonable rates, or affects any contract between the shipper and carriers whereby unreasonable rates are stipulated for and taken. There can be no question that, in the absence of such prohibition or restraint, a common carrier can lawfully demand or contract for such compensation for carriage as he may be able to obtain. His privileges would, in such cases, be like

those of any other person, and subject only to the economic laws which flow from trade and competition. If there is any municipal law which supersedes or supplements these economic laws, and subjects the carrier to restraints or regulations not imposed upon general business, it must be found either in the municipal law of the states or in a law of the United States.

It is not disputed that within the territory of the states, and upon subjects affected by state law, such a prohibition exists. It is one of the restraints embodied in the common law of England, and is therefore in force within every jurisdiction where the common law is the law of the land. It seems to me equally clear that, outside of the Interstate Commerce Act, there is no law of the United States, as a distinct sovereignty, imposing such restraint. The United States, as a distinct sovereignty, imposes no laws upon its subjects, except such as are expressly or impliedly enacted by Congress. Congress has not adopted the common law of England as a national municipal law. The courts of the United States have had many occasions to enforce the common law, but in every instance it has been as the municipal law of the state by which the subject-matter was affected. Outside of the Interstate Commerce Act, there is no enactment of Congress, and no self-operating provision of the Federal Constitution, which expressly or by implication evidences a command or purpose to interfere with the freedom of interstate commerce, or lay any restraint upon the rights of carriers or shippers engaged therein. *Welton v. Missouri*, 91 U. S. 282, 23 L. ed. 850; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257.

The question then arises, is the municipal law of the state applicable to the transaction set forth in the declaration? Is the act or contract of a carrier, who accepts goods for carriage from one state into another, subject to that particular provision of the municipal law of the several states where the goods are taken, or through which they are conveyed, which prohibits the exaction of unreasonable rates? There can be no doubt that to Congress is given, by the Constitution, the absolute power to regulate commerce between the states. This power, independently of legislation, is not necessarily exclusive of the right of the states to reasonably regulate such incidents of interstate commerce, lying within their respective jurisdictions, as wharves, pilots, harbors, roads, bridges, etc. A wharf, harbor, or bridge lying within a state is a tangible entity, over which the laws of the state extend. The cost of their creation and the expenses of their maintenance make the imposition of tolls or

charges not only reasonable, but necessary. These must be enforced by and subject to some law, and, in the absence of congressional legislation, there is no law except that of the state. The application of state law in such cases is not inconsistent with the general power conferred upon Congress, and does not introduce into commerce between the states either confusion or restraint. Such regulations may exist harmoniously with regulations imposed by other states upon wharves, harbors, and bridges within their territorial limits. But the fixing of a rate for the carriage of goods from one state to another is not simply an incident of, or appurtenance to, commerce, but is the very core and essence of interstate commerce. It is not a physical entity within the limits of a state, and it cannot be subject to regulation in one state without coming into interference with the equally rightful regulations of other states, and thus producing hopeless contradiction and confusion. How can Illinois determine what is a reasonable charge for carriage across Indiana, Ohio, or Pennsylvania? The reasonableness of such rate depends, among other things, upon the cost of construction and wages paid beyond her jurisdiction; the amount of capitalization allowed, and taxes and assessments exacted, by other jurisdictions; the terms of contracts for the interchange of freight between carriers, made and allowed under the laws of other states; and the amount of traffic carried, which may, in turn, be affected by the laws of the other states governing the acquisition of, or consolidation with, other lines. These, and many others, are the elements of the cost of carriage, and, before the reasonableness of a rate can be determined, the cost must be ascertained. The reasonableness of rates for such long distances, and over different methods of conveyance, can only be approximately ascertained at best, by men of special learning and equipment in such matters. Is it possible that the Constitution contemplates that such learning can be found in the courts and juries of every county traversed by a line 1000 miles long? I am of the opinion that a rate for the carriage of interstate commerce, dependent, as it is, for its reasonableness upon so many different considerations of expenditure, business, and interpretations of

the laws of different states, is essentially a national affair, and its regulation is therefore exclusively national. The rate of carriage is the heart pulse of commerce, and can be subject safely to a single source of restraint only. Many restraints, themselves entirely different and inconsistent with each other, would destroy the very possibility of uniformity or fixedness of rates. It follows, therefore, that in my opinion the local municipal law of the several states is not applicable to the reasonableness of these rates, and cannot be appealed to as a basis for suits such as these.

It is urged on argument that, inasmuch as the contracts for shipment were made in Illinois, the law of Illinois necessarily entered into their constitution and terms; that a contract could not be made which contravened the municipal law of the state. The counts of the declaration which proceed upon contract assume that the rate charged was agreed upon between the parties. Now the law of Illinois does not introduce a new term into this contract. Its utmost effect would be to forbid a contract for an unreasonable rate, and therefore make the supposed contract unlawful. But the effect of this would be simply to abrogate the contract, and leave the transaction open to such adjustment as the application of the proper laws allowed. That law, as has already been pointed out, cannot be found in the jurisdiction of the states, but only in the body of the laws of the United States.

Those counts of the declaration which proceed directly upon the Interstate Commerce Act cannot be sustained in these suits. The courts of the United States, upon removed cases, have no wider jurisdiction than have the courts of the state from which they were removed. The removal simply transfers the hearing from the state to the national tribunal, but does not enlarge the right of the court to hear the cause. The right to question the reasonableness of an interstate commerce rate is a matter of primary, as well as of exclusive jurisdiction in the Federal courts. It does not reside in the jurisdiction of the state courts, or of the Federal courts, acquired by the fact of diverse citizenship.

For the reasons above stated, the demurrers are sustained, and the several counsel will prepare their orders accordingly.

UNITED STATES CIRCUIT COURT, DISTRICT OF SOUTH CAROLINA.

Ex parte JAMES E. EDGERTON.

No authority to punish the agent of a carrier engaged in interstate commerce, under a state law, for receiving in the course of his employment liquors imported from another state, is given by the

Wilson Law of 1890, which makes liquors subject to the operation of state laws upon their arrival in the state.

(December 11, 1894.)

APPPLICATION for a writ of habeas corpus to procure the discharge of petitioner from the custody of the sheriff of Charleston county, to which he had been committed for 4 INTER S.

the alleged violation of the state law prohibiting the importation of intoxicating liquors. *Petitioner discharged.*

The facts are stated in the opinion.

Messrs. Bryan & Bryan for petitioner.

Mr. W. St. J. Jervey for respondent.

Simonton, D. J., delivered the opinion of the court:

This case comes up on a petition for habeas corpus, the rule thereon, and the return thereto. James E. Edgerton, the petitioner, is the general freight and passenger agent of the Clyde Line of steamships, and its general manager in the port of Charleston. These steamships ply between New York, Charleston, and Jacksonville over the high seas. Their business is that of common carriers engaged in foreign commerce and in commerce between the states.

On the 19th of September, 1893, there were brought to this port in the steamship *Seminole*, and unloaded at the dock of the line, along with other freight of a miscellaneous character, 12 barrels. Each barrel had its mark,—nine of them were lettered; three had on them the name of the consignee in full. On each barrel was a statement of its supposed contents,—two were marked "Soda Water;" five, "Ginger Ale;" one, "Sarsaparilla;" one, "Mineral Water;" one, "B Cider." The manifest showed that all of the barrels were shipped in due course at New York, for delivery at the port of Charleston. On reaching the dock they were discharged with, and as a part of, the ship's cargo. On that day one R. H. Pepper obtained a warrant from a trial justice in Charleston, which, after reciting that complaint had been made before him by said Pepper that "James E. Edgerton, general freight agent of the Clyde Steamship Company, has brought into this state 12 barrels of intoxicating liquors, in violation of sections 2 and 25 of an act approved December 24, 1892," commands the arrest of Edgerton, to be brought before the justice, to be dealt with according to law. The affidavit with the warrant alleges that "Edgerton did unlawfully bring into this state the intoxicating liquors, contrary to the act of assembly in such case made and provided, and that Edgerton is not a licensed dispenser, and is without any permission or license to bring in the same." The petitioner was arrested, carried before the trial justice, released on bail, was afterwards surrendered by his sureties, and is now in custody of the sheriff of Charleston county under this warrant. He prays his discharge, for that his arrest, and the act of assembly upon which it is based, are in contravention of the interstate commerce law, of which he seeks the protection. The return of the sheriff gives as the cause of detention that Edgerton has been under recognizance to answer for a violation of the law of the state, and was surrendered by his sureties. The barrels in question were opened, and were found to contain beer,—an intoxicating liquor.

Looking to the warrant as stating the cause and ground of arrest, and assuming that the act of assembly which it quotes as its authority does in fact forbid the bringing of intoxicating liquors into this state, the question is, can any state forbid the importation of intoxicating

liquors into its territory by a common carrier engaged in interstate and foreign commerce? The authority to regulate commerce with foreign countries and between the states is exclusively in the Congress of the United States. When Congress has not legislated on any part of this subject, such commerce is free. *Bowman v. Chicago & N. W. R. Co.* 1 Inters. Com. Rep. 823, 125 U. S. 465, 31 L. ed. 700; *Mr. Justice Field*, in *Mobile County v. Kimball*, 102 U. S. 696, 26 L. ed. 239, says:

"That power [to regulate commerce] is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several states and to adopt measures to promote its growth and insure its safety. * * * Some of them [the subjects of commerce] are national in their character, and admit and require uniformity of regulation,—affecting alike all the states * * * Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale, and exchange of commodities. Here, then, can be of necessity only one system or plan of regulations, and that Congress alone can prescribe."

Mr. Justice Lamar, in *Kidd v. Pearson*, 3 Inters. Com. Rep. 285, 128 U. S. 17, 32 L. ed. 849, says:

"The power expressly conferred upon Congress to regulate commerce is absolute and complete in itself, with no limitations other than are prescribed in the Constitution; is to a certain extent exclusively vested in Congress; so far free from state action; is coextensive with the subject on which it acts, and cannot stop at the external boundary of a state, but must enter into the interior of every state whenever required by the interests of commerce with foreign nations or among the several states."

In *Bowman v. Chicago & N. W. R. Co.* 1 Inters. Com. Rep. 823, 125 U. S. 465, 31 L. ed. 700, a statute of Iowa forbidding common carriers to bring intoxicating liquors into the state from any state or territory without being first furnished with a certificate under the seal of the auditor of the county to which it is to be transported or consigned, certifying that the consignee, or the person to whom it is to be transported or delivered, is authorized to sell intoxicating liquors in the county, although adopted without a purpose of affecting interstate commerce, but as a part of a general system designed to protect the health and morals of the people against the evils resulting from the unrestricted manufacture and sale of intoxicating liquors within the state, is neither an inspection law nor a quarantine law, but is essentially a regulation of commerce among the states, affecting interstate commerce in an essential and vital part, and, not being sanc-

tioned by the authority, express or implied of Congress, is repugnant to the Constitution of the United States.

In *Leisy v. Hardin*, 3 Inters. Com. Rep. 86, 185 U. S. 100, 34 L. ed. 128, the Supreme Court of the United States, speaking through the chief justice, distinctly recognize intoxicating liquor as an article of commerce:

"They are subjects of exchange, barter, and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of the courts."

The precise question we are discussing was decided in that case. It was held that, in the absence of legislation on the part of Congress, no state can prohibit the importation of intoxicating liquors from abroad or from a sister state; and, further, that the police power of the state over the imported article does not commence the instant when the article enters the country, but only when it has become incorporated in and mixed up with the mass of property in the country. The effect of this decision was to protect an imported article while in the original package, and, inasmuch as the right to sell followed the right to import, the original package could be sold unbroken, notwithstanding that the law of the state into which it was imported absolutely forbade the manufacture or sale of intoxicating liquors. To meet this last conclusion, Congress passed the Act of 1890 commonly known as the "Wilson Act." Its title is "An Act to Limit the Effect of the Regulations of Commerce between the Several States and Foreign Countries in Certain Cases." Its provisions are:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 Stat. at L. 818.

It will be noticed that this Act does not in any way forbid the importation of intoxicating liquors; indeed it deals with such liquors after having been transported into any state.

In this connection it is well to compare the provisions of the Act of Congress extending the police power of the states over nitroglycerine:

"The two preceding sections shall not be so construed as to prevent any state, territory, district, city or town within the United States from regulating or prohibiting the traffic in or transportation of those substances between persons and places lying or being within their respective territorial limits or from prohibiting the introduction thereof into such limits for sale, use or consumption therein." Rev. Stat. § 4280.

It will also be noted that the Act proceeds at once to remedy the mischief it was intended to meet. The regulations of commerce protected the original package. Under this protection, the laws of the state against intoxicating liquors were evaded, and the laws forbidding the manufacture made nugatory. Congress placed the original package under the state police power. It cautiously went no further. But we are not left to general reasoning. The construction of this Act of Congress came up in *Wilkerson v. Rahrer* ("Re Rahrer") 140 U. S. 564, 35 L. ed. 577. Of it, the chief justice, delivering the opinion of the court, says:

"Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

The decisions of the supreme court distinctly declare that before the passage of the Wilson Act no state could forbid the importation of intoxicating liquors. This last case declares that the Wilson Act gave no new power to the states. All that it did was to remove a protection from the imported package, and place it under state jurisdiction. The liquors in this case without doubt come within the police powers of the state as soon as they become part of the property of the state. The commission of any act done in and about them, under such circumstances, can lawfully be punished. It is no offense on the part of this general agent of the Clyde Line that the liquors were imported as stated.

Let the prisoner be discharged.

UNITED STATES SUPREME COURT.

THE POSTAL TELEGRAPH CABLE COMPANY, *Appt.*,

v.
THE CITY COUNCIL OF CHARLESTON ET AL.

(See S. C. 153 U. S. 692, 38 L. ed. 871.)

1. An ordinance of a city imposing a license fee upon every telegraph company, or agency, doing

business in the city, for business done exclusively in the city, not including business done to and

NOTE.—As to right of telegraph and telephone companies to use public streets and erect poles therein; compensation; injunction poles for street car propulsion; placing electric wires under surface of streets, see note to *St. Louis v. Western U. Telegr. Co.* 37: 610. Mem. References in this note are to U. S. Repts. L. ed.

4 INTER 8.

As to power of Congress to control commerce; state statute when invalid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid, see note to *Harmon v. Chicago*, 37: 216.

from points without the state or business done for the government, its officers or agents, is not void as an interference with interstate commerce.

2. Messages of a telegraph company sent and delivered entirely within the state are subject to its taxing power.

[No. 1009.]

Submitted Jan. 22, 1894. Decided May 14, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of South Carolina, dismissing a suit in equity brought by the Postal Telegraph Cable Company, plaintiff, against the City of Charleston *et al.*, to restrain the collection of a license imposed upon said company by an ordinance of said city, and dissolving a temporary injunction. *Affirmed.*

The facts are stated in the opinion.

Messrs. R. S. Guernsey and T. M. Mordecai, for appellant:

The ordinance which imposes this tax of \$500 is void because it is specific taxation of property or the use of it.

Harmon v. Chicago, 147 U. S. 396 (87: 216).

The license required by the ordinance is a tax upon the telegraph company for the privilege of exercising its franchise within the city of Charleston and is not a mere exercise of the police power granted to the city by the state.

San Francisco v. Liverpool & L. & G. Ins. Co. 74 Cal. 113; *Pembina Consol. S. Min. & M. Co. v. Pennsylvania*, 125 U. S. 181 (81: 650), 2 Inters. Com. Rep. 24; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 12 (24: 711); *Cooley, Taxn.* 886; *Cooley, Const. Lim.* 245.

The Postal Telegraph Cable Company having constructed its lines along the post roads in the city of Charleston, no state or municipal authority can exact a license for the privilege of conducting its business and restraining the powers conferred upon it under its franchises and under the acts of Congress.

Western U. Teleg. Co. v. Pendleton, 123 U. S. 358 (80: 1189), 1 Inters. Com. Rep. 306; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 580 (81: 790).

The Postal Telegraph Cable Company does no business which can properly be included under the provisions of this ordinance, for the reason that it does no business exclusively within the city of Charleston.

The ordinance in question is an interference with interstate commerce and is *ultra vires* and void.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1 (24: 708); *Western U. Teleg. Co. v. Texas*, 105 U. S. 460 (26: 1067); *Pickard v. Pullman Southern Car Co.* 117 U. S. 34 (29: 785).

The decision of the United States Supreme Court, in the case of *Leloup v. Mobile*, 127 U. S. 640 (32: 311) 2 Inters. Com. Rep. 134, and cases there cited should be followed in the case at bar.

Ward v. Maryland, 79 U. S. 12 Wall. 427 (30: 451).

A burden imposed upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting it.

Minnesota v. Barber, 136 U. S. 818 (84: 455), 4 INTER S.

8 Inters. Com. Rep. 185; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489 (30: 694), 1 Inters. Com. Rep. 45; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114 (34: 394), 3 Inters. Com. Rep. 178; *Minot v. Philadelphia, W. & B. R. Co.* 2 Abb. (U. S.) 323; *State v. Railroad Corp.* 4 S. C. 376.

An injunction is the proper remedy to prevent the collection of the illegal license tax and penalty in this case.

Ratterman v. Western U. Teleg. Co. 127 U. S. 411 (32: 229), 2 Inters. Com. Rep. 59; *Allen v. Baltimore & O. R. Co.* 114 U. S. 311 (29: 200).

Mr. Charles Inglesby, for appellees:

So far as the legality under the constitution of South Carolina, of the license tax is concerned, the question is *res adjudicata*.

State v. Hayne, 4 S. C. 418; *Information v. Jager*, 29 S. C. 438.

The ordinance expressly excluded all interstate commerce business, all government business, and is absolutely confined to the business done within the city of Charleston.

No constitutional implication prohibits a state tax upon the property of an agent of the government merely because it is the property of such an agent.

Union Pac. R. Co. v. Peniston, 85 U. S. 18 Wall. 5 (21: 787); *Western U. Teleg. Co. v. Texas*, 105 U. S. 460 (26: 1067); *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411 (32: 229); *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 6 (36: 602); *Maine v. Grand Trunk R. Co.* 142 U. S. 217 (35: 994); *Home Ins. Co. v. Augusta*, 93 U. S. 122 (23: 826); *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 876 (27: 423).

Mr. Justice Shiras delivered the opinion of the court:

On the first day of July, 1892, the Postal Telegraph Cable Company, a corporation of the state of New York, filed in the Circuit Court of the United States for the District of South Carolina a bill of complaint against the city of Charleston, a municipal corporation of the state of South Carolina, and William L. Campbell and Glenn E. Davis, citizens of the state of South Carolina, and respectively sheriff and treasurer of said city, seeking to restrain the collection of a license imposed upon the said Postal Telegraph Cable Company by an ordinance of the city council of Charleston. A preliminary injunction was granted enjoining the defendants from proceeding to collect said license until the hearing of the cause on its merits. Answers were filed by the city and by the city treasurer and city sheriff, and issue was joined by replications. The complainant put in evidence tending to sustain the allegations of the bill.

The facts, as disclosed by the bill, answers, and evidence, were substantially these:

The Postal Telegraph Cable Company, a corporation of the state of New York, has an

office in the city of Charleston; is engaged in sending and receiving messages by wire to and from points inside and outside of the state of South Carolina; and has its lines over the post roads, highways, and railroads in the city of Charleston, and in several of the states. The company has accepted the provisions of the Act of Congress approved July 28, 1866, whereby it has put its lines at the service of the United States for postal, military, and other purposes, and given precedence to its business. The company has offices in other cities and towns in South Carolina, several of which have adopted ordinances exacting licenses from the company. During the year commencing January 1, 1892, and for several years prior to that time, the company has been engaged in the business of receiving and sending telegrams for private persons and for the public between the city of Charleston and other places within the state of South Carolina, and also in sending telegraphic communications between the governmental departments of the United States, and was and is engaged in the telegraph business for the purpose of interstate commerce. By an Act approved December 17, 1881, the general assembly of the state of South Carolina authorized the city council of Charleston to impose a license tax, not exceeding five hundred dollars, on all persons engaged in any business, trade or profession in the city of Charleston. By an ordinance, entitled, "An ordinance to regulate licenses for the year 1892," the city council enacted that every person, firm, company, or corporation engaged in any trade, business, or profession within the city of Charleston should obtain, on or before the 20th day of January, 1892, a license therefor. The provision relating to telegraph companies is as follows: "Telegraph companies or agencies, each for business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents, \$500." A penalty, for failure to take out the license, of fifty per cent of the amount of the tax was provided for, and a continuing penalty of fifty per cent for each day's business done without taking out such license. The Postal Telegraph Cable Company, after notification, declined and failed to take out and pay for such license, and, on May 28, 1892, in pursuance of the terms of the ordinance, the license tax of \$500, with penalty of fifty per cent was assessed against the company and put in the hands of the city treasurer for collection, who issued execution therefor, addressed to the city sheriff, requiring him to proceed to collect said license tax and penalty by distress and sale.

At the final hearing, on June 21, 1893, the temporary injunction was dissolved, and the bill dismissed with costs. From this decree the present appeal was taken.

We do not deem it necessary to discuss the contention that the ordinance imposing the license tax in question is invalid by reason of its disregard of provisions of the constitution of South Carolina. The supreme court of that state has, in several cases, judicially settled that the power to raise revenue by a license tax on business, given by statute to the city

council of Charleston, does not violate any provision of the state constitution. *State v. Hayne*, 4 S. C. 418; *Information v. Jager*, 29 S. C. 443.

It is claimed that the license required by the ordinance is a tax upon the telegraph company for the privilege of exercising its franchise within the city of Charleston, and not an exercise of the police power granted to the city by the state; that the Postal Telegraph Cable Company, having constructed its lines along post roads in the city of Charleston and elsewhere, no state or municipal authority can exact a license for the privilege of conducting its business, thus restraining the powers possessed by it under its franchises and under the acts of Congress; and that the ordinance in question is an interference with interstate commerce and therefore void.

The questions thus suggested have been so frequently and so recently considered and decided by this court, in well known cases, that our duty will be sufficiently performed by briefly citing and applying those cases.

That this license is not a condition upon which the right to do business depends, but is a tax, is shown by the case of *Home Ins. Co. v. Augusta*, 93 U. S. 122 [23: 826]. There the city council of the city of Augusta passed an ordinance which imposed a license tax of \$250 "on each and every fire, marine, or accidental insurance company located, having an office, or doing business within the city of Augusta." The Home Insurance Company, a corporation of the state of New York, and having an agency in the city of Augusta, refused to recognize the obligation of the ordinance, and filed a bill in the superior court of Richmond county in the state of Georgia, to enjoin the city council from collecting the license tax. That court, having refused the injunction prayed for, and having dismissed the bill, the case went to the supreme court of Georgia, which affirmed the decree of the superior court, and the case was then brought to this court.

It was argued on behalf of the insurance company that, as it had complied with the provisions of the laws of Georgia which authorized foreign insurance companies to do business in that state, it was not competent for a municipal corporation of the state to impose an additional condition on the right of the company to do business. But it was held, citing *License Tax Cases*, 72 U. S. 5 Wall. 462 [18:495], that the license in question must be regarded as nothing more than a tax; that the penalty provided was a mode of enforcing its payment; and that the license, when issued, was only a receipt for the tax, and not a grant of an authority to conduct business on condition of paying the license.

In *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 376 [27: 428], where a ferry company, authorized by an act of assembly of the state of Illinois to carry on its business and paying state taxes prescribed in its charter, was called upon by a city ordinance to pay a license tax, it was held by this court that the exaction of a license fee is an ordinary exercise of police power by municipal corporations; that the power of the state to authorize any city within its limits to enforce a license tax on trades or callings generally, especially those which are

quasi public, cannot be disputed; and that whether a license fee is exacted under the power to regulate or the power to tax, is a matter of indifference if the power to do either exists.

It was held, in *Western U. Tele. Co. v. Massachusetts*, 125 U. S. 580 [81: 790], that a tax imposed by the laws of Massachusetts upon the Western Union Telegraph Company, a corporation of the state of New York, on account of the property owned and used by it within Massachusetts, was valid.

But it is contended that, while a state can prohibit a foreign corporation from doing business within its territory, or can impose conditions upon the exercise of its franchises, such power does not exist when such corporations are engaged in interstate commerce or are agents of the United States government, and reliance is placed on the case *Leloup v. Mobile*, 127 U. S. 640 [82: 811], 2 Inters. Com. Rep. 184. There it was held that where a telegraph company is doing the business of transmitting messages between different states, and has accepted and is acting under the telegraph law passed by Congress July 24, 1866, no state within which it sees fit to establish an office can impose upon it a license tax, or require it to take out a license for the transaction of such business; that telegraphic communications are commerce, as well as in the nature of postal service, and if carried on between different states they are interstate commerce, and within the power of regulation conferred upon Congress, free from the control of state regulations, except such as are strictly of a police character; and that any state regulations by way of tax on the occupation, or business, or requiring a license to transact such business, are unconstitutional and void. Accordingly, a judgment of the supreme court of Alabama, which sustained the validity of an ordinance of a municipal corporation of that state imposing a license tax upon the Western Union Telegraph Company, engaged in the business of transmitting telegrams from and to points within the state of Alabama and between private individuals of the state of Alabama, as well as between citizens of said state and citizens of other states, was reversed. But it was said, in the course of the discussion in that case, that "it is urged that a portion of the telegraph company's business is internal to the state of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. This tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

In *Western U. Tele. Co. v. Texas*, 105 U. S. 460 [26: 1067], in error to the supreme court of Texas, it was held that, in respect to its foreign and interstate business, a telegraph company is, as an instrument of commerce, subject to the regulating power of Congress, and, if it accepts the provisions of Act of July 24, 1866 (Rev. Stat. §§ 5263, 5268) it becomes an agent of the United States, so far as the business of the government is concerned; and that the state laws, so far as they impose upon such company a specific tax on each message which it transmits beyond the state, or which an of-

ficer of the United States sends over its lines on public business, are unconstitutional; but it was said that "any tax which the state may put on messages by private parties, and not by agents of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States."

The case, in *Ratterman v. Western U. Tele. Co.*, 127 U. S. 411 [82: 239], 2 Inters. Com. Rep. 59, was one where the telegraph company, a corporation of the state of New York, filed a bill in the Circuit Court of the United States for the Southern District of Ohio, against Ratterman, treasurer of Hamilton county, Ohio, seeking to restrain the collection of a tax on the gross receipts of the company, which were principally, but not wholly, derived from business between points within and points without the state of Ohio. The complainant, in its bill, expressed its willingness to pay and offered to pay taxes chargeable against its property and business within the state, but alleged that the defendant refused to accept such partial payment, and demanded payment for the total assessment on all the gross receipts. The district and circuit judges certified a division of opinion to this court, as to whether a single tax upon the receipts of a telegraph company, which receipts were derived partly from interstate commerce and partly from commerce within the state, but which were returned and assessed in gross and without separation or apportionment, was wholly invalid, or invalid only in proportion and to the extent that said receipts were derived from interstate commerce. Mr. Justice Miller delivered the unanimous opinion of this court. The case of *Philadelphia & R. R. Co. v. Pennsylvania* ("The State Freight Tax") 82 U. S. 15 Wall. 282 [21: 146], was cited as ruling that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the state to collect that arising upon commerce wholly within its own territory. Accordingly the decree of the court below, following the opinion of the circuit judge, enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the state, was affirmed.

The question arose and was determined in the same way, in the case of *Western U. Tele. Co. v. Seay*, 132 U. S. 472 [33: 409], 2 Inters. Com. Rep. 726. It there appeared that a statute of Alabama imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the business done by it in this state." The Western Union Telegraph Company reported to the board of assessors only its gross receipts received from business wholly transacted within the state. The board required of the company a further return of its gross receipts from messages carried partly within and partly without the state. The company made such further return, and the tax was imposed

on the gross receipts as shown by the two returns. This mode of assessment was sustained by the supreme court of Alabama, but this court held that the statute of Alabama, thus construed, was a regulation of commerce, and that the tax imposed upon the messages comprised in the second return was unconstitutional. In the discussion of the case, *Mr. Justice Miller* expressed himself as follows: "The principle of our cases is, in respect to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866 (Rev. Stat. §§ 5263-5268) that they shall not be taxed by the authorities of a state for any messages, or receipts arising from messages, from points within the state to points without, or from points without to points within the state, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that messages of the former class are elements of commerce between the states and not subject to legislative control of the states, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the state, and, therefore, subject to its taxing power." See, likewise, *Pacific Exp. Co. v. Seibert*, 142 U. S. 339 [35: 1035], 3 Inters. Com. Rep. 810.

The reasoning of these cases needs no reinforcement, and their conclusions are readily applied to the case in hand.

The express terms of the ordinance restrict the tax to "business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents."

It is claimed that the Postal Telegraph Cable Company is not within the terms of this ordinance, because it does not do any business

exclusively within the city of Charleston; that its city offices are merely initial points for sending and receiving messages, and that, irrespective of the messages sent or received outside of the state, the intrastate messages are not between points within the city; and that, if license exactions were allowed to and made by the various cities in the state, great injury and wrong would be done to the telegraph company.

But this is a hardship, if such exists, that is not within our province to redress. If business done wholly within a state is within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power.

It is further contended that the ruling of the cited cases does not cover the case of a telegraph company which has constructed its lines along the post roads in the city of Charleston, and elsewhere, and which is exercising its functions under the Act of Congress as an agency of the government of the United States. It is obvious that the advantages or privileges that are conferred upon the company by the Act of July 24, 1866 (Rev. Stat. §§ 5263-5268) are in the line of authority to construct and maintain its lines as a means or instrument of interstate commerce, and are not necessarily inconsistent with a right on the part of the state in which business is done and property acquired to tax the same, within the limitations pointed out in the cases heretofore cited.

It was upon the doctrine of these cases that the court below acted in refusing the injunction and dismissing the bill, and its decree is therefore affirmed.

Harlan, J., Brown, J., Jackson, J., dissented.

THE NORTHERN PACIFIC RAILROAD COMPANY, *Appt.*,

v.

A. G. CLARK, County Auditor of Kidder County, North Dakota, ET AL.

(See S. C. 153 U. S. 252, 38 L. ed. 706.)

1. No one can have an injunction against the collection of a tax until he has paid so much of the tax assessed against him as it can be plainly seen he ought to pay.
2. The suit in equity by the Northern Pacific Railroad Company to enjoin the collection of the taxes imposed upon its property in certain

counties of North Dakota is without equity, because of the failure to aver that the company had tendered or paid the gross earnings tax for the year 1889 (or the tax assessed by the county auditors) and it is not entitled to the equitable relief prayed without first tendering or paying such taxes.

[No. 1045.]

Argued April 12, 1894. Decided April 30, 1894.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, of propositions of law upon which that court desired the instructions of this

court, in a suit in equity brought by the Northern Pacific Railroad Company, plaintiff, against A. G. Clark, auditor of the county of Kidder, North Dakota *et al.*, to enjoin the

NOTE.—As to direct taxes, see note to *Scholey v. Rew*, 23: 99.

As to power of states to tax, see note to *Dobbins v. Erie County*, 10: 1022.

Mem. References in notes are to U. S. Repts. L. ed.

As to when taxes illegally assessed can be recovered back, see note to *Erskine v. Van Arsdale*, 21: 63.

As to when an injunction to restrain the collection of a tax will be granted, see note to *Dows v. Chicago*, 20: 66.

collection of certain taxes upon the lands of the company in Kidder county, Stutsman county, Richland county, and McLean county, in that state, etc. *Eighth question certified in the affirmative.*

Seesame case in circuit court, 47 Fed. Rep. 681.

The facts are stated in the opinion.

Mr. Fred M. Dudley, for appellant:

This suit is not without equity because of the failure to aver that the complainant has tendered or paid the "gross earnings tax" for the year 1889, and said complainant is entitled to the equitable relief prayed without first tendering or paying such tax.

In states where a court of equity exercises a jurisdiction to set aside, or to restrain the collection of illegal assessments or taxes, the relief will not be granted unless the plaintiff pays such portion of the tax or assessment as is lawful and justly due.

Pom. Eq. Jur. § 398; *Morrison v. Hershire*, 32 Iowa, 271.

The rule is confined in its application, by the courts, to cases where the tax is excessive, or is partly legal and partly illegal.

Cooley, Taxn. (2d ed.) 768, and note; *Taylor v. Secor* ("State R. Tax Cases") 92 U. S. 575 (23: 668).

"Gross earnings percentage" cannot be made a condition precedent to the granting of an injunction under this rule, unless the "gross earnings percentage" be a tax on these lands. That it is not, is self-evident.

The exemption from assessment and levy of taxes in the ordinary manner, made by the "gross earnings law," did not depend upon the payment of the three per centum of the gross earnings in the first instance, but upon the filing with the secretary of the territory of a resolution adopted by the railroad company and attested by its secretary, accepting the provisions of the act and subjecting the corporation to its terms.

As the "gross earnings law" required the payment of a certain percentage upon the gross earnings of each year, the earnings of that year must be completed before any payment can be made; thus for the year 1889, no payment could be made prior to 1890, when by the terms of the act the percentage was to be paid in two parts, one half on or before February 15, and one half on or before August 1; nevertheless the exemption was complete for the year 1889.

The "gross earnings act" having provided an exclusive remedy for failure to pay the percentage by a distraint by the territorial treasurer, the railroad company is entitled to an order restraining the counties from seeking to collect another and unauthorized tax. Further, the failure to pay the gross earnings percentage is a question between the territorial officials and the railroad company; with it the county officials have nothing to do.

Since the failure to pay the "gross earnings" per centum would not give the counties the right to tax these lands as other lands are taxed, it is not essential to negative such failure in the bill of complaint; and no inference can be drawn from the absence of an averment, that no such payment has been made; and that portion of the opinion of the circuit court, holding that there is no equity in com-

plainant's bill, is founded upon an assumed fact that is not in the record.

There was, and is, no "gross earnings" percentage due, and there is no one authorized to receive such money.

Before any payment became due under the act for 1889, it was repealed by the adoption of the constitution as repugnant to it.

Where a statute requires a certain tax to be collected and the act prescribing the method of such collection is repealed before the collection is made, or the tax due, and there is no saving clause, the right to make such collection is gone, and all proceedings for the collection of the tax, after such repeal, are void.

McQuilkin v. Doe, 8 Blackf. 581, 583; *Marion Twp. Gravel Road Co. v. Sleeth*, 53 Ind. 35, 41; *Tivey v. People*, 8 Mich. 128, 130, 131; *Hunt v. Jennings*, 5 Blackf. 195, 38 Am. Dec. 465; *Abbott v. Britton*, 23 La. Ann. 511; *French v. State*, 53 Miss. 651; *Musgrove v. Vicksburg & N. R. Co.* 50 Miss. 677.

Prior to the time it became due in February, or certainly prior to January 1, when the gross earnings upon which the tax was to be computed, were completed, there was no amount due whatever. The territory had no vested right in any sum; its claim at best amounted to no more than an inchoate right. With the repeal of the act without a saving clause, all possibility of this inchoate claim ripening into a perfect right was extinguished. There never was, therefore, any amount due the territory or state under the "gross earnings law" as the percentage upon the earnings for 1889; and the company is not, and never has been, under any obligations, legal or equitable, to pay or tender such sum.

Backwell, Tax Titles, §§ 1047, 1049; Cooley, Taxn. (2d ed.) 18; *Bleidorn v. Abel*, 6 Iowa, 5; *Van Inwagen v. Chicago*, 61 Ill. 31; *Com. v. Standard Oil Co.* 101 Pa. 119; *St. Joseph County Comrs. v. Ruckman*, 57 Ind. 96; *Ben-net v. Hargus*, 1 Neb. 419; *Butler v. Palmer*, 1 Hill, 324.

A valuable consideration for the exemption from taxation was, in fact, given by the railroad company and accepted and retained by the state.

Northern Pac. R. Co. v. Carland, 5 Mont. 146.

Under the provisions of the Act of Congress approved July 15, 1870 (16 Stat. at L. 291) the lands granted to the Northern Pacific Railroad Company could not be taxed until the company had paid "into the treasury of the United States the cost of surveying, selecting and conveying" the lands granted to the company. The railroad company did not, prior to 1887, pay such fees upon lands owned by it, and hence its lands were not taxable.

Northern Pac. R. Co. v. Rockne ("Northern Pac. R. Co. v. Traill County") 115 U. S. 600 (29: 505).

There was, therefore, subject to taxation within the territory, but a small amount of personal property of the company.

The railroad company insisted that it was beyond the power of the territory to lay a tax upon the interstate earnings, as such a tax would be a tax upon interstate commerce; and that the gross earnings upon which the percentage was to be computed must be restricted

to territorial earnings. In August, 1887, acting upon this construction, it refused to make the second payment for 1886, claiming that the first payment was more than was due for the entire year, computing the amount to be paid upon the territorial earnings alone, and that such payment satisfied the entire amount due for the year.

The railroad company brought suit to enjoin the sale of its property, basing its action upon the grounds stated. The case having been carried to the territorial supreme court, the company's position was there sustained in a decision rendered October 18, 1888.

Northern Pac. R. Co. v. Raymond, 2 Inters. Com. Rep. 321, 1 L. R. A. 732, 5 Dak. 356.

The act of March 7, 1889, required the payment of all sums and interest due under the act of 1883, as a condition precedent to the acceptance of the contract. It further required any company which had not paid such percentages or made a return of its earnings on both territorial and interstate traffic under the act of 1883, to make such return within thirty days from the date of the act, "and pay one half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the territory on local and interstate earnings of such companies but remaining unpaid at the time of filing said account and within thirty days after the passage of this act, or the same shall not apply to such company or companies. The balance of such taxes due for the current year shall be paid to the territorial treasurer on or before the 15th day of August, 1889.

The Northern Pacific Railroad Company accepted this act; and, as a condition precedent, made a return to the territorial treasurer of its earnings on interstate as well as territorial traffic for the years in which it had not made such return under the act of 1883, and paid the percentage thereon April 4, 1889.

In addition thereto, the company obligated itself to pay in August, 1889, the last half of the gross earnings percentage for 1888 computed on both territorial and interstate traffic.

If the supreme court of the territory construed the act of 1888 correctly in *Northern Pac. R. Co. v. Raymond*, 2 Inters. Com. Rep. 321, 1 L. R. A. 732, 5 Dak. 356, and *Northern Pac. R. Co. v. Barnes*, 2 N. D. 810, and this court cannot question that construction, so far as it determines the meaning of the territorial act. *Stuteman County v. Wallace*, 142 U. S. 293, 306 (35: 1018, 1022).

This immense sum of over \$175,000 must be considered as a cash consideration for the exemptions contained in the act of 1889. Certainly the counties cannot justly complain of a lack of equity while they retain this sum, amounting to double the entire tax assessed upon the lands.

The railroad company has paid, under this law, into the territorial treasury, a sum far greater than the taxes upon the lands for the same year could have amounted to. And in all of these views that payment is an incontrovertible answer either to discrimination or lack of equity. In either of the views considered, the attempt by the counties to tax these lands after the state has collected more than the amount of the tax in consideration of exemption, occupies

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the same moral plane as the exercise of the blackmailer's art.

Messrs. E. W. Camp and W. H. Standish, for appellees:

The appellant's counsel, while admitting that the amount to be paid as a condition precedent to invoking the aid of a court of equity is the amount conceded to be due, and while conceding that the appellant had obligated itself to pay an amount equal to 8 per centum of its gross earnings for and during the year 1889 as consideration for exemption from taxation upon its other property for that year, nevertheless seeks to excuse the appellant for its neglect to fulfill this obligation.

As to the first excuse offered, while the tax imposed was not a tax directly upon the lands, it was a tax imposed in lieu of all other taxes, including taxes with which the lands would otherwise be chargeable. This is the only ground upon which the appellant claims exemption from such taxes under this act. For the purpose of this discussion, we must, of course, admit the validity of this act and that the exemption it offered could have been made effective for the year 1889. This being the case, payment of the tax imposed by the act would have discharged all claims for taxes upon the lands for that year. Unless, then, those claims had been already discharged by mere acceptance of the act, they remain still undischarged, so long as payment of the tax imposed by the act is deferred, and the amount of that tax must be deemed to be the amount "conceded to be due" and which should be paid as a condition precedent to invoking the aid of a court of equity. But it is urged that those claims had been already discharged by mere acceptance of the act, which necessitates notice of the second excuse offered, viz: that the acceptance of the act, and not payment thereunder, created the exemption as to the lands.

We cannot so read the act. In the first section, after providing for payment of the per centum, it is expressly provided as follows:

"And the payment of such amount annually as aforesaid, shall be and is in full of any and all other taxation and assessment whatever upon the property aforesaid."

This is the very provision under which the appellant claims exemption, and yet it expressly makes that exemption dependent upon payment. But, as if to make assurance doubly sure, the proviso in section 7 expressly declares that—

"Any company failing to promptly and strictly comply with the provisions herein set forth and to pay all sums herein provided to be paid, shall be subject to assessment and taxation in the same manner as individuals."

Could language be plainer?

The third excuse offered is that the act itself was repealed prior to the time when the first installment became due, and there was no one authorized to receive the money; and that, consequently, there is no "gross earnings" percentage due.

It is impossible to construe this statement in any other light than as an avowed unwillingness on part of appellant to pay the amount which it concedes to be due as consideration for the exemption claimed. If the obligation

was complete at time of acceptance (which is not disputed) the continuance of that obligation could not be made to depend upon the continuance in effect of the act under which it arose. The repeal of that act might, or might not, have weakened the remedy for enforcement; but in either event the obligation itself continued the same.

No attempt to discharge the obligation contracted for the year 1889 has been shown. It would seem as though the least that the appellant could have done, had it desired to do equity, would have been to aver its willingness to discharge that obligation, on the contrary, its unwillingness to do so is manifest.

Mr. Justice Jackson delivered the opinion of the court:

This case, under the style of the *North-ern Pac. R. Co. v. Walker*, 148 U. S. 391 [37: 494], was before this court at October term, 1892, and the jurisdiction of the circuit court not appearing upon the face of the record, it was remanded with leave to amend. The appellant accordingly, on June 6, 1893, filed in the Circuit Court of the United States for the District of North Dakota its amended bill of complaint, in which, after setting forth its creation and organization under and by virtue of an Act of Congress approved July 2, 1864, entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound on the Pacific Coast by the Northern Route," and certain acts and joint resolutions of Congress supplementary thereto and amendatory thereof, it was alleged that for the purposes of laying out, locating, constructing, furnishing, and maintaining a railroad and the telegraph line between the points indicated there was granted to it by Congress every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of the railroad line as the company might adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of the railroad line whenever it passed through any state, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, free from pre-emption or all other claims at the time the line of the railroad should be definitely fixed, and the plat thereof be filed with the Commissioner of the General Land Office; that the railroad company duly accepted the terms, conditions, and impositions of said Act of Congress, and that on the respective dates of May 28, 1873, and July 20, 1880, it definitely fixed the line of its railroad through certain counties in the territory of Dakota (now the state of North Dakota) and filed plats thereof in the office of the Commissioner of the General Land Office; that the line of railroad so fixed extends opposite to and past the lands set forth and described in the schedules made a part of the bill; that prior to December 20, 1880, it had completed that portion of the railroad and telegraph line extending on, over, and along the line of definite location of the railroad, and that the President of the United States, from time to time, after the same had been examined by commissioners, had accepted the railroad and telegraph line as

having been constructed and completed in all respects as required by the Act of July 2, 1864, and the acts and joint resolutions supplementary and amendatory thereof.

The bill further alleged that the lands on each side of the railroad, and every portion thereof, were within forty miles of the company's line of road so definitely fixed; that they were public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and no entry or application to make entry for the lands was made or was pending when the lists of definite location were filed in the office of the Commissioners of the General Land Office on May 26, 1873, and July 20, 1880; that the described lands had been surveyed by United States surveyors, and had been reported to be agricultural in their character and non-mineral; and that the lands were not on July 2, 1864, or May 26, 1873, and July 20, 1880, known as mineral lands, etc.; that the company had prior to the year 1889, in accordance with the direction of the Secretary of the Interior, duly prepared and filed lists in the United States land offices in the land districts in which the lands were situated respectively, describing the lands and claiming them as a portion enuring to it under and by virtue of the Act of Congress approved July 2, 1864, which lists were duly allowed and approved by the United States district land officers, to whom the fees prescribed by law were paid by the company, and which were retained by the United States; that the lists of lands so filed were duly transmitted by the district land officers to the Commissioner of the General Land Office for his approval; that since the lists were filed and transmitted to the Commissioner of the General Land Office, the Commissioner, under the direction of the Secretary of the Interior, had required the company to file in the office of the Commissioner, or in the office of the land office districts in which the lands were respectively situated, an affidavit made by some person acquainted with the character of the lands, setting forth and showing that the same were non-mineral, and that until such affidavits had been filed the Commissioner refused to approve the lists; that the company had not, nor had any one in its behalf, filed affidavits of persons having knowledge of the mineral or non-mineral character of the lands set out in the lists.

The bill then proceeds to state that none of the lands described had ever been certified or patented to the railroad company, and that neither the United States, nor any of its officers or agents, had ever ascertained and determined what specific lands in the state of North Dakota passed to the railroad company by virtue of the Act of July 2, 1864, although the railroad company had repeatedly petitioned to have this done; that the United States and its officers had refused to certify to the company the lands described in the schedules of the bill, but held the lists suspended and unapproved upon the claim that the lands may be mineral in character, and as such excepted from the grant to the company, or that the lands may not have been free from claims or rights reserved in the grant, or that the question as to whether title to the lands had passed to the railroad company under and by virtue of the

granting Act, and acts amendatory thereof; that said matters were still in controversy, and pending before the Commissioner of the General Land Office and the Secretary of the Interior.

It is further alleged that the railroad company had no other right, title, claim, interest, property, or possession in or to any of the lands or premises described in the bill except such right, title, claim, interest, property, or possession as it may have obtained under and by virtue of the acts and resolutions of Congress, and its compliance with the conditions thereof.

It is then averred that on March 7, 1889, the legislature of the territory of Dakota passed an act, which was duly approved by the governor of the territory, entitled "An act providing for the levy and collection of taxes upon the property of railroad companies in this territory," in and by which it was, among other things, enacted and provided: "In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this territory, or upon the equipment, appurtenances, or appendages thereof, or upon any other property situated within this territory belonging to the corporation owning or operating such railroads, upon the capital stock, or business transactions of said railroad company, there shall hereafter be paid into the treasury of this territory an amount equal to a percentage of all the gross earnings of the corporation owning or operating such railroad arising from the operation of such railroad as shall be situated within the territory, both upon territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided;" that the railroad company did, within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, filed with the secretary of the territory of Dakota, accept and become subject to the provisions of the Act of March 7, 1889; that within thirty days of its passage the railroad company, as required by the act, prepared and filed with the treasurer of the territory, in the manner required by the provisions of chapter 99 of the Session Laws of the territory for the year 1888, an account of the gross earnings of the company, both territorial and interstate, for the years 1886 and 1887, and paid into the treasury the entire amount of taxes claimed by the territory on local and interstate earnings remaining unpaid at the time of filing such account for said years, such payment being as follows, to wit: For the last half of the year 1886, \$83,095.81; for the year 1887, \$65,585.46. Such sums so paid, as provided for in the territorial act of March 7, 1889, were percentages computed entirely upon gross earnings of the company derived from domestic business, the percentage for the same years computed upon the gross earnings derived from interstate business having been previously paid by the company, as required by the provisions of the territorial act of 1888.

It was also alleged that, at the same time, the company paid into the treasury of the territory one half of the entire amount due for the year 1888, amounting to \$46,987.09, and

that before August 15, 1889, it had paid the remainder of the amount due for the year 1888; that the sums so paid into the treasury for the year 1888 were percentages computed upon the gross earnings of the company for that year, derived from both domestic and interstate business, the former amounting to \$11,446.78 and the latter to \$82,427.40, and it was alleged that all the percentages derived from interstate business so paid into the treasury were not due from the company, except by virtue of the act of March 7, 1889, and the company's acceptance thereof, and that they were paid as a consideration for the exemption from taxation provided for by that act, and for no other reason.

It is then charged that, notwithstanding the premises, in the year 1889 the county auditors for the counties of Kidder, Stutsman, Richland, and McLean, under the authority of the laws of the territory of Dakota, had assessed the company's lands situate in their respective counties for purposes of county taxation, and that they had advertised the lands as described in the schedules to the bill, for sale, and were about to wrongfully sell the same for the non-payment of taxes so levied, together with penalties and costs, and to issue certificates of sale for the same in the form prescribed by the laws of North Dakota, and unless restrained by the order of the court they would sell the lands, and issue certificates of sale thereafter, whereby the rights of the railroad company in and to the lands would be irreparably injured, and lead to multiplicity of suits concerning the title thereto.

It was further claimed on the part of the railroad company that the taxes so assessed and levied upon the lands were a cloud upon the title of the railroad company thereto; that if sold and certificates were issued to the purchaser, such certificates would constitute a cloud upon the title of the company in and to the lands so sold; that the counties were bankrupt, and that if the railroad company should pay the taxes and then bring an action against them to recover the amount thereof, it would require a multiplicity of suits, and such judgments as might be recovered would be worthless.

The bill further averred that the amount of the taxes levied upon the lands, together with the costs and penalties claimed by the county auditors to have accrued thereon, and for which the lands had been advertised for sale, and were about to be sold, were as follows: Upon the lands in Kidder county, \$12,820.67; upon the lands in Stutsman county, \$8863.39; upon the lands in Richland county, \$4094.37; and upon the lands in McLean county, \$4048.17—the amount of such tax, penalty, and cost upon each tract of land being particularly shown in the schedules attached to the bill.

The prayer of the bill was to the effect that the county assessments and taxes so levied upon the lands of the railroad company might be declared illegal and void, and a cloud upon the title of the company, and that the defendants, and each of them, their deputies and successors in office, be restrained from selling or attempting to sell the lands or any portion thereof, or from issuing tax certificates therefor.

The defendants appeared and demurred to the amended bill on the ground that, according to the showing made therein, the plaintiff was not entitled to the relief sought. The circuit court sustained the demurrer and dismissed the bill on the ground that the act of 1889 was void, because it violated the Organic Act, which provided that the legislative assembly of the territory shall not make any discrimination in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value; secondly, that the bill was without equity in failing to allege payment or tender of the gross earnings tax for the year 1889. 47 Fed. Rep. 681.

From this judgment the railroad company appealed to the United States Circuit Court of Appeals for the Eighth Circuit, and that court, desiring instructions upon certain questions presented by the assignments of error filed in the cause, certified to this court various propositions of law, as to whether the railroad company acquired such title to the odd numbered sections of land within the place limits of the grant of July 2, 1864, which were not mineral, and which, at the dates of the grant and of the filing of the map of definite location in the office of the Commissioner of the General Land Office, were not reserved, sold, granted, or otherwise appropriated, as to render them taxable before being patented and certified to the railroad company; whether the company was taxable on such lands by the territories after the filing of the map of definite location of its railroad, and full compliance with the terms and conditions of the granting Act, while the United States refused to patent and certify such lands to the company; whether chapter 107 of the Laws of Dakota for 1889, being an act entitled "An Act Providing for the Levy and Collection of Taxes upon the Properties of Railroad Companies in this Territory," approved March 7, 1889, was void as a regulation of interstate commerce; whether the act of March 7, 1889, was in conflict with the 5th and 14th amendments of the Constitution of the United States, and with the organic law of the territory, as an attempt to exempt from taxation the lands granted by the Act of July 2, 1864; whether the act of March 7, 1889, should be construed as granting an exemption for the year 1889, or to be in force and effect only after the year 1890. The eighth and remaining question certified is as follows: "Is said bill without equity because of the failure to aver that the complainant has tendered or paid the 'gross earnings tax' for the year 1889; and is said complainant entitled to the equitable relief prayed without first tendering or paying such tax?"

In the view we take of the case, the answer to the last question will dispose of the suit, and render it unnecessary to enter upon the consideration and determination of the other propositions of law on which instructions are asked.

By an act of the legislature of the territory, approved March 9, 1883, chapter 99, Laws of 1883, it was provided that all railroad companies, except railroads operated by horse power, owned and operated within the territory, should pay two per centum on the gross earnings of their railroads for a period of five years, and thereafter three per centum on the

gross earnings, in lieu of all other taxes upon said railroads and the capital stock and business thereof. The payment of this percentage was to be made at designated dates in each year, and penalties were imposed upon the companies failing to comply with the provisions of the law as to the making of returns of earnings and paying the percentages imposed by the act. The moneys so received and collected were to be apportioned between the territory and the several counties through which the railroads respectively ran.

This act of 1883 left the railroad companies no choice as to whether they would pay the designated percentage on their gross earnings, or remain subject to taxation upon their property in the ordinary method. It was compulsory upon them. It is not material to the present case to consider whether this act was constitutional or not; it was repealed by the act of legislature approved January 29, 1889. Now, it is shown by the bill that at the time the act of 1883 was repealed the appellant was in default of the payment of the percentages due upon its gross earnings for the years 1886, 1887, and 1888.

On March 7, 1889, the legislature of the territory of Dakota passed an act, entitled "An Act Providing for the Levy and Collection of Taxes upon Property of Railroad Companies in this Territory,"* which went into force and effect immediately after its passage.

This act is by its terms nothing but a tax law, and while it adopted the same rule of percentages on the gross earnings as provided in the act of 1883, it differed from that act in not being compulsory upon the railroad companies, for it left to them the election as to which of two modes of taxation they should accept or submit to. It practically gave to the railroad companies the choice of having their property taxed as other property in the territory, by assessment and levy, or of taking the benefits of the act upon the terms and conditions provided therein. It was, by section 7, made a condition of the acceptance of the act that "any railroad company assessed under chapter 99 of the Laws of 1883 shall, within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assess-

*Be it enacted by the Legislative Assembly of the Territory of Dakota:

1. *Percentage of gross earnings to be paid in lieu of other taxes.*—In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this territory, or upon the equipment, appurtenances, or appendages thereof, or upon any other property situated in this territory belonging to the corporation owning or operating such railroads, upon the capital stock or business transactions of said railroad company, there shall hereafter be paid into the treasury of this territory an amount equal to a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operating of such railroad, as shall be situated within this territory, both upon territorial and interstate traffic. In case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided.

Every such railroad corporation or person owning or operating or that may hereafter own or operate any line of railroad in this territory which shall have accepted this act shall pay to said treasurer each year "for the first five years" after the approval of this act an amount equal to three per centum of such gross earnings, and for and in each and every year after the expiration of such

ments under said laws of 1883, including taxes on both territorial and interstate earnings, before they can avail themselves of the provisions of this act." It was further provided that any company failing to strictly comply with the provisions of the act within the time provided should be immediately subject to assessment and taxation upon its property in the same manner as the property of individuals was assessed and taxed.

The companies accepting the benefits of the act were not only to pay arrearages under the law of 1883, but were also to pay a percentage of gross earnings for the current year of 1889, it being provided that "if such acceptance was filed on or before the 15th day of February in any year such companies should pay one half of said amount on said 15th day of February and the balance on the 15th day of August next following. Should such acceptance be filed before the 15th day of August and after the 15th day of February in any year, then an amount equal to three per centum of such account shall be paid in full on or before the 15th day of August in each year."

It is shown by the bill that the appellant ac-

cepted the provisions and benefits of the act within thirty days after March 7, 1889, and it thereby became liable to pay the required percentage on its gross earnings on or before the 15th of August, 1889. It is also shown by the bill that within thirty days after the passage of the act it paid the arrearages of percentages on its gross earnings accruing under the act of 1883, for the years 1886, 1887, and 1888; but it is not alleged that it made payment, or tender of payment, of the percentage on its gross earnings for the year 1889, or any portion thereof, although by the express provisions of the act a percentage on a portion of such gross earnings was due and payable on the 15th day of August, 1889.

The moneys to be received and collected by the territorial treasurer under this act from the railroad companies which accepted its provisions were to be apportioned between the territory and the several counties, respectively, through which the railroads run, or in which the companies had lands subject to taxation, in the manner pointed out in section 6 of the act. The several counties, whose auditors are made defendants in the present

five years an amount equal to two per cent of said gross earnings," and the payment of such amount annually as aforesaid shall be and is in full of any and all other taxation and assessment whatever upon the property aforesaid.

Said payments shall be made, except as herein-after provided, one half on or before the 15th day of February, and one half on or before the 1st day of August in each year. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company. An abstract shall be furnished by said company to the treasurer of this territory on or before the 1st day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of such company, and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the governor of this territory, or any other person appointed by law, to examine under oath the officers, employees of said company, or other persons, and if any person so examined by the governor or other authorized person shall knowingly or willfully swear falsely, concerning the matter aforesaid, every such person is declared to have committed perjury; and for the purpose of securing to the territory the payment of the aforesaid per centum it is hereby declared that the territory shall have a lien upon the railroad of said company, and upon all property, estate, or effects of said company whatsoever, personal, real, or mixed, and the lien hereby secured to the territory shall have and take precedence of all demands, decrees, and judgments against said company.

2. *When company shall fail to make return.*—If any such railroad company having accepted this act shall fail to make return of its gross earnings as aforesaid, or of any part thereof, at the time and in the manner provided by law, and such default shall continue during the period of thirty days, such company shall be subject to a penalty of an amount equal to ten per cent of the tax imposed upon such company by this act, and the treasurer of the territory shall forthwith ascertain the amount of such percentage justly due from such company, as near as may be, from such evidence as may be available, and shall thereupon collect such amount so ascertained, together with the said penalty thereon.

The amount so ascertained by the territorial treasurer as in this section provided shall, together with the said penalty thereon, be by him entered in the books of his office and such entry when so made shall stand in the place of the report required by law to be made by such company, and shall in all courts within this territory be evidence of the amount of such tax and penalty and of the other facts stated therein in pursuance of this act.

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3. *Neglect to pay taxes.*—In case any railroad company which shall have accepted the provisions of this act shall fail or neglect to pay the amount reported at the time and in the manner hereinafter provided, for a period of thirty days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten per centum thereof as a penalty for such failure or neglect to pay.

4. *Territorial treasurer to distrain.*—At any time after the expiration of the period of thirty days after the amount as above provided has become due and payable under the provisions of this act, the territorial treasurer or his deputy shall distrain sufficient goods, chattels, or other movable property, if found within this territory, to pay the said amount due from such corporation, together with the penalty thereon as hereinafter provided, and shall immediately advertise the sale of the same in at least three newspapers published within this territory, stating the time when and the place where such property shall be sold, such sale shall take place at some point on the railroad of such delinquent company, and at least four weeks' notice of the time and place of such sale shall be given; such delinquent company, its successors or assigns, may pay in such amount and penalty at any time before the sale of the property distrained as herein provided, and thereupon further proceedings in connection with such distress shall cease, and the property distrained shall be delivered to the owner thereof.

5. *Land subject to taxation.*—The lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased, contracted to be sold or leased; and on or before the first day of April of each year each railroad company having lands within the territory shall return to the county clerk of each county within this territory full and complete lists, verified by the affidavits of such officers of the company having knowledge of the facts, of all lands of such company situated within such county, sold, or contracted to be sold, or leased, during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A. D. 1889, in compliance with the terms of this section, shall include a complete list of all lands sold or leased, prior to the last day of December, 1888.

6. *How taxes apportioned.*—The moneys received and collected by the territorial treasurer in pursuance to this act shall be disposed of by him as follows: In case the railroad company paying such tax owns no land granted in aid of the construction of its railroad, one third of the same shall be retained in the territorial treasury for the use of the territory, and the remainder shall be apportioned among the several counties into or through which

case, were therefore interested in the gross earnings tax which the appellant was required to pay for the year 1889 in lieu of all other ordinary taxes upon its property.

The gross earnings act remained in force until November 2, 1889, when it was repealed by the repugnant provisions contained in the constitution of the state of North Dakota, as adopted and approved by Congress, and the claim is now made by the appellant that the repeal relieves it from liability to pay any percentage on its gross earnings for the year 1889, or any part thereof, because the same was not payable until after 1890; and that it was not liable to assessment and taxation on its property because it had accepted the provisions of the gross earnings act of 1889.

This contention, if correct, would relieve the appellant from any burden in the way of taxation for the year 1889, but such a claim as this cannot possibly be sustained. The act of March 7, 1889, clearly intended that the gross earnings tax, therein provided for, as to all companies which would accept its provisions, should supply revenue for the territory and the counties for the year 1889. It is equally clear from the whole act as a tax law, that the railroad company had to pay the required per-

centage on its grossearnings for that year, and that such percentage was payable in part on the 15th day of August in that year. It is not therefore correct to say that no part of the gross earnings were payable until 1890; but, if that were not the case, having accepted the provisions of that act and thus becoming liable to pay the designated percentage of its gross earnings in lieu of taxes for the year 1889, that liability would not be discharged by the subsequent repeal of the gross earnings act of 1889. If the company was released from the gross earnings tax by the repeal of the act, its property immediately became subject to assessment and taxation in the manner provided for the assessment and taxation of property of individuals in the territory, and it would not vitiate any such assessment made on the part of the counties that happened to be made prior to the repeal of the act of 1889. Such assessment would remain in full force and effect after the repeal of the act and until satisfied.

It is next contended by the appellant that its payment of arrearages, claimed to be due under the act of 1883, was a consideration for the exemption of its property from taxation for the year 1889. This position cannot be sustained

the railroad or railroads of such companies run, in proportion to the number of miles of main track situated in such counties respectively. In case the railroad company paying such tax owns land granted in aid of the construction of its railroad, then thirty per cent of the tax paid by such company shall be retained in the territorial treasury for the use of the territory, and forty per cent shall be apportioned among the several counties into or through which the railroad or railroads of such company run, in proportion to the number of miles of main track situated in such counties, respectively, and thirty per cent shall be apportioned among the several counties in which lands forming a part of its land grant are situated, in proportion to the number of acres of surveyed and unsold lands in said counties.

7. *Any railroad company.*—Which, at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this territory, may at any time within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, and filed with the secretary of the territory, accept and become subject to the provisions of this act, and provided that any railroad company which is now in arrears in the payment of taxes assessed under chapter 90 of the Laws of 1883 shall, within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assessments under said laws of 1883 before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both territorial and interstate earnings. It is further expressly provided that any company failing to strictly comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and taxation in the manner provided for the assessment and taxation of the property of individuals of this territory, and said taxes shall be collected in the same manner as is now provided in cases of the property of individuals. Any company which has not complied with the provisions of chapter 90 of the Session Laws of 1883, by paying all taxes claimed on gross earnings both territorial and interstate, or by filing an account of gross earnings both territorial and interstate, shall prepare and file such account in the manner therein provided within thirty days from the passage hereof, and pay one half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the territory on local and interstate earnings of such companies, but remaining unpaid at the time of filing said account and within thirty days after the passage of this act, or the same

shall not apply to such company or companies. The balance of said taxes due for the current year shall be paid to the territorial treasurer on or before the 15th day of August, 1889. Any railroad company that may be hereafter organized in this territory, or that shall hereafter become the owner of or engaged in operating any lines of railroad in this territory, may accept and become subject to the provisions of this act by filing a resolution of its board of directors in the manner as hereinbefore provided.

In case any such railroad company shall accept and become subject to the provisions of this act, it shall at the time of filing such acceptance render an account of gross earnings both territorial and interstate, in the manner as hereinbefore provided, and shall pay at the time of rendering such account, all amounts claimed by the territorial auditor as tax due on the local and interstate earnings of such company for the current or any preceding year, and shall thereafter pay an amount equal to 3 per centum of such account, as follows: If such acceptance is filed on or before the fifteenth day of February in any year, such company shall pay one half of said amount on said fifteenth day of February, and the balance on the fifteenth day of August following. Should such acceptance be filed before the fifteenth day of August and after the fifteenth day of February in any year, then an amount equal to 3 per centum of such account shall be paid in full on or before the fifteenth day of August in each year. Thereafter accounts shall be rendered and payment made in the manner provided in this act; provided, that any company failing to promptly and strictly comply with the provisions herein set forth and to pay all sums herein provided to be paid shall be subject to assessment and taxation in the same manner as individuals.

8. *In case of non-acceptance.*—The railroads and property of all railroad companies owning or operating lines of railway in this territory, which companies shall not accept and become subject to the provisions of this act, shall not be entitled to the exemption in this act contained, but shall be subject to taxation in such manner as shall be provided by law.

9. *Repeal or amendment.*—This act shall be subject to repeal or amendment by any future legislature, and nothing herein contained shall be construed as a repeal of any revenue law now in existence, as applicable to any railroad company which shall not accept the provisions of this act as herein provided.

10. *Effect when.*—This action shall take effect and be in force from and after its passage.

Approved March 7, 1889.

for, by the terms of the act of 1889, the payment of those arrearages was simply a condition upon which the railroad company was allowed to accept the benefits of that act, which was not an act exempting the property of the railroad company from taxation, but merely substituted one mode of taxation for another upon the terms and conditions specified. One of the terms on which the railroad was allowed to accept the gross earnings tax, in lieu of the ordinary tax upon its property, was that it should pay the arrearages which the territory claimed under the act of 1888. No exemption from taxation for the year 1889 was contemplated. The railroads accepting the act were required to pay the gross earnings tax for that year in addition to such arrearages. It cannot, therefore, be properly claimed that the payment of these arrearages constituted a consideration for any exemption from taxation, or that such payment raised any equity on the part of the appellant against the payment of taxes for 1889, whether such taxes were imposed in the shape of a percentage on the gross earnings for that year, or in the shape of the ordinary assessment upon its property.

There is nothing in the allegations of the bill showing affirmatively that the company did not possess the equitable title or ownership in the lands described and assessed. Nor do the averments of the bill negative the fact that the appellant was properly chargeable with taxes on the lands coming within the grant of July 2, 1864, and within the limits of the line of definite location of its road. Payment of the gross earnings tax, imposed by the act of 1889, would have discharged all claims for taxes upon the company's lands for that year, but no ground is shown by the bill for releasing the appellant for the payment of either the percentage tax on its gross earnings, or from the payment of the assessment upon its lands made by the county auditors. By section 7 of the act of 1889, its failure to promptly and strictly comply with the provisions thereof, and pay all sums therein provided to be paid, subjected the company to assessment and taxation in the same manner as individuals. It did not comply with the provisions of the act in paying the percentage of gross earnings due on the 15th day of August, 1889, and thereupon its property became liable to assessment and taxation as the property of individuals in the several counties.

Being liable to pay either the percentage on gross earnings in accordance with the provisions of the act of 1889, or the tax upon its lands, as other property of like character was assessed, the appellant was not entitled to any relief in a court of equity by injunction without payment or tender of what was due under one or the other of those modes of taxation.

In *Taylor v. Secor* ("State R. Tax Cases") 92 U. S. 575, 616, 617 [28: 663, 674], the rule is established that before an injunction will be granted in such cases as the present, a party must pay or tender what can be seen to be due on the face of the bill, and, speaking for the court in that case, *Mr. Justice Miller* said that the duty of making such a tender or payment before any injunction will be allowed is laid down "as a rule to govern the courts of the United States in their action in such cases." This rule was repeated in *German Nat. Bank of Chicago v. Kimball*, 108 U. S. 732, 733 [26: 469], where it was treated as a fatal objection to the bill that there was no offer to pay any sum as a tax which the party ought to pay, and, again speaking for this court, *Mr. Justice Miller* there said: "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay," etc.

Applying this rule to the present case, it is clear that the appellant's bill was properly dismissed for failing to pay, or tender to pay, taxes which he ought to have paid on its property, or, in lieu thereof a percentage of its gross earnings.

Our response, therefore, to the eighth question certified is, that the bill was without equity, because of the failure to aver that the plaintiff had tendered or paid the gross earnings percentage for the year 1889 (or the tax assessed by the county auditors) and was not entitled to the equitable relief prayed without first tendering or paying such taxes.

The answer of the court to that question will accordingly be certified to the Circuit Court of Appeals for the Eighth Circuit.

Mr. Justice Brewer dissented.

THE COVINGTON & CINCINNATI BRIDGE COMPANY, *Plff. in Err.*,

COMMONWEALTH OF KENTUCKY.

(See S. C. 154 U. S. 204, 38 L. ed. 962.)

1. The Kentucky law of 1890 fixing rates of toll and fare over the bridge of The Covington & Cincinnati Bridge Co., spanning the Ohio river and connecting the states of Ohio and Kentucky, is an attempted regulation of commerce which it is not within the power of the state to make.
2. A state has no power to regulate tolls upon a bridge connecting such state with another state; Congress alone has such power.
4. Whether two states can, in the absence of legislation by Congress, fix, by reciprocal action, the rates of toll and fare over a bridge connecting

NOTE.—As to power of Congress to regulate commerce, see note to *Gibbons v. Ogden*, 5: 23, and to *Brown v. Maryland*, 6: 678.

As to interstate commerce; regulation of; power of

Congress; how far exclusive, see note to *Gloucester Ferry Co. v. Pennsylvania*, 29: 158.

As to power of Congress to control commerce; state statute when invalid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid, see note to *Harmon v. Chicago*, 37: 216.

Mem. References in notes are to U. S. Repts. L. ed. 4 INTER S.

such states, this court does not decide in this case.

3. A bridge across waters between two states and

connecting such states, is an instrument of interstate commerce and traffic across it is interstate commerce.

[No. 1025.]

Argued Jan. 26, 29, 30, 1894. Reargued April 25, 1894. Decided May 26, 1894.

IN ERROR to the Court of Appeals of the State of Kentucky, to review a judgment of that court, affirming the judgment of the criminal court of Kenton county, in that state, adjudging the defendant, The Covington & Cincinnati Bridge Company, guilty of the offenses charged in an indictment against that company, for collecting illegal tolls upon the bridge of that company across the Ohio river between the states of Kentucky and Ohio, and imposing a fine upon defendant. *Reversed, and case remanded for further proceedings.*

Statement by Mr. Justice Brown:

This was an indictment found by the grand jury of Kenton county, Kentucky, against the defendant Bridge Company for demanding and collecting illegal tolls, refusing to sell tickets at the rates required by law, and for failing to keep an office for the sale of tickets at its bridge in said county.

The Covington & Cincinnati Bridge Company was incorporated under an act of the legislature of Kentucky, approved February 17, 1846, the third section of which required the confirmation of the act by the state of Ohio, before the corporation should open its books for subscription; and the eighth section of which declared that "the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon, with their goods, carriages, or animals of every description or kind; provided, however, that the said company shall lay before the legislature of this state a correct statement of the costs of said bridge, and an annual statement of the tolls received for passing the same, and also the cost of keeping the said bridge in repair, and of the other expenses of the company; and the said president and directors shall, from time to time, reduce the rates of toll, so that the net profits of the said bridge shall not exceed fifteen per cent per annum, after the proper deductions are made for repairs and charges of other descriptions."

By an act of the legislature of Ohio, enacted March 9, 1849, this company was made a body corporate and politic of that state, "with the same franchises, rights, and privileges, and subject to the same duties and liabilities," as were specified in its original incorporation; and with a further proviso that "nothing herein contained shall be construed to take away the jurisdiction of this state to the center of the said bridge, nor in anywise to acknowledge the jurisdiction of the commonwealth of Kentucky this side of the said center."

On March 20, 1850, this act of confirmation was amended by the legislature of Ohio by granting the company "power to enter upon any lands in the city of Cincinnati, from low-water mark in the Ohio river northwardly, not

exceeding one hundred feet in width, to Front street, and appropriate the same" for passageways and abutments, etc.

The original act of incorporation was amended by the legislature of Kentucky by the following amongst other subsequent acts:

1. By act of February 23, 1856, authority was given to increase the capital stock from \$300,000 to \$700,000, with power in the city of Covington to subscribe for and purchase \$100,000.

2. By act of February 6, 1858, the company was authorized to issue preferred stock under certain restrictions, such stockholders to receive dividends of 6 per cent.

3. By act of February 5, 1861, the capital stock was increased to \$1,000,000, one half of such amount in preferred stock, and to pledge the revenues of the company for the payment of dividends upon such preferred stock to the extent of 15 per cent per annum.

4. By act of January 21, 1865, the capital stock was increased to \$1,250,000, the additional \$250,000 being preferred stock, the holders of which should enjoy all the benefits, privileges, and immunities to which the holders of the existing stock were entitled.

By the sixth section of this act the legislature reserved the right to change, alter, or amend the original charter, "but not so as to abridge or injure legal or equitable rights acquired thereunder."

5. By act of February 25, 1865, the above sixth section was repealed.

6. By Act of Congress of February 16, 1865, the bridge was declared to be a lawful structure and post road for the conveyance of the mails of the United States. 13 Stat. at L. 431.

The bridge was completed and opened for travel January 1, 1867.

On March 31, 1890, the legislature of Kentucky passed another act amendatory of the act of incorporation, and out of which this prosecution arose, providing that it should be unlawful for any person or corporation to charge, collect, demand, or receive for passage over the bridge spanning the Ohio river, constructed under such act of incorporation, any toll, fare, or compensation greater than, or in excess of, certain rates prescribed by the act, which were much less than the directors had fixed upon under the eighth section of the act of incorporation. The second section provided that the company should sell passage tickets over their bridge at these rates, entitling the holder to passage either way over said bridge; and by the third section, the company was required to keep an office within the county of Kenton constantly open for the sale of such tickets; and keep conspicuously posted a schedule of the tolls fixed in pursuance of the act.

The company failing to conform to this last mentioned act, this indictment was filed May

9, 1890. Defendant demurred thereto, and the case was submitted upon this demurrer and a statement of facts, showing the cost of the bridge structure and offices to have been \$1,855,462.86; the per cent. of net earnings on cost for first 23 years, 4.82; the per cent of net earnings on cost for the year 1889, 6.14; the estimated per cent of net earnings on cost for 1890, 4½, under the charges fixed by the directors; the estimated percentage of net earnings on cost for the year 1890, under the act of which complaint was made 1½. The court sustained the demurrer and dismissed the indictments upon the ground that the act of 1890 impaired the obligation of the contract contained in the eighth section of the original act. The commonwealth appealed to the court of appeals, by which the judgment of the court below was reversed, and the case remanded with directions to overrule the demurrer, and for further proceedings. The case was thereupon remanded to the lower court and submitted without a jury. The court adjudged the defendant guilty, and imposed a fine of \$1000, from which judgment the defendant again appealed to the court of appeals, which affirmed the judgment of the court below, and certified, at the request of the appellant, the following questions as arising under the Constitution and laws of the United States:

1. Whether the act of 1890 was within the constitutional inhibition of laws impairing the obligation of contracts.
2. Whether such acts were in violation of the exclusive power of Congress to regulate commerce among the states.
3. Whether said act was in violation of the 14th Amendment, prohibiting the taking of private property without due process of law.

Defendant thereupon sued out a writ of error from this court.

Messrs. Lawrence Maxwell, Jr., Solicitor General, Wm. M. Ramsay, James W. Bryan, John F. Fisk and Charles H. Fisk, for plaintiff in error:

The bridge of the plaintiff in error, being an instrumentality of interstate commerce, lying partly in two states, it is not competent for the legislature of Kentucky to regulate it by prescribing tolls for the transit and passage of persons and property thereover from one state to another.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557 (30: 244), 1 Inters. Com. Rep. 81.

The question of the reasonableness of the rates is not material. If the legislature of Kentucky can fix the tolls at all, the amount will rest in its discretion.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (29: 158), 1 Inters. Com. Rep. 382.

A bridge is an instrument of commerce within the meaning of the Constitution.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1 (24: 708); *Western U. Teleg. Co. v. Texas*, 105 U. S. 460 (26: 1067); *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347 (30: 1187), 1 Inters. Com. Rep. 806; *Mobile County v. Kimball*, 102 U. S. 691 (26: 238); *California v. Central Pac. R. Co.* 127 U. S. 1 (32: 150), 2 Inters. Com. Rep. 153; *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641 (34: 295); *Decker v. Baltimore & N. Y. R. Co.* 80 Fed. Rep. 723.

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The plaintiff in error is engaged in the business of interstate commerce, because its bridge extends from one state to another, and every passage thereover of persons or property is necessarily from one state to another.

Budd v. New York, 143 U. S. 517 (36: 247), 4 Inters. Com. Rep. 45; *Munn v. Illinois*, 94 U. S. 113 (24: 77); *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155 (24: 94); *Philadelphia & R. R. Co. v. Pennsylvania* ("State Freight Tax") 82 U. S. 15 Wall. 232 (21: 146).

If it is competent for the legislature of Kentucky to fix tolls for this bridge, the acts of 1890 prescribe rates which are in conflict with the contract contained in the original charter of the company.

Stone v. Yazoo & M. V. R. Co. 62 Miss. 607, 52 Am. Rep. 193; *Stone v. Farmers Loan & T. Co.* 116 U. S. 307 (29: 636); *Philadelphia, W. & B. R. Co. v. Bowers*, 4 Houst. (Del.) 506; *Sloan v. Pacific R. Co.* 61 Mo. 24, 21 Am. Rep. 397; *Hamilton v. Keith*, 5 Bush, 458; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425.

If it is to be presumed, in the absence of proof, that the bridge company failed to file, or delayed in filing, the reports called for by the eighth section of the charter, such failure or delay does not work a forfeiture of its right to collect tolls under its charter.

Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174 (32: 377); *Stanley v. Colt*, 72 U. S. 5 Wall. 119 (18: 502); *Goldborough v. Orr*, 21 U. S. 8 Wheat. 217 (5: 600); *Philadelphia, W. & B. R. Co. v. Howard*, 54 U. S. 13 How. 307 (14: 157).

Messrs. Wm. J. Hendrick, Atty. Gen. of Kentucky, and *Wm. Goebel*, for defendant in error:

The business or employment of the bridge company is not commerce, and the acts of 1890 are not regulations of commerce. Those acts are regulations of charges for the use of artificial facilities constituting mere local aids to commerce, and affect commerce only incidentally. Such facilities do not require, nor admit of, uniformity of regulation. Congress not having legislated on the subject, it was competent for the state to do so. A state having power to impose charges for the use of such facilities, it has also power to determine what the charges shall be.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 Inters. Com. Rep. 351, 87 Fed. Rep. 616; *Mobile County v. Kimball*, 102 U. S. 691 (26: 238); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29: 158), 1 Inters. Com. Rep. 382; *Newport & O. Bridge Co. v. United States*, 105 U. S. 470 (26: 1143).

Congress has never attempted to regulate the operation of bridges or ferries, nor the tolls or fares on either. These matters Congress has left to the states, and the states always have regulated and controlled them.

Keokuk N. L. Packet Co. v. Keokuk, 95 U. S. 80 (24: 377); *Huse v. Glover*, 119 U. S. 543 (30: 487); *Ouachita & M. R. Packet Co. v. Aiken*, 121 U. S. 444 (30: 976), 1 Inters. Com. Rep. 379; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678 (27: 442); *Conway v. Taylor*, 66 U. S. 1 Black, 608 (17: 191).

If, by virtue of its original charter, the corporation was exempt from legislative control of its tolls, it lost the exemption by reason of

the amendment to its charter, approved January 21, 1865.

Gibbs v. Consolidated Gas Co. 180 U. S. 408 (32: 984); *Chicago L. Ins. Co. v. Needles*, 118 U. S. 588 (28: 1088); *Shields v. Ohio*, 95 U. S. 819 (24: 357); *Miller v. New York & E. R. Co.* 21 Barb. 518; *Worcester v. Norwich & W. R. Co.* 109 Mass. 108; *Greenwood v. Union Freight R. Co.* 105 U. S. 18 (26: 961).

Whatever power is dependent solely upon the grant of the charter, is abrogated by the repeal of the law which granted these special rights.

Com. v. Essex Co. 18 Gray, 289; *Miller v. New York*, 82 U. S. 15 Wall. 498 (21: 104); *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 454 (21: 204); *Maine Cent. R. Co. v. Maine*, 96 U. S. 499 (24: 886); *Union Pac. R. Co. v. United States ("Sinking Fund Cases")* 99 U. S. 700 (25: 496); *Hill v. Glasgow R. Co.* 41 Fed. Rep. 610.

There being no consideration for the act, it was a mere gratuitous concession which the state might at any time recall or disregard.

Christ Church v. Philadelphia County, 65 U. S. 24 How. 801 (16: 604); *Tucker v. Ferguson*, 89 U. S. 22 Wall. 574 (22: 816); *Louisville Gas Co. v. Citizens Gas Light Co.* 115 U. S. 688 (29: 510).

The bridge company failed to perform an express duty, which was, by the terms of its charter, made a condition of the exemption from legislative control of tolls, which it claims. By failing to perform the condition, it waived and lost the alleged exemption dependent upon it.

Rich v. Atwater, 16 Conn. 419; *Voorhees v. Jackson*, 85 U. S. 10 Pet. 471-9: 499; *Auditor v. Haycraft*, 14 Bush, 284.

The state need not accept any substitute for performance of the condition.

Maine Cent. R. Co. v. Maine, 96 U. S. 499 (24: 886); *Atty. Gen. v. Petersburg & R. R. Co.* 28 N. C. 461.

The power to fix or regulate tolls or other charges for the use of property clothed with a public interest is a power of government, continuing in its nature; and when that power has been by the state delegated to a corporation, it may be resumed at will unless the state has unequivocally contracted not to do so. There was no such contract in the original charter of the Covington & Cincinnati Bridge Company.

Stone v. Farmers Loan & T. Co. 116 U. S. 307 (29: 686); *Stone v. Illinois Cent. R. Co.* 116 U. S. 847 (29: 650); *Providence Bank v. Billings*, 29 U. S. 4 Pet. 560 (7: 955); *Charles River Bridge v. Warren Bridge*, 96 U. S. 11 Pet. 420 (9: 778); *Minot v. Philadelphia, W. & E. R. Co. ("Delaware R. Tax")* 85 U. S. 18 Wall. 206 (21: 888); *Bailey v. Maguire*, 89 U. S. 22 Wall. 215 (22: 850); *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659 (24: 1086); *Gordon v. Appeal Tax Court*, 44 U. S. 8 How. 183 (11: 529); *Piqua Branch of Bank of Ohio v. Knoop*, 57 U. S. 16 How. 869 (14: 977); *Proprietors of Passaic & H. River Bridges v. Hoboken Land & Imp. Co.* 68 U. S. 1 Wall. 116 (17: 571); *Home of the Friendless v. Rouse*, 75 U. S. 8 Wall. 480 (19: 495); *Ruggles v. Illinois*, 108 U. S. 526 (27: 812); *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174 (32: 877).

The fixing of a maximum of rates in a charter does not make a contract, nor deprive the

legislature of the power subsequently to regulate and reduce the rates.

Com. v. Easton Bank, 10 Pa. 442; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174 (32: 877).

The power to charge being coupled with the condition that the charge shall be reasonable, the state is left free to act on the subject of reasonableness within the limits of its general authority, as circumstances may require.

Munn v. Illinois, 94 U. S. 118 (24: 77); *Ruggles v. Illinois*, 108 U. S. 526 (27: 812); *Dow v. Beidelman*, 125 U. S. 680 (31: 841), 2 Inters. Com. Rep. 56; *Minneapolis & E. R. Co. v. Minnesota*, 134 U. S. 467 (38: 985), 3 Inters. Com. Rep. 224; *Chicago & G. T. R. Co. v. Wellman*, 148 U. S. 839 (38: 176); *Budd v. New York*, 148 U. S. 517 (38: 247), 4 Inters. Com. Rep. 45.

The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely.

Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659 (24: 1086); *Pennsylvania R. Co. v. Canal Comrs.* 21 Pa. 9.

Mr. Justice Brown delivered the opinion of the court:

This case involves the power of a state to regulate tolls upon a bridge connecting it with another state, without the assent of Congress, and without the concurrence of such other state in the proposed tariff.

The right of the commonwealth of Kentucky to prescribe a schedule of charges in this instance is contested, not only upon the ground that such regulation is an interference with interstate commerce, but upon the further ground that it impairs the obligation of the contract contained in the original charter of the company.

The power of Congress over commerce between the states and the corresponding power of individual states over such commerce have been the subject of such frequent adjudication in this court, and the relative powers of Congress and the states with respect thereto are so well defined, that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarkation between the powers belonging exclusively to Congress, and those in which the action of the state may be concurrent. The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all.

The first class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power, the states may authorize the construction of highways, turnpikes, railways, and canals between points in the same state, and regulate the tolls

for the use of the same (*Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 456 [22:878]), and may authorize the building of bridges over non-navigable streams, and otherwise regulate the navigation of the strictly internal waters of the state—such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other states or foreign countries. *Veazie v. Moor*, 55 U. S. 14 How. 568 [14: 545]; *United States v. The Montello*, 78 U. S. 11 Wall. 411 [20: 191], 87 U. S. 20 Wall. 430 [22: 891]. This is true notwithstanding the fact that the goods or passengers carried or traveling over such highway between points in the same state may ultimately be destined for other states, and, to a slight extent, the state regulations may be said to interfere with interstate commerce. The states may also exact a bonus, or even a portion of the earnings of such corporation, as a condition to the granting of its charter. *Society for Savings v. Cotte*, 78 U. S. 6 Wall. 594 [18: 897]; *Provident Inst. for Savings v. Massachusetts*, 73 U. S. 6 Wall. 611 [18: 907]; *Hamilton Mfg. Co. v. Massachusetts*, 78 U. S. 6 Wall. 632 [18: 904]; *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 456 [22: 678]; *Ashley v. Ryan*, post, p. 664.

Congress has no power to interfere with police regulations relating exclusively to the internal trade of the states (*United States v. De Witt*, 76 U. S. 9 Wall. 41 [19: 593]; *Patterson v. Kentucky*, 97 U. S. 501 [24: 1115]) nor can it by exacting a tax for carrying on a certain business thereby authorize such business to be carried on within the limits of a state. *License Tax Cases*, 72 U. S. 5 Wall. 463 [18: 497]. The remarks of the *Chief Justice* in this case contain the substance of the whole doctrine: "Over this [the internal] commerce and trade, Congress has no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject."

It was at one time thought that the admiralty jurisdiction of the United States did not extend to contracts of affreightment between ports of the United States, though the voyage were performed upon navigable waters of the United States. *Allen v. Newberry*, 62 U. S. 21 How. 244 [16: 110]. But later adjudications have ignored this distinction as applied to those waters. *The Belfast v. Boon*, 74 U. S. 7 Wall. 624, 641 [19: 266, 271]; *Rodd v. Hearit* ("The *Lottaanna*"), 88 U. S. 21 Wall. 558, 587 [22: 654, 665]; *Lord v. Goodall, N. & P. SS.* Co. 102 U. S. 541 [26: 224].

Under this power the states may also prescribe the form of all commercial contracts, as well as the terms and conditions upon which the internal trade of the state may be carried on. *Trade Mark Cases*, 100 U. S. 82 [25: 550].

Within the second class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots

(*Cooley v. Philadelphia Port Wardens*, 58 U. S. 12 How. 299 [18: 996]; *Pacific Mail SS. Co. v. Joliffe*, 69 U. S. 2 Wall. 450 [17: 805]; *Ex parte McNiel*, 80 U. S. 18 Wall. 236 [20: 624]; *Wilson v. McNamers*, 102 U. S. 572 [26: 234]) quarantine and inspection laws and the policing of harbors (*Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 208 [6: 23, 71]; *New York v. Miln*, 36 U. S. 11 Pet. 102 [9: 648]; *Turner v. Maryland*, 107 U. S. 88 [27: 370]; *Morgan's L. & T. R. & SS. Co. v. Louisiana Board of Health*, 118 U. S. 455 [30: 237]) the improvement of navigable channels (*Mobile County v. Kimball*, 102 U. S. 691 [26: 288]; *Escunaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678 [27: 442]; *Huse v. Glover*, 119 U. S. 543 [30: 487]) the regulation of wharfs, piers, and docks (*Cannon v. New Orleans*, 87 U. S. 20 Wall. 577 [22: 417]; *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80 [24: 877]; *Northwestern U. Packet Co. v. St. Louis*, 100 U. S. 423 [25: 688]; *Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 659 [26: 1169]; *Pittsburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691 [27: 584]; *Ouachita & M. R. Packet Co. v. Aiken*, 121 U. S. 444 [30: 976], 1 Inters. Com. Rep. 379), the construction of dams and bridges across the navigable waters of a state (*Wilson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 [7: 412]; *Cardwell v. American River Bridge Co.* 118 U. S. 205 [28: 959]; *Pound v. Turck*, 95 U. S. 459 [24: 525]), and the establishment of ferries. *Conway v. Taylor*, 66 U. S. 1 Black, 603 [17: 191].

Of this class of cases it was said by *Mr. Justice Curtis* in *Cooley v. Philadelphia Port Wardens*, 58 U. S. 12 How. 299, 318 [18: 996, 1004]: "If it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution, and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of Congressional regulations." See also *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 192, 193 [4: 547, 548]. But even in the matter of building a bridge, if Congress chooses to act, its action necessarily supercedes the action of the state. *Pennsylvania v. Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421 [15: 435]. As matter of fact, the building of bridges over waters dividing two states is now usually done by Congressional sanction. Under this power the states may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax be not laid upon the commerce itself.

But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the third class—of those laws wherein the jurisdiction of Congress is exclusive. *Brown v.*

Houston, 114 U. S. 632 [29: 257]; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465 [31: 700], 1 Inters. Com. Rep. 823. Subject to the exceptions above specified, as belonging to the first and second classes, the states have no right to impose restrictions, either by way of taxation, discrimination, or regulation, upon commerce between the states. That, while the states have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several states, they have no right to tax such commerce itself, is too well settled even to justify the citation of authorities. The proposition was first laid down in *Crandall v. Nevada*, 73 U. S. 6 Wall. 85 [18: 745], and has been steadily adhered to since. That such power of regulation as they possess is limited to matters of a strictly local nature, and does not extend to fixing tariffs upon passengers or merchandise carried from one state to another, is also settled by more recent decisions, although it must be admitted that cases upon this point have not always been consistent.

The question of the power of the states to lay down a scale of charges, as distinguished from their power to impose taxes, was first squarely presented to the court in *Munn v. Illinois*, 94 U. S. 113 [24: 77], in which a power was conceded to the state to prescribe regulations and fix the charges of elevators used for the reception, storage, and delivery of grain, notwithstanding such elevators were used for the storage of grain destined for other states. The decision was put upon the ground that elevators were property "affected with a public interest," and that from time immemorial in England, and in this country from its first colonization, it had been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. That the decision does not necessarily imply a power in the states to prescribe similar regulations with regard to railroads and other corporations directly engaged in interstate commerce is evident from the remarks of the *Chief Justice* (p. 185) in delivering the opinion of the court: "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the state of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce than the dray or the cart by which but for them grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may operate upon commerce outside its immediate jurisdiction." The principle of this case has been recently affirmed in *Budd v. New York*, 148 U. S. 517 [36: 247], 4 Inters. Com. Rep. 45, and reaffirmed in *Brass v. North Dakota*, *post*, p. 670, though not without strong opposition from a minority of the court.

4 INTER S.

In the next case, viz, that of the *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155 [24: 94], was a bill filed by the Chicago, Burlington & Quincy Railroad Company, an Illinois corporation, to restrain the prosecution of suits against it under "An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this state." The complainant was also the lessee of the Burlington & Missouri Railroad in Iowa, the two roads being connected by a bridge which crossed the Mississippi river at Burlington, thus making a continuous railroad from Chicago to Plattsburgh on the Mississippi river, in Iowa. The case was held to be covered by *Munn v. Illinois*, the road, like the warehouse in that case, being situated within the limits of a single state. "Its business," said the *Chief Justice*, "is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as interstate commerce, and, until Congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without, may be indirectly affected." In short, the case was treated as one of internal commerce only.

In the next case, viz, *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 [24: 97], it was held that under the constitution of Wisconsin, providing that all acts creating corporations within the state "may be altered or repealed by the legislature at any time after their passage," the legislature had a right to prescribe a maximum of charges to be made by the Chicago & Northwestern Railway Company for transporting persons or property within the state, or taken up outside the state and brought within it, or taken up inside and carried without. The vital question is not discussed at any length, but it was held that, until Congress acted with reference to the relations of this company to interstate commerce, it was within the power of the state of Wisconsin to regulate its affairs so far as they were of a domestic concern. These three cases were cited with approval in *Ruggles v. Illinois*, 108 U. S. 526 [27: 812], in which the power of a state to limit the amount of charges by a railroad company for fares and freight was recognized.

A similar principle, though under quite a different state of facts, was involved in *Hall v. De Cuir*, 95 U. S. 485 [24: 547], which concerned an act of the legislature of Louisiana, requiring those engaged in the transportation of passengers among the states to give all persons traveling within that state, upon vessels employed in such business, equal rights and privileges in parts of the vessel, without distinction on account of race or color. The act was held to be a regulation of interstate commerce, and, therefore, unconstitutional and void. In *Stone v. Farmers Loan & T. Co.* ("Railroad Commission Cases") 116 U. S. 307 [29: 636] it was held that the right of a state to limit the charges of a railroad company for the transportation of persons or property within its jurisdiction could not be granted away by its legislature unless by words of positive grant or words equivalent in law.

and that a statute which granted to a railroad company the right from time to time to fix and regulate the tolls and charges by them to be received for transportation did not deprive the state of its power to act upon the reasonableness of the tolls and charges so fixed and regulated. It was held that the state might, "beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi." "Nothing can be done by the government of Mississippi which will operate as a burden on the interstate business of the company or impair the usefulness of its facilities for interstate traffic. . . . The commission is in express terms prohibited by the Act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one state to another. The statute makes no mention of property taken up without the state and delivered within, nor of such as may be taken within and carried without." The court studiously avoided committing itself upon the question of the power of the commission over interstate commerce.

The prior cases were all reviewed, and the subject exhaustively considered in the *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 [30:244], 1 Inters. Com. Rep. 31, in which there came under review a statute of Illinois enacting that if any railroad company should, within that state, charge or receive for transporting passengers or freight of the same class the same or a greater sum for any distance than it does for a longer distance, it should be liable to a penalty for unjust discrimination. The defendant in that case made such discrimination in regard to goods transported over the same road or roads, from Peoria, Illinois, and from Gilman, in Illinois, to New York; charging more for the same class of goods carried from Gilman than from Peoria, the former being 86 miles nearer the city of New York than the latter, this difference being in the length of line in the state of Illinois. The court held that such transportation was commerce among the states, even as to that part of the voyage which lay within the state of Illinois, and that the regulation of such commerce was confided to Congress exclusively, under its power to regulate commerce between the states, and that the statute in question, being intended to regulate the transmission of persons or property from one state to another, was not within that class of legislation which the states may enact in the absence of legislation by Congress. In delivering the opinion of the court Mr. Justice Miller cited the prior cases, and said that it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce, which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the states in the absence of any legislation by Congress upon the same subject. He further observed that "the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the

state in which the railroad company did business to regulate or limit the amount of any of these traffic charges. The importance of that question overshadowed all others; and the case of *Munn v. Illinois* was selected by the court as the most appropriate one in which to give its opinion on that subject, because that case presented the question of a private citizen, or unincorporated partnership, engaged in the warehouse business in Chicago. . . . free from the question of continuous transportation through the several states, . . . and the question how far a charge made for a continuous transportation over several states, which included a state whose laws were in question, may be divided into separate charges for each state, in enforcing the power of the states to regulate the fares of its railroads, was evidently not fully considered." The substance of the opinion was that, if the prior cases were to be considered as laying down the principle that the states might regulate the charges for interstate traffic, they must be considered as overruled. See also *Bozman v. Chicago & N. W. R. Co.* 125 U. S. 465 [31:700], 1 Inters. Com. Rep. 823. In none of the subsequent cases has any disposition been shown to limit or qualify the doctrine laid down in the *Wabash* case, and to that doctrine we still adhere.

The real question involved here is whether this case had been distinguished from the *Wabash* case. That involved the right of a single state to fix the charge for transportation from the interior of such state to places in other states. This case involves the right of one state to fix charges for the transportation of persons and property over a bridge connecting it with another state, without the assent of Congress or such other state, and thus involving the further inquiries, first, whether such traffic across the river is interstate commerce; and, second, whether a bridge can be considered an instrument of such commerce.

The first question must be answered in the affirmative upon the authority of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 [29:158], 1 Inters. Com. Rep. 882, in which the state of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted in ferrying passengers and freight over the river Delaware between Philadelphia, in Pennsylvania, and Gloucester, in New Jersey. This traffic was held to be interstate commerce, and, inasmuch as it appeared that the ferry boats were registered in New Jersey, and were taxable there, it was held that there was no property held by the company which could be the subject of taxation in Pennsylvania, except the lease of a wharf in that state. "Congress alone," said the court (p. 204), "therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating for its own interests and products and against those of other states." If, as was intimated in that case, interstate commerce means simply commerce between the states, it must apply to all commerce which crosses the state line, regardless

of the distance from which it comes or to which it is bound, before or after crossing such state line—in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington; and while the reasons which influenced this court to hold in the Wabash case that Illinois could not fix rates between Peoria and New York may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same, and, at least in the absence of mutual or reciprocal legislation between the two states, it is impossible for either to fix a tariff of charges.

With reference to the second question, an attempt is made to distinguish a bridge from a ferry boat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 189 [6: 28, 68], to be "intercourse," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier.

Let us examine some of the cases which are supposed to countenance the doctrine that ferries and bridges connecting two states are not instruments of commerce between such states in such sense as to exempt them from state control. In *Conway v. Taylor*, 66 U. S. 1 Black, 608 [17: 191], a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that state who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side or beyond the jurisdiction of the state. The opinion, however, did not pass upon the question of the right of one state to regulate the charge for ferryage, nor does it follow that because a state may authorize a ferry or bridge from its own territory to that of another state, it may regulate the charges upon such bridge or ferry. A state may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the state. It is true the states have assumed the right in a number of instances, since the adoption of the Constitution, to fix the rates or tolls upon in-

terstate ferries and bridges, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several states. But we are not aware of any case in this court where such right has been recognized. Of recent years it has been the custom to obtain the consent of Congress for the construction of bridges over navigable waters, and by the seventh section of the Act of September 19, 1890 (26 Stat. at L. 426, 454), it is made unlawful to begin the construction of any bridge over navigable waters, until the location and plan of such bridge have been approved by the Secretary of War, who has also been in frequent instances authorized to regulate the tolls upon such bridges, where they connected two states. So, too, in *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365 [27: 419], it was held that a state had the power to impose a license fee, either directly or through one of its municipal corporations, upon ferry keepers living in the state, for boats which they owned and used in conveying from a landing in the state passengers and goods across a navigable river to another state. It was said that "the levying of a tax upon vessels or other watercraft, or the exaction of a license fee by the state within which the property subject to the exaction has its *situs*, is not a regulation of commerce within the meaning of the Constitution of the United States." Obviously the case does not touch the question here involved. Upon the other hand, however, it was held in *Moran v. New Orleans*, 112 U. S. 69 [18: 658], that a municipal ordinance of New Orleans imposing a license tax upon persons owning and running tow boats to and from the Gulf of Mexico was void as a regulation of commerce.

It is clear that the state of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own state. It is obvious that the bridge could not have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil; and without authority from that state to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the state of Kentucky has the right to regulate the travel upon such bridge and fix the tolls, the state of Ohio has the same right, and so long as their action is harmonious there may be no room for friction between the states; but it would scarcely be consonant with good sense to say that separate regulations and separate tariffs may be adopted by each state (if the subject be one for state regulation), and made applicable to that portion of the bridge within its own territory. So far as the matter of construction is concerned, each state may proceed separately by authorizing the company to condemn land within its own territory, but in the operation of the bridge their action must be joint or great confusion is likely to result. It may be for the interest of Kentucky to add to its own population by encouraging residents of Cincinnati to purchase homes in Covington, and

to do this by fixing the tolls at such a rate as to induce citizens of Ohio to reside within her borders. It might be equally for the interest of Ohio to prescribe a higher rate of toll to induce her citizens to remain and fix their homes within their own state, and as persons living in one state and doing business in another would necessarily have to cross the bridge at least twice a day, the rates of toll might become a serious question to them. Congress, and Congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions. The authority of the state, so frequently recognized by this court, to fix tolls for the use of wharves, piers, elevators, and improved channels of navigation, has always been limited to such as were exclusively within the territory of a single state, thus affecting interstate commerce but incidentally, and cannot be extended to structures connecting two states without involving a liability of controversies of a serious nature. For instance, suppose the agent of the Bridge Company in Cincinnati should refuse to recognize tickets sold upon the Kentucky side, enabling the person holding the ticket to pass from Ohio to Kentucky, it would be a mere *brutum fulmen* to attempt to punish such agent under the laws of Kentucky. Or, suppose the state of Ohio should authorize such agent to refuse a passage to persons coming from Kentucky, who had not paid the toll required by the Ohio statute; or that Kentucky should enact that all persons crossing from Kentucky to Ohio should be entitled to a free passage, and thus attempt to throw the whole burden upon persons crossing in the opposite direction. It might be an advantage to one state to make the charge for foot passengers very low and the charge for merchandise very high, and for the other side to adopt a converse system. One scale of charges might be advantageous to Kentucky in this instance, where the larger city is upon the north side of the river, while a wholly different system might be to her advantage at Louisville, where the larger city is upon the south side.

We do not wish to be understood as saying that, in the absence of Congressional legislation or mutual legislation of the two states, the company has the right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case. As was said in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 217 [29: 158, 166], 1 Inters. Com. Rep.

382: "freedom from such imposition does not of course imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the states secured under the commercial power of Congress." Nor are we to be understood as passing upon the question whether, in the absence of legislation by Congress, the states may by reciprocal action fix upon a tariff which shall be operative upon both sides of the river.

We do hold, however, that the statute of the commonwealth of Kentucky in this case is an attempted regulation of commerce which it is not within the power of the state to make. As was said by *Mr. Justice Miller* in the *Wabash* case: "It is impossible to see any distinction in its effect upon commerce of either class between a statute which regulates the charges for transportation and a statute which levies a tax for the benefit of the state upon the same transportation."

The judgment of the court of appeals of Kentucky is, therefore, reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

Mr. Chief Justice Fuller, Mr. Justice Field, Mr. Justice Gray and Mr. Justice White concurred in the judgment of reversal, for the following reasons:

The several states have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one state, or between two adjoining states, subject to the paramount authority of Congress over interstate commerce.

By the concurrent acts of the legislature of Kentucky in 1846, and of the legislature of Ohio in 1849, this bridge company was made a corporation of each state, and authorized to fix rates of toll.

Congress, by the Act of February 17, 1865, chap. 39, declared this bridge "to be, when completed, in accordance with the laws of the states of Ohio and Kentucky, a lawful structure;" but made no provision as to tolls; and thereby manifested the intention of Congress that the rates of toll should be established by the two states. 13 Stat. at L. 481.

The original acts of incorporation constituted a contract between the corporation and both states, which could not be altered by one state without the consent of the other.

COVINGTON & CINCINNATI ELEVATED RAILROAD & TRANSFER & BRIDGE COMPANY, *Plff. in Err.*,v.
COMMONWEALTH OF KENTUCKY.

(See S. C. 154 U. S. 224, 38 L. ed. 970.)

The Kentucky law of 1890 fixing the tolls and fare over the bridge connecting that state and Ohio and spanning the Ohio river at Cincinnati, is in conflict with the interstate commerce clause of the Constitution.

[No. 1043.]

Argued Jan. 26, 29, 30, 1894. Reargued April 25, 1894. Decided May 26, 1894.

IN ERROR to the Court of Appeals of the State of Kentucky, affirming the judgment of the criminal court of Kenton county, in that state, adjudging the defendant the above-named Bridge Company guilty, and imposing a fine for taking illegal tolls and fares on the bridge spanning the Ohio river, between the states of Kentucky and Ohio, contrary to a law of Kentucky. *Reversed, and case remanded for further proceedings.*

Messrs. Wm. H. Jackson and W. H. Wadsworth for plaintiff in error, on both arguments.
Messrs. Wm. Goebel and Wm. J. Hendrick, Atty. Gen. of Kentucky, for defendant in error, on both arguments.

Mr. Justice Brown delivered the opinion of the court:

This case differs from the last only in the fact that the plaintiff in error was not incorporated until 1886, and subsequently to a general law of the state declaring that all charters and grants of or to corporations shall be subject to amendment or repeal at the will of the legislature. Conceding that these words became a part of its charter, and hence that no contract was impaired by the legislation of 1890, such legislation is still open to the objection found to exist in the former case, that

it is in conflict with the interstate commerce clause of the Constitution.

The judgment of the court of appeals of Kentucky is, therefore, reversed, and the case remanded to that court for further proceedings.

Mr. Chief Justice Fuller, Mr. Justice Field, Mr. Justice Gray and Mr. Justice White concurred in the judgment of reversal, for the like reasons as in the case of *Covington & C. Bridge Co. v. Kentucky*, ante, p. 649.

J. W. BRENNAN, *Plff. in Err.*, v. CITY OF TITUSVILLE.

(See S. C. 153 U. S. 289, 38 L. ed. 719.)

1. A manufacturer of goods, which are legitimate subjects of commerce, who carries on his business of manufacturing in one state can send an agent into another state to solicit orders for the products of his manufactory without paying to the latter state a tax for the privilege of thus trying to sell his goods.
2. A regulation as to the manner of sale of subjects of commerce whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, is a regulation of commerce.
3. Whatever may be the reason given to justify, or the power invoked to sustain the act of the state, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained.
4. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States government created thereby.
5. Nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of Congress.
6. A license tax required for the sale of goods is in effect a tax upon the goods themselves.
7. A license tax imposed by a state upon an agent of a citizen of another state for the privilege of selling his goods in the former state, is a direct burden on interstate commerce, and therefore beyond the power of the state.
8. No state can levy a tax on interstate commerce in any form, whether by way of duties laid on

NOTE.—As to power of Congress to regulate commerce, see note to *Gibbons v. Ogden*, 5:23, and to *Brown v. Maryland*, 6:378.

As to tonnage tax, see note to *Inman S.S. Co. v. Tinker*, 24:118.

As to interstate commerce; regulation of; power of

Congress; how far exclusive, see note to *Gloucester Ferry Co. v. Pennsylvania*, 22:158.

As to power of Congress to control commerce; state statute when valid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid, see note to *Harmon v. Chicago*, 37:216.

Mem. References in notes are to U.S. Repts. L. ed.

the transportation of the subjects of that commerce, or on the receipts derived from that trans-

portation, or on the occupation or business of carrying it on.

[No. 902.]

Submitted Jan. 5, 1894. Decided April 30, 1894.

IN ERROR to the Supreme Court of the State of Pennsylvania, to review a judgment of that court, affirming the judgment of the court of common pleas of Crawford county, in that state, sentencing J. W. Brennan to pay a fine of \$25, and costs for the violation of an ordinance imposing a tax for a license for soliciting orders for and selling goods in the city of Titusville. *Reversed, and case remanded for further proceeding.*

Statement by Mr. Justice Brewer:

On May 13, 1890, plaintiff in error was convicted in the court of the city recorder of the city of Titusville, Pennsylvania, of a violation of an ordinance, entitled "An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville," and sentenced to pay a fine of \$25 and costs. From that sentence he appealed to the court of common pleas of Crawford county. In that court the case was tried upon the following agreed statement of facts:

"1. J. A. Shephard is a manufacturer of picture frames and maker of portraits, residing in Chicago, in the state of Illinois, of which state he is a citizen and in which city he has his manufactory and place of business.

"2. In the prosecution of said business he employs agents who, under his direction, solicit orders for pictures and picture frames in the state of Pennsylvania and in other states of the Union, by going personally to residents and citizens of said state of Pennsylvania and other states and exhibiting samples of his pictures and frames, going, when necessary, from house to house in said state of Pennsylvania and other states.

"3. The defendant, J. W. Brennan, was an agent of the said J. A. Shephard, employed by him to travel and solicit orders for said pictures and frames in the manner stated, upon a salary and also upon commission upon the amount of his sales, at the time of his arrest, May 25, 1889, upon a warrant issued by the authorities of the city of Titusville, in the state of Pennsylvania.

"4. Upon receiving orders for pictures and picture frames, the agents of the said J. A. Shephard forwarded the same to him at Chicago, in the state of Illinois, where the goods were made, and from there shipped by said J. A. Shephard to the purchasers in Titusville, in the state of Pennsylvania, by railroad freight and express, and the price of said goods was collected and forwarded by the express companies and sometimes by the agents to said Shephard, at Chicago, in the state of Illinois. J. W. Brennan, the agent employed by J. A. Shephard, was engaged in conducting the business in the manner stated at the time of his arrest, May 25, 1889. The said J. W. Brennan, at the time of his arrest and before, had not been otherwise

employed than as stated, and was acting solely for the said Shephard.

"5. The city of Titusville had enacted an ordinance, in force at the date of the arrest of said J. W. Brennan, which in the 12th section thereof provides in words and figures as follows:

"That all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the said treasurer therefor the following sums, according to the time for which said license shall be granted, viz: For one day, one dollar and fifty cents; one week, \$5.00; three months, \$10.00; one year, twenty-five dollars; provided, that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers residing and doing business in said city."

"And the said ordinance further provides, in the 18th section thereof, as follows:

"That any person or persons failing to obtain a license as required by this ordinance shall, upon conviction thereof before any magistrate, alderman, or justice of the peace of said city, forfeit and pay a fine not exceeding one hundred dollars, nor less than the amount required for a license to such person or persons, together with twenty per cent added as a penalty, with costs of suit; and in default of payment thereof shall undergo a confinement in the city or county prison for a period not exceeding ninety days, or perform hard labor on the streets or elsewhere in said city not exceeding such period."

"6. At the time of his arrest the defendant Brennan was not and had not been selling by sample to manufacturers or licensed merchants or dealers residing in said city of Titusville, and was not, within the provision of the 12th section of said ordinance, soliciting to such excepted persons.

"7. The defendant, J. W. Brennan, at the time of his arrest had not obtained a license as required by said ordinance, and had not paid to the treasurer of the city of Titusville the license fee provided by said ordinance.

"8. The defendant was arrested, tried, convicted, and sentenced to pay a fine of \$25 and costs of suit under said ordinance, on the 29th day of May, 1889, before W. M. Dame, city recorder of the city of Titusville.

"If the court should be of opinion upon the facts stated that the defendant, J. W. Brennan, was liable to take out a license and pay the license fee provided by said ordinance, then judgment to be entered for the plaintiff, the city of Titusville, for \$25 and costs of suit. If the court should be of opinion that said Brennan was not so liable then

judgment to be entered for the defendant, with costs of suit."

Upon these facts, on May 20, that court entered judgment against him for \$25 and costs. From that judgment he appealed to the supreme court of the state, which court, on October 5, 1891, affirmed the judgment. Thereupon he sued out a writ of error from this court.

Mr. Roger Sherman, for plaintiff in error:

Until the sale has been completed in the state to which the article has been imported, and it has thereby become mingled in the common mass of property within that state, there exists no power in the state, nor in any of her municipalities, to interfere, by any action with the free exportation of the commodity.

Robbins v. Shelby County Taxing Dist. 120 U. S. 497 (80: 697), 1 Inters. Com. Rep. 45; *Leisy v. Hardin*, 135 U. S. 100 (84: 128), 3 Inters. Com. Rep. 86.

The business carried on was strictly within the rule prohibiting state or municipal interference.

A state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce.

Rothermel v. Meyerle, 3 Inters. Com. Rep. 315, 9 L. R. A. 366, 136 Pa. 250-256.

This was an indirect tax upon Mr. Shephard's business and property.

Welton v. Missouri, 91 U. S. 275 (23: 347); *Walling v. Michigan*, 116 U. S. 446 (29: 691); *McCall v. California*, 136 U. S. 104 (84: 891), 3 Inters. Com. Rep. 181; *Minnesota v. Barber*, 136 U. S. 314 (84: 455), 3 Inters. Com. Rep. 185; *Patterson v. Kentucky*, 97 U. S. 501 (24: 1115); *Crowley v. Christensen*, 137 U. S. 86 (84: 620); *Brimmer v. Rebman*, 138 U. S. 78 (84: 862), 3 Inters. Com. Rep. 485.

Mr. George A. Chase, for defendant in error:

All rights are held subject to the police power of the state.

Boston Beer Co. v. Massachusetts, 97 U. S. 25 (24: 989.)

The police power extends to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects.

Barbier v. Connolly, 113 U. S. 27 (28: 923).

The 14th Amendment was not designed to interfere with the power of the state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity.

Hayes v. Missouri, 120 U. S. 68 (30: 578); *Powell v. Pennsylvania*, 127 U. S. 678 (32: 253); *Munn v. Illinois*, 94 U. S. 118 (24: 77); *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (35: 613), 3 Inters. Com. Rep. 595.

The authority of the states over commerce not wholly internal, particularly in respect to the police power, and their power to tax the

subjects of interstate commerce is evidenced by the recent decisions of this court in several important cases.

Maine v. Grand Trunk R. Co. 142 U. S. 217 (35: 994), 3 Inters. Com. Rep. 807; *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326 (30: 1200); *Horn Silver Min. Co. v. New York*, 143 U. S. 805 (36: 164), 4 Inters. Com. Rep. 57; *Budd v. New York*, 143 U. S. 517 (36: 247), 4 Inters. Com. Rep. 45.

The fee required to be paid by the ordinance under which this suit originated is not a tax, in the common acceptance of that term, but a license fee.

Cooley, Taxn. 386; *Burroughs, Taxn.* § 79; *Cooley, Const. Lim.* 202, and note.

If it be a license fee or license tax it cannot be a regulation of commerce.

License Tax Cases, 73 U. S. 5 Wall. 471 (18: 500); *Osborne v. Mobile*, 83 U. S. 16 Wall. 479 (21: 470); *Ward v. Maryland*, 79 U. S. 12 Wall. 418 (20: 449).

It is competent for the legislature to grant a city or town power to require the payment of money as the condition of exercising particular employment. This is not in the nature of a tax which must be general, but of an excise on special vocations.

Dill. Mun. Corp. (4th ed.) § 357, note 3 and cases cited.

This power is recognized and affirmed by the supreme court of Pennsylvania in several cases.

Warren Borough v. Geer, 117 Pa. 207; *Com. v. Gardner*, 7 L. R. A. 666, 133 Pa. 284; *Titusville v. Brennan*, 14 L. R. A. 100, 143 Pa. 642.

Mr. Justice Brewer delivered the opinion of the court:

The question in this case is whether a manufacturer of goods, which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one state can send an agent into another state to solicit orders for the products of his manufactory without paying to the latter state a tax for the privilege of thus trying to sell his goods.

It is true, in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the state can tax for the privilege of selling to one class it can for selling to another, or to all. In either case it is a restriction on the right to sell, and a burden on lawful commerce between the citizens of two states. It is as much a burden upon commerce to tax for the privilege of selling to a minister as it is for that of selling to a merchant. It is true, also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, is surely a regulation of commerce. It must be borne in mind that the goods which the defendant was engaged in selling, to wit, pictures and pictures frames, are open to no condemnation, and are unchallenged subjects of commerce. There is no charge of dealing in obscene or indecent pictures, or that the pictures, or the frames,

were in any manner dangerous to the health, morals, or general welfare of the community. It must also be borne in mind that the ordinance is not one designed to protect from imposition and wrong either minors, habitual drunkards, or persons under any other affliction or disability. There is no discrimination except between manufacturers and licensed merchants on the one hand, and the rest of the community on the other, and unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants it cannot be to tax for the privilege of selling to the rest of the community. The same observation may also be made in respect to the places and manner in which the sales were charged to have been made. It is as much within the scope of the police power to restrain parties from going to a store or manufactory as from going to a dwelling-house for the purposes of making a sale. We do not mean to say that none of these matters to which we have referred are within the reach of the police power; but simply that the conditions on the one side are no more within its reach than those on the other, so that if, under the excuse of an exercise of the police power, this ordinance can be sustained, and sales in the manner therein named be restricted, by an equally legitimate exercise of that power almost any sale could be prevented.

But again, this license does not purport to be exacted in the exercise of the police but rather of the taxing power. The statute under which the ordinance in question was passed is found in Laws of Pennsylvania, 1874, pages 280 to 271. Clause 4 of section 20, page 289, grants authority "to levy and collect license tax on . . . hawkers, peddlers, . . . merchants of all kinds, . . . and regulate the same by ordinance."

The ordinance itself is entitled "An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville," and the special section requires a license for transacting business, the license being graded in amount by the time for which it is obtained. This license, therefore, the failure to take out which is the offense complained of, and for which defendant was sentenced, is a license for "general revenue purposes" within the very declarations of the ordinance. Even if those declarations had been the reverse, and the license in terms been declared to be exacted as a police regulation, that would not conclude this question, for whatever may be the reason given to justify, or the power invoked to sustain the act of the state, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained. Thus, in *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661 [29: 516, 520], this court, by Mr. Justice Harlan, said:

"Definitions of the police power must, however, be taken, subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

4 INTER 8.

"Illustrations of interference with the rightful authority of the general government by state legislation which was defended upon the ground that it was enacted under the police power, are found in cases where enactments concerning the introduction of foreign paupers, convicts, and diseased persons, were held to be unconstitutional, as conflicting, by their necessary operation and effect, with the paramount authority of Congress to regulate commerce with foreign nations, and among the several states. In *Henderson v. Wickham*, 92 U. S. 259 [23: 543], the court, speaking by Mr. Justice Miller, while declining to decide whether in the absence of action by Congress, the states can, or how far they may, by appropriate legislation protect themselves against actual paupers, vagrants, criminals, and diseased persons, arriving from foreign countries, said, that no definition of the police power, and 'no urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' (p. 271.) *Chy Lung v. Freeman*, 92 U. S. 275 [23: 550]. And in *Hannibal & St. J. R. Co. v. Huse*, 95 U. S. 465 [24: 527], Mr. Justice Strong, delivering the opinion of the court said that 'the police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution.'"

In *Walling v. Michigan*, 116 U. S. 446, 460 [29: 691, 695], in the opinion delivered by Mr. Justice Bradley, it was said: "The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States government created thereby."

In *Leisy v. Hardin*, 135 U. S. 100, 108 [34: 128, 132], 8 Inters. Com. Rep. 36, Mr. Chief Justice Fuller commenced the opinion of the court with this general statement of the law applicable to questions of this kind:

"The power vested in Congress 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is coextensive with the subject on which it acts and cannot be stopped at the external boundary of a state, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 [6: 23]; *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 [6: 678]."

"And while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to Congress by the Constitution

is not within the jurisdiction of the police power of the state, unless placed there by congressional action."

And, in the still later case of *Crutcher v. Kentucky*, 141 U. S. 47, 59 [35: 649, 652], Mr. Justice Bradley referred to the matter in these words:

"But the main argument in support of the decision of the court of appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the state. But it does not follow that everything which the legislature of a state may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce."

So in the case of *Minnesota v. Barber*, 136 U. S. 313 [34: 455], 3 Inters. Com. Rep. 185, in which a law of the state of Minnesota, ostensibly a law for inspection of meats, was declared unconstitutional, the court distinguished in the opinion by Mr. Justice Harlan between that which is mere inspection and in the legitimate exercise of the police power, and that which, under the guise of inspection, is a direct burden upon and obstruction to interstate commerce. Very similar to this was the case of *Brimmer v. Rebmam*, 138 U. S. 78 [34: 862], 3 Inters. Com. Rep. 485, in which also an inspection statute of the state of Virginia was set aside for the same reason.

Because a license may be required in the exercise of the police power it does not follow that every license rests for its validity upon such police power. A state may legitimately make a license for the privilege of doing a business one means of taxation, and that such was the purpose of this ordinance is obvious, not merely from the fact that in the title it is declared to be for "general revenue purposes," but also from the further fact that, so far as we are informed by any quotations from or references to any part of the ordinance, there is no provision for any supervision, control, or regulation of any business for which by the ordinance a license is required. In other words, so far as this record discloses, this ordinance sought simply to make the various classes of business named therein pay a certain tax for the general revenue of the city.

Even if it be that we are concluded by the opinion of the supreme court of the state that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the state; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free.

4 INTER S.

That this license tax is a direct burden on interstate commerce is not open to question. In the early and leading case of *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 444 [6: 678, 687], in which a state law requiring an importer to take out a license and pay \$50 before he should be permitted to sell a package of imported goods, was adjudged in conflict with the commerce clause in the national Constitution. Chief Justice Marshall said:

"But if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more."

"It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made."

In *Welton v. Missouri*, 91 U. S. 275, 278 [23: 347, 348], Mr. Justice Field said:

"Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves."

In *Leloup v. Mobile*, 137 U. S. 640, 645 [32: 311, 313], 2 Inters. Com. Rep. 134, are these words from Mr. Justice Bradley:

"Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a state may lawfully exact it it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the state is enabled to say that it shall not be carried on in this way, and to that extent to regulate it.

These questions of interference by state regulations with interstate commerce have been frequently before this court, and it may not be unwise to examine a few of them. *Welton v. Missouri*, 91 U. S. 275 [23: 347], presented these facts: Welton was indicted and convicted for acting as a peddler under a statute defining a peddler to be one "going from place to place to sell" goods not the growth, produce, or manufacture of the state, and prohibiting any one from peddling without a license. The conviction was set aside by this court. It is true that the case turned largely upon the act of discrimination

between products of other states and those of Missouri, but nevertheless the decision is an adjudication that the imposition of a license tax on the peddling of goods is a regulation of commerce.

Robbins v. Shelby County Taxing Dist. 120 U. S. 489 [90: 694], 1 Inters. Com. Rep. 45, was a case closely in point. Robbins was engaged in soliciting in the city of Memphis, Tenn., the sales of goods for a Cincinnati firm, exhibiting samples for the purpose of effecting such sales, his employment being that which is usually denominated that of a drummer. This business was declared by a statute of Tennessee to be a privilege for which a license tax was required. Robbins was convicted of a violation of that statute. The statute made no discrimination between those who represented business houses out of the state and those representing like houses within the state. There was, therefore, no element of discrimination in the case, but, nevertheless, the conviction was set aside by this court on the ground that whatever the state might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the state, it could not impose upon those who acted as drummers for business houses outside of the state (and who were, therefore, engaged in interstate commerce) any burden by way of a license tax. The opinion by *Mr. Justice Bradley* is elaborate and enters fully into a discussion of the question, citing many authorities. It affirms in the strongest language the exclusive power of Congress over interstate commerce; that its failure to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and that whatever may be the extent to which the police power of the state can go, it cannot go so far as to uphold any regulations directly affecting interstate commerce.

In the case of *Leloup v. Mobile*, 127 U. S. 640 [32: 311], 2 Inters. Com. Rep. 184, a license tax sought to be imposed by the state upon a telegraph company engaged in interstate commerce, was declared beyond the powers of the state.

Asher v. Texas, 128 U. S. 129 [32: 868], 2 Inters. Com. Rep. 241. In that case, a statute requiring from "every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax of \$35" was declared inoperative so far as it affected one soliciting orders for a business house in another state, and the case of *Robbins v. Shelby County Taxing Dist.* was expressly reaffirmed.

The same doctrine was applied in *Stoutenburgh v. Hennick*, 129 U. S. 141 [32: 637], to the case of an agent of a Maryland business house soliciting orders in the District of Columbia without having taken out a license there, as required by an act of the legislative assembly of the District of Columbia.

In *Lyng v. Michigan*, 185 U. S. 161, 166 [34: 150, 153], 8 Inters. Com. Rep. 143, it was said:

"We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties

laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In *McCall v. California*, 186 U. S. 104 [34: 391], 8 Inters. Com. Rep. 181, it appeared that McCall was an agent in San Francisco, California, engaged in soliciting business for an Eastern railroad corporation, but not engaged in selling tickets for that company, or receiving, or paying out, money on its account, yet it was held that he was engaged in interstate commerce, and the license tax imposed upon him for the privilege of doing such business was unconstitutional. *Mr. Justice Lamar*, reviewing the prior cases and replying to the objection that this only indirectly affected the commerce of the road, said (p. 111 [393]):

"The test is, was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent."

In *Orutcher v. Kentucky*, 141 U. S. 47 [35: 649], an act of the state of Kentucky which forbade the agent of an express company, not incorporated by the laws of that state, from carrying on business without first obtaining a license from the state, and, as preliminary thereto, that he should satisfy the auditor of the state that the company he represented was possessed of an actual capital of at least \$150,000, was held to be a regulation of commerce and invalid. *Mr. Justice Bradley*, speaking for the court, observed (p. 61 [658]):

"The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as at give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void."

Within the reasoning of these cases it must be held that the license tax imposed upon the defendant was a direct burden on interstate commerce, and was, therefore, beyond the power of the state.

The case of *Picklen v. Shelby County Taxing Dist.* 145 U. S. 1 [36: 601], 4 Inters. Com. Rep. 79, is no departure from the rule of decision so firmly established by the prior cases. At least, no departure was intended, though as shown by the division in the court, and by the dissenting opinion of *Mr. Justice Harlan*,

the case was near the boundary line of the state's power. In that case the plaintiffs were in a general commission business, not acting for any particular firm within or without the state. Of the power of a state to impose a license tax upon such a general business there can be no question. The license required by the statute was \$50 per annum, plus .10 on every \$100 of capital invested, or, if no capital was invested, 24 per cent on the gross yearly commissions, and at the time of taking out the license the licensees were required to give bond to make return and pay such 24 per cent at the end of the year. The plaintiffs, for the year 1887, paid each the sum of \$50, and having no capital, executed bonds for the return and payment of the 24 per cent. At the end of the year 1887 they failed to make such return and payment, and the authorities refused to issue new licenses for the succeeding year until that was done. Plaintiffs' contention was that, as to one of them, all, and as to the others, most, of their commissions were received on sales of goods forwarded by non-resident parties. On that ground they refused to perform the stipulation of their bonds. It was held that the tax was an entirety, and was not affected by the variable and adventitious results of business from year to year. It could hardly be contended that if the license tax exacted in advance for the privilege of engaging in such business was a fixed sum, a party paying the tax could, on a failure to secure and do any business, recover the tax so paid, for the tax is not for the business done, but for the privilege of engaging in business. So, when the plaintiffs in that case applied for their licenses at the beginning of the year they assumed the whole liability imposed by the state. That all of it was not paid at once did not affect

the measure of liability. Suppose the tax, a fixed sum, had been payable one half at the commencement and the other half at the close of the year, would it be thought that, having paid the first half at the commencement of the year, they could resist payment of the second half on the ground that half of their commissions were received on goods shipped from outside the state? In other words, the tax imposed was for the privilege of doing a general commission business within the state, and whatever were the results peculiarly to the licensees, or the manner in which they carried on business, the fact remained unchanged that the state had, for a stipulated price, granted them this privilege. It was thought by a majority of the court that to release them from the obligations of their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the state therefor. In the opinion in that case, by the Chief Justice, the authorities which are referred to in this opinion, were cited, and the general rule was announced as is here stated. We only refer thus at length to that case to show the distinction between it and this case, and to notice that in the opinion was reaffirmed the proposition that "no state can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on."

For these reasons the judgment of the supreme court of the state of Pennsylvania is reversed, and the case remanded for further proceedings in conformity with this opinion.

OSSIAN D. ASHLEY ET AL., *Pliffs. in Err.*,

v.

DANIEL J. RYAN, Secretary of State of the State of Ohio.

(See S. C. 153 U. S. 496, 38 L. ed. 778.)

1. A writ of error to a state court brings before this court only the Federal questions in the case.
2. A state, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise in either case implies a

submission to the conditions without which the franchise could not have obtained.

3. A state has the right to determine upon what conditions its laws as to the consolidation of corporations may be availed of.
4. The exaction of a charge by a state for the filing of articles of consolidation of several railroad companies forming a connecting line, only one of which is a corporation of the state as a condition

NOTE.—As to jurisdiction of Federal over state courts: necessity of Federal question; what constitutes Federal question, see note to Hamblin v. Western Land Co. 37: 287.

As to corporations, when deemed citizens or persons, see note to United States v. Amedy, 6: 502.

As to when consolidation dissolves former companies, see note to Shields v. Ohio, 24: 357.

As to forfeiture of franchises of, for misuse, nonuse, or abuse, see note to Chicago L. Ins. Co. v. Needles, 28: 1084.

As to when taxation of stock or shares in corpora-

tion impairs obligation of contracts, see note to Providence Bank v. Billings, 7: 980.

As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty or Constitution, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to review decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 160.

Mem.—References in note are to U. S. Repts. L. ed.

imposed by the state upon the taking of corporate being or the exercise of corporate franchises, constitutes no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and its enforcement involves no attempt on the part of the state to extend its taxing power beyond its territorial limits.

5. The law of Ohio requiring a corporation to pay

the secretary of state for filing articles of agreements of consolidation of corporations a percentage on the capital stock of the new consolidated corporation created by such articles, is valid and constitutional when applied to the consolidation of foreign corporations with a domestic corporation of the state forming a continuous line of railroad through several states.

[No. 888.]

Argued and Submitted April 26, 1894. Decided May 14, 1894.

IN ERROR to the Supreme Court of the State of Ohio, to review a judgment of that court, affirming the judgment of the Circuit Court of Franklin County, Ohio, affirming the judgment of the Court of Common Pleas of said county, sustaining a demurrer to the petition in and dismissing an action brought by Oestian D. Ashley *et al.*, plaintiffs, against Daniel J. Ryan, secretary of the state of Ohio, defendant, to restrain the defendant from paying into the treasury of the state certain moneys, paid him as a fee for filing in his office articles of agreement of consolidation of certain railway companies which the plaintiffs claim had been wrongfully exacted of them, and which had been paid under protest, and also to recover the moneys so paid for said fee, over and above \$700. *Affirmed.*

Statement by Mr. Justice White:

The Wabash, St. Louis & Pacific Railroad Company, which owned and operated lines running through the states of Ohio, Indiana, Illinois, Missouri, and Michigan, having defaulted in the payment of interest on its bonds, foreclosure proceedings were commenced in the Federal courts for the sale of its property. Subsequently a committee was entrusted with the duty of buying in the property. After purchase by the committee the property in the several states was transferred to companies incorporated in those states. The following were the companies thus organized, and to whom the necessary transfers were respectively made:

In Ohio: The Toledo & Western; capital stock, \$700,000.

In Michigan: The Detroit & State Line Wabash; capital stock, \$300,000.

In Indiana: The Wabash Eastern, of Indiana; capital stock, \$9,000,000.

In Illinois: The Wabash Eastern, of Illinois; capital stock, \$12,000,000.

In Missouri: The Wabash Western; capital stock, \$30,000,000.

Thereafter these several companies were consolidated into one. Section 1486 of the Revised Statutes of Ohio contains, among other provisions, the following:

"The secretary of state shall hereafter charge and collect the following fees for official services:

"1. For filing the articles of incorporation of any corporation whose capital stock is ten thousand dollars or under, ten dollars; of a corporation whose capital stock is over ten thousand dollars, one tenth of one per cent upon the authorized capital stock of such corporation.

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"2. For filing a certificate of increase of the capital stock of any corporation having a capital stock where the amount of the increase is ten thousand dollars or under, ten dollars; where the amount of increase is over ten thousand dollars, one tenth of one per cent upon the proposed amount of increased capital.

"3. For filing articles of agreements of consolidation of corporations having a capital stock, the following fees shall be collected by the secretary of state: Said articles of agreements of consolidation shall be treated as the articles of incorporation of the new consolidated corporations created by such articles or agreements of consolidation, and the fees for filing such articles or agreements of consolidation shall be the same in each case as is hereinbefore set forth for the filing of articles of incorporation of a corporation having the same amount of capital stock, as is provided for by the articles or agreements of consolidation for the new consolidated corporation, created by any such articles or agreement of consolidation; and in fixing the amount of such fees, no credit shall be allowed for fees previously paid by any of the constituent corporations, parties to such consolidation, but the same shall be determined solely by the amount of capital stock of the new corporation created by such articles or agreements of consolidation."

By another provision of the Revised Statutes of Ohio, the fees to be collected under the foregoing law were required to be paid by the secretary of state into the treasury.

The plaintiffs in error presented their articles of consolidation, for filing, to the secretary of state, and tendered \$700, that being one tenth of one per cent on the capital stock of the Toledo & Western Railroad, the only Ohio corporation which had entered into the consolidation. The secretary refused to file the proffered articles for that amount, and demanded \$52,000, or one tenth of one per cent of the par value of the entire stock of the consolidated corporation. This amount was paid under protest, and suit was at once brought to recover all the excess paid over and above the \$700 originally tendered, upon the ground that such excess had been collected without warrant of law; that it constituted a tax for the general purposes of revenue, and, therefore, its exaction was contrary to the constitution and laws of the state of Ohio; and, moreover, that its enforcement would violate the Constitution of the United States, because it would be an attempt on the part of the state of Ohio to lay a burden on interstate commerce, or the instruments of such commerce

and to give an extraterritorial force to its taxing power.

Pending the controversy, an injunction issued restraining the secretary of state from covering into the state treasury the sum which had been paid him under protest. The cause was ultimately taken to the supreme court of the state of Ohio, and by that court the judgment which maintained the validity of the charge was affirmed. The plaintiffs in error thereupon brought the cause here for review.

Mr. Henry Crawford, for plaintiffs in error:

Illegal fees and taxes paid under compulsion, can be recovered back.

Baker v. Cincinnati, 11 Ohio St. 534.

A payment may be, under circumstances, involuntary and an action brought to recover the money, when the position or interests of the party are such as to require from another the performance of a duty enjoined by law and he is illegally compelled to pay money to induce such performance.

Stephan v. Daniels, 27 Ohio St. 527; *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 521; *Wilson v. Felton*, 40 Ohio St. 306.

Taxes illegally assessed may always be recovered back, if the collector understands from the payer that the tax is regarded as illegal and that suit will be instituted to compel the refunding.

Erskine v. Van Arsdale, 82 U. S. 15 Wall. 75 (21: 63); *Shelton v. Platt*, 139 U. S. 595 (35: 276); *Harmon v. Chicago*, 147 U. S. 896 (37: 216).

The law under which the charge was exacted is not a police regulation, but an attempted exercise of the taxing power of the state, and its construction and validity must be adjudged exclusively on that theory.

Marmet v. State, 45 Ohio St. 68; *State v. Hipp*, 38 Ohio St. 199; *Adler v. Whitbeck*, 44 Ohio St. 539; *Pittsburg, C. & St. L. R. Co. v. State*, 49 Ohio St. 189; *United States v. Vassar ("License Tax Cases")* 72 U. S. 5 Wall. 462 (18: 497); *Southern SS. Co. v. New Orleans Port Wardens*, 78 U. S. 6 Wall. 81 (18: 749); *Mays v. Cincinnati*, 1 Ohio St. 268; *Cincinnati v. Bryson*, 15 Ohio, 625; *Ryall v. Virginia*, 116 U. S. 572 (29: 785).

This rule holds good as to exercise or franchise charges.

Home Ins. Co. v. New York, 134 U. S. 599 (33: 1029); *Horn Silver Min. Co. v. New York*, 143 U. S. 305 (36: 164), 4 Inters. Com. Rep. 57.

This court should limit the scope of the law and construe it not to authorize the imposition of a unit franchise or organization tax, rated upon the aggregate capital stock of combined domestic and foreign corporations.

Pennoyer v. Neff, 95 U. S. 714 (24: 565); *Pana v. Boulder*, 107 U. S. 529 (27: 424); *Gormley v. Clark*, 134 U. S. 338 (33: 909); *Wilson v. Seligman*, 144 U. S. 41 (36: 838); *United States v. Wigglesworth*, 2 Story, 369; *Cincinnati, N. O. & T. P. R. Co. v. Kentucky ("Kentucky R. Tax Cases")* 115 U. S. 334 (29: 417); *Marye v. Baltimore & O. R. Co.* 127 U. S. 117 (32: 94); *Lee v. Sturges*, 2 L. R. A. 556, 46 Ohio St. 167; *State Treasurer v. Auditor General*, 46 Mich. 224; *Chicago & N. W. R. Co. v. Auditor General*, 53 4 INTER S.

Mich. 79; People v. New York, C. & St. L. R. Co. 15 L. R. A. 82, 129 N. Y. 474.

Under the law as construed by the state court the tax under challenge is in part illegal because it is a unit charge mainly laid upon incorporations and franchises not created or granted by Ohio, or upon business operations carried on outside its boundaries.

Exchange Bank of Columbus v. Hines, 3 Ohio St. 1; *Weston v. Charleston*, 27 U. S. 2 Pet. 406 (7: 487); *St. Louis v. Wiggins Ferry Co.* 78 U. S. 11 Wall. 423 (20: 192); *People v. Equitable Trust Co.* 96 N. Y. 388; *Northern Cent. R. Co. v. Jackson*, 74 U. S. 7 Wall. 262 (19: 88); *Cleveland, P. & A. R. Co. v. Pennsylvania ("State Tax on Foreign Held Bonds")* 82 U. S. 15 Wall. 300 (21: 179); *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 504 (33: 690); *California v. Central Pac. R. Co.* 127 U. S. 41 (32: 157), 2 Inters. Com. Rep. 153; *Muller v. Docs*, 94 U. S. 447 (24: 208).

The assessment of public charges against this class of corporations has always been levied only upon the state's proportional share of the whole property, franchise, stock or earnings.

State v. Metz, 32 N. J. L. 199; *Pittsburg, Ft. W. & O. R. Co. v. Com.* 66 Pa. 73, 5 Am. Rep. 344; *Minot v. Philadelphia, W. & B. R. Co. ("Delaware R. Tax")* 85 U. S. 18 Wall. 206 (21: 888); *Erie R. Co. v. Pennsylvania*, 88 U. S. 21 Wall. 492 (22: 595); *Taylor v. Scoor ("State R. Tax Cases")* 92 U. S. 610 (23: 672); *Western U. Teleg. Co. v. Texas*, 105 U. S. 460 (26: 1067); *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530 (31: 790); *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (35: 613), 3 Inters. Com. Rep. 595; *Horn Silver Min. Co. v. New York*, 143 U. S. 305 (36: 164), 4 Inters. Com. Rep. 57; *Maine v. Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 8 Inters. Com. Rep. 807; *Sebastian v. Covington & C. Bridge Co.* 31 Ohio St. 451; *Covington & C. Bridge Co. v. Mayer*, 31 Ohio St. 317.

Upon the theory that the entire organization tax of \$52,000 was assessed only upon the Ohio constituent of the interstate copartnership, the exaction plainly imposes a unequal and discriminating burden in violation of the 14th Amendment.

Portland Bank v. Apthorp, 12 Mass. 262; *Oliver v. Washington Mills*, 11 Allen, 279; *Fields v. Highland County Comrs.* 36 Ohio St. 476; *Youngblood v. Seaton*, 32 Mich. 406, 20 Am. Rep. 654; *McMahon v. Palmer*, 102 N. Y. 188, 55 Am. Rep. 796; *Boyer v. Boyer*, 113 U. S. 689 (28: 1069); *People v. Albany Ins. Co.* 93 N. Y. 460; *Com. v. People's Five Cent Sav. Bank*, 5 Allen, 428; *Home Ins. Co. v. New York*, 134 U. S. 599 (33: 1029); *Whitbeck v. Mercantile Nat. Bank of Cleveland*, 127 U. S. 193 (32: 118); *Yick Wo v. Hopkins*, 118 U. S. 357 (30: 221); *Santa Clara County v. Southern Pac. R. Co.* 9 Sawy. 165, 18 Fed. Rep. 385; *Cummings v. Merchants Nat. Bank*, 101 U. S. 158 (25: 906); *New York v. Weaver*, 100 U. S. 539 (25: 705); *Cooley*, Taxn. 128.

The tax as laid is in principle and result an unlawful interference with interstate commerce and necessarily imposes a burden upon national instrumentalities engaged therein.

Philadelphia & R. R. Co. v. Pennsylvania ("State Freight Tax") 82 U. S. 15 Wall. 273

(21: 160); *Maine v. Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 3 Inters. Com. Rep. 807; *Brown v. Maryland*, 25 U. S. 12 Wheat. 444 (6: 687); *Cook v. Pennsylvania*, 97 U. S. 566 (24: 1015); *Crandall v. Nevada*, 73 U. S. 6 Wall. 35 (18: 745); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29: 158), 1 Inters. Com. Rep. 382; *McCall v. California*, 136 U. S. 104 (34: 391), 3 Inters. Com. Rep. 181; *Crutcher v. Kentucky*, 141 U. S. 47 (35: 649).

Mr. J. K. Richards, Atty. Gen. of Ohio, for defendant in error:

By consolidation, whether the Ohio companies or between an Ohio company and companies of another state, a new company is formed by the extinguishment of the old ones.

Shields v. Ohio, 95 U. S. 324 (24: 359); *Compton v. Wabash, St. L. & P. R. Co.* 45 Ohio St. 592; *Lee v. Sturges*, 2 L. R. A. 556, 46 Ohio St. 163; *Taylor v. Secor* ("State R. Tax Cases") 92 U. S. 618 (23: 675).

As to the validity of a state law as affected by the constitution of the state, the decision of the state courts are to be accepted as the rule of decision for the Federal courts.

Pembina Consol. S. Min. & M. Co. v. Pennsylvania, 125 U. S. 183 (31: 651), 2 Inters. Com. Rep. 24; *Bucher v. Ohehsire R. Co.* 125 U. S. 582 (31: 798); *Leffingwell v. Warren*, 87 U. S. 2 Black, 599 (17: 261); *Luther v. Borden*, 48 U. S. 7 How. 1 (13: 581); *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 21 (35: 614), 3 Inters. Com. Rep. 595.

There are two broad grounds for sustaining the act: power to regulate corporations, and power to raise revenue.

Baker v. Cincinnati, 11 Ohio St. 534; *Adler v. Whitbeck*, 44 Ohio St. 562; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 531 (31: 790); *California v. Central Pac. R. Co.* 137 U. S. 40 (32: 157).

This franchise, the grant of which rests with the discretion of the state, may be taxed as the legislature of the state may choose.

Home Ins. Co. v. New York, 134 U. S. 599 (33: 1029); *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 365.

The state has the power to put a price on corporate privileges, and to exact a bonus for the grant of a franchise.

Gordon v. Appeal Tax Court, 44 U. S. 3 How. 138 (11: 529); *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 456 (22: 678).

For the privilege of foreign corporations to do business in a state other than that in which it was created, the state may exact such contribution as it sees fit.

Bank of Augusta v. Earle, 38 U. S. 18 Pet. 519 (10: 274); *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404 (15: 451); *Paul v. Virginia*, 75 U. S. 8 Wall. 168 (19: 357); *Ducat v. Chicago*, 77 U. S. 10 Wall. 410 (19: 972); *Doyle v. Continental Ins. Co.* 94 U. S. 535 (24: 148); *Philadelphia Fire Assn. v. New York*, 119 U. S. 110 (30: 342); *Pembina Consol. S. Min. & M. Co. v. Pennsylvania*, 125 U. S. 181 (31: 650), 2 Inters. Com. Rep. 24; *Milwaukee Fire Dept. v. Helfenstein*, 16 Wis. 136; *Leavenworth v. Booth*, 15 Kan. 627; *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 523; *State v. Reinmund*, 45 Ohio St. 218.

The raising of revenue being a recognized purpose of government, the legislature, under 4 INTER S.

the general grant, may exact this contribution. *Union Pac. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5 (21: 787).

The fees are for official services in granting a franchise.

The character of the investments of the corporation will not be permitted to affect the tax on its corporate franchise.

Society for Savings v. Coits, 73 U. S. 6 Wall. 594 (18: 897); *Provident Inst. for Savings v. Massachusetts*, 73 U. S. 6 Wall. 611 (18: 907); *Hamilton Mfg. Co. v. Massachusetts*, 73 U. S. 6 Wall. 632 (18: 904); *Minot v. Philadelphia, W. & B. R. Co.* ("Delaware R. Tax") 85 U. S. 18 Wall. 206 (21: 888); *Maine v. Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 3 Inters. Com. Rep. 807.

The effect of filing articles of consolidation of a railway company of Ohio with railway companies of other states, is to create a new corporation.

Shields v. Ohio, 95 U. S. 324 (24: 359), 26 Ohio St. 86; *Compton v. Wabash, St. L. & P. R. Co.* 45 Ohio St. 592; *Ferguson v. Meredith*, 68 U. S. 1 Wall. 25 (17: 604); *McMahan v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418; *State v. Sherman*, 22 Ohio St. 411; *Wabash, St. L. & P. R. Co. v. Ham*, 113 U. S. 587 (22: 235); *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359 (25: 185).

There is no denial of the equal protection of the laws. An equal and uniform contribution is required.

Barbier v. Connolly, 113 U. S. 81 (28: 924); *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (33: 892); *Home Ins. Co. v. New York*, 134 U. S. 594 (33: 1025); *Pacific Exp. Co. v. Seibert*, 142 U. S. 339 (35: 1085), 3 Inters. Com. Rep. 810; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386 (35: 1051); *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512 (29: 463); *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 305 (32: 107); *Horn Silver Min. Co. v. New York*, 143 U. S. 305 (36: 164), 4 Inters. Com. Rep. 57; *Munn v. Illinois*, 94 U. S. 118 (24: 77); *Budd v. New York*, 143 U. S. 517 (36: 247), 4 Inters. Com. Rep. 45; *Wurts v. Hoagland*, 114 U. S. 606 (29: 229); *Walston v. Nevin*, 128 U. S. 578 (33: 544); *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26 (32: 585); *Hayes v. Missouri*, 120 U. S. 68 (30: 578); *Dow v. Beidelman*, 125 U. S. 680 (31: 841), 3 Inters. Com. Rep. 56.

The exaction of this fee for a franchise which Ohio alone can grant, in no way interferes with or places a burden on interstate commerce.

Philadelphia & R. R. Co. v. Pennsylvania ("State Tax on Railway Gross Receipts") 82 U. S. 15 Wall. 293 (21: 167); *Minot v. Philadelphia, W. & B. R. Co.* ("Delaware R. Tax") 85 U. S. 18 Wall. 232 (21: 896); *Taylor v. Secor* ("State R. Tax Cases") 92 U. S. 608 (23: 671); *Western U. Teleg. Co. v. Texas*, 105 U. S. 460 (28: 1067); *Brown v. Houston*, 114 U. S. 628 (29: 257); *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530 (31: 790); *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411 (32: 229), 2 Inters. Com. Rep. 59; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (35: 613), 3 Inters. Com. Rep. 595; *Maine v. Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 3 Inters. Com. Rep. 807; *Pacific Exp. Co. v. Seibert*, 142 U. S. 354 (35: 1040), 3 Inters. Com. Rep. 810.

Mr. Justice White delivered the opinion of the court:

With the question whether the sum paid was authorized by the Ohio statutes, or constituted a fee, a license, or a tax, under the Ohio laws and constitution, we are not concerned. The writ of error brings before us only the Federal question. *Watson v. Mercer*, 38 U. S. 8 Pet. 88 [8:876]; *Barber v. Connolly*, 118 U. S. 27 [28:928]. Nor does the determination of the Federal question render it necessary to define the nature of the charge imposed, for, whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction.

The purpose of the tender of the articles of consolidation to the secretary of state was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the state of Ohio, and depended for their existence upon the provisions of its laws. Without that state's consent they could not have been procured. Ohio Rev. Stat. 3239, 3382, 3384b, amended by act of April 1, 1890, 87 Ohio Laws, 184. Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the state of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the state charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the secretary of state exacted. As it was within the discretion of the state to withhold or grant the privilege of exercising corporate existence, it was, as a necessary result, also within its power to impose whatever conditions it might deem fit as pre-requisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. We say voluntary assumption, because, as the claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the state and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought.

That the right to be a state corporation depends solely upon the grace of the state, and is not a right inherent in the parties, is settled. Thus, in *California v. Central Pac. R. Co.* 127 U. S. 40 [32:157], 2 Inters. Com. Rep. 153, speaking through *Mr. Justice Bradley*, the court

said: "A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration.

Under our system, their existence and disposal are under control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority.

. . . No private person can take another's property, even for public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

In *Home Ins. Co. v. New York*, 134 U. S. 595 [38:1026], through *Mr. Justice Field*, we said: "The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporation or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely within the discretion of the state."

These citations only reiterate principles established beyond controversy by a series of decisions. *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519 [10:274]; *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404 [15:451]; *Paul v. Virginia*, 75 U. S. 8 Wall. 168 [19:357]; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410 [19:972].

Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another state. The power of corporations of other states to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that state as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. *Bank of Augusta v. Earle*, and *Lafayette Ins. Co. v. French*, *supra*; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 181 [19:357, 360].

In the latter case, speaking through *Mr. Justice Field*, we observed: "Now a grant of a corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence, even, by other states, and the enforcement of its contracts

made therein depend purely upon the comity of these states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy.

At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those states would soon pass into their hands. The principal business of every state, would, in fact, be controlled by corporations created in other states."

It follows from these principles that a state, in granting a corporate privilege to its own citizens, or what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have obtained. In *Paul v. Virginia, supra*, the court said: "Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest."

In the case of the *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 456 [22: 678], considering a grant by the state of Maryland to a railroad company of a right to build a branch from Baltimore to Washington, upon condition that the company should pay semi-annually to the state one fifth of the amount received from the transportation of passengers over the road authorized, the court spoke as follows: "The state could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ, in a constitutional point of view, when it authorized its private citizens to build the road and reserved for its own use a portion of its earnings? We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the state, as a consideration of the franchise, had stipulated that it should have all the passenger money, and the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It was simply the exercise by the state of absolute control over its own property and preroga-

tives." And the contention that the charge imposed a burden upon interstate commerce was thus answered: "It may, incidentally, affect transportation. It is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *discreto intuitu*, and in the exercise of an undoubted power. The state is conceded to possess the power to tax its corporations, and yet every tax imposed on a carrier corporation effects more or less the charges it is compelled to make upon its customers. So, the state has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro*; and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more or less than a bonus."

In *Ducat v. Chicago, supra*, the court said: "The only difference between the statute of Virginia and that of Illinois is that the latter is more onerous to the companies than the former. The difference is in degree, not in principle." That was a case in which an insurance company was not only required to comply with the general law of the state of Illinois, but also to pay a portion of its premium to the city of Chicago as a condition of doing business therein.

The case of *Philadelphia Fire Asso. v. New York*, 119 U. S. 110 [30: 842], involved the validity of a tax imposed by the state of New York on an insurance company which had been incorporated in Pennsylvania. Mr. Justice Blatchford, in delivering the opinion of the court said: "This Pennsylvania corporation came into the state of New York to do business by the consent of the state under this act of 1858, with a license granted for a year, and has received such license annually, to run for a year. It is within the state for any given year under such license, and subject to the conditions prescribed by statute. The state, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax or a further tax as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given."

Indeed, the cases illustrating this doctrine are too numerous for review, and need only be referred to. *Society for Savings v. Coile*, 73 U. S. 6 Wall. 594 [18:897]; *Provident Inst. for Savings v. Massachusetts*, 73 U. S. 6 Wall. 611 [18:907]; *Hamilton Mfg. Co. v. Massachusetts*, 73 U. S. 6 Wall. 632 [18:904]; *Philadelphia & R. Co. v. Pennsylvania* ("State Tax on Railway Gross Receipts") 82 U. S. 15 Wall. 284 [21:164]; *Union Pac. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5 [21: 787]; *Minot v. Philadelphia, W. & B. R. Co.* ("The Delaware R. Tax") 85 U. S. 18 Wall. 206 [21:888]; *Taylor v. Secor* ("State R. Tax Cases") 92 U. S. 575 [23:663]; *Philadelphia & S. M. S. Co. v. Pennsylvania*, 123 U. S. 326 [30:1200], 1 Inters. Com. Rep. 308; *California v. Central Pac. R. Co.* 127 U. S. 1 [32:150]; *Horns Ins. Co.*

v. *New York*, 184 U. S. 594 [88:1025]; *Maine v. Grand Trunk R. Co.* 142 U. S. 217 [85:994], 8 Inters. Com. Rep. 807.

The question here is not the power of the state of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the state to determine upon what conditions its laws as to the consolidation of corporations may be availed of.

Considering as we do, that the payment of the charge was a condition imposed by the

state of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that state, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the state to extend its taxing power beyond its territorial limits.

Judgment affirmed.

NORMAN BRASS, *Pff. in Err.*,

v.

THE STATE OF NORTH DAKOTA *ex rel.* LOUIS W. STOESER.

(See S. C. 158 U. S. 391, 38 L. ed. 767.)

1. The law of North Dakota, of March 7, 1891, regulating grain warehouses and the weighing and handling of grain, etc., is constitutional. *Munn v. Illinois*, 94 U. S. 113 (24: 77) and *Budd v. New York*, 143 U. S. 517 (36: 247) followed.
2. The North Dakota law of March 7, 1891, is not unconstitutional, because it is applicable to the entire state, which is agricultural and is not restricted to large cities.
3. One who enters upon the business of elevating and storing the grain of other persons for profit in North Dakota, becomes subject to the stat-

utory regulations, although he also elevates and stores his own grain in the same warehouse.

4. The legislature of North Dakota, in regulating by a general law the business and charges of public warehousemen engaged in elevating and storing grain for profit, does not deny to the plaintiff in error the equal protection of the laws nor deprive him of his property without due process of law, and such statutory regulations do not amount to a regulation of commerce between the states.

[No. 768.]

Argued April 26, 1894. Decided May 14, 1894.

IN ERROR to the Second Judicial District Court of Ramsey County, State of North Dakota, to review a judgment of that court entered in pursuance of a judgment of the supreme court of North Dakota, affirming the judgment of the former court, granting a writ of mandamus to Norman Brass, upon the petition of Louis W. Stoesser, requiring said Brass to receive from said Stoesser, at the elevator of the former, grain tendered by the latter for storage, at the statutory rate of that state for storage in handling such grain. *Affirmed.*

See same case below, 2 N. D. 482.

Statement by *Mr. Justice Shiras*:

Norman Brass, the plaintiff in error, owns and operates a grain elevator in the village of Grand Harbor, in the state of North Dakota. The defendant in error, Louis W. Stoesser, owns a farm adjoining the village, on which in the year 1891 he raised about four thousand bushels of wheat. On September 30, 1891, Stoesser applied to store a part of his wheat crop for the compensation fixed by section eleven of chapter 126 of the laws of North

Dakota for the year 1891, which Brass refused to do unless paid therefor at a rate in excess of that fixed by the statute. On this refusal, Stoesser filed in the District Court of Ramsey County, North Dakota, a petition for an alternative writ of mandamus. The district court granted an alternative writ of mandamus as follows:

"The state of North Dakota to Norman Brass, respondent: Whereas the following facts have been made to appear to this court by the verified petition of the above named relator, to wit: 1. That he is the relator in the above entitled matter; that he owns and operates a farm containing 540 acres in the vicinity of the railroad station of Grand Harbor, in the county and state aforesaid, and during the year 1891 has raised on said farm about 4000 bushels of grain, principally wheat. 2. That the relator has not sufficient storage capacity on his farm or elsewhere for said grain so raised as aforesaid, but is dependent almost wholly upon the grain elevators and warehouses in the vicinity of said farm for storage capacity. 3. That fully fifty per

NOTE.—As to what is "due process of law," see note to *Pearson v. Yewdall*, 24:436.

As to retrospective statutes, when valid, see note to *Otoe County v. Baldwin*, 28: 331.

As to 15th Amendment to United States Constitu-

tion, its construction and effect, see note to *United States v. Reese*, 23: 568.

As to power of Congress to regulate commerce, see note to *Gibbons v. Ogden*, 6: 23, and to *Brown v. Maryland*, 6: 678.

As to interstate commerce, regulations of; power of Congress; how far exclusive, see note to *Gloucester Ferry Co. v. Pennsylvania*, 20: 156.

Mem.—References in note are to U.S. Repts. L. ed. 4 INTER S.

cent of the grain raised in said Ramsey county, North Dakota, is dependent for storage capacity upon the grain elevators and warehouses at the various towns, villages, and railroad stations in said Ramsey county. 4. That the respondent, Norman Brass, is now and at all the time herein stated has owned and operated a grain elevator at the railroad station of Grand Harbor aforesaid for the purpose of buying, selling, storing, and shipping grain for profit. 5. That the relator on the 30th day of September, 1891, hauled fifty-eight bushels of wheat to the grain elevator of respondent, Norman Brass, at Grand Harbor aforesaid, and tendered the same at said elevator of said Norman Brass for storage, and requested said Norman Brass to receive, elevate, insure, and store said grain for twenty days, and at the time tendered to said Brass two cents per bushel for compensation for receiving, elevating, insuring and storing said grain for twenty days; that said grain when so tendered as aforesaid was dry and in a suitable condition for storage, and there was in said grain elevator of said Brass at Grand Harbor aforesaid at said time storage capacity for over twenty-five thousand bushels of grain not in use and wholly unoccupied. 6. That said Brass then and there refused to receive said grain for the purpose aforesaid and wholly refused to store said grain at said price. 7. That the relator endeavored to secure storage for said grain at the only other elevator in operation at said railroad station of Grand Harbor aforesaid, but said elevator refused to receive relator's grain upon the same ground as respondent. 8. That the relator is informed and believes that the owners of grain elevators and warehouses within a radius of fifty miles of Grand Harbor aforesaid refused to receive grain for storage at said price: Now, therefore, this court, in order that justice may be done in this behalf to him, Louis W. Stoesser, relator, does hereby command and enjoin you that immediately upon receipt of this writ you do receive from relator, while your storage capacity at your elevator herein mentioned is sufficient for that purpose, all grain that may be tendered you by the relator in a dry and suitable condition for storage at a rate of compensation not exceeding the following schedule, viz, for receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel; storage rates after the first twenty days, one half cent per bushel for each fifteen days or fraction thereof, and shall not exceed five cents for six months, or that you show cause to the contrary before this court at the court house, in the city of Devil's Lake, Ramsey county, North Dakota, on the 5th day of October, 1891, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard; and how you have executed this writ make known to this court at the time and place aforesaid, and have you then and there this writ.

"Dated Sept. 30, 1891."

To which writ appellant made return by answer as follows:

"The return of the respondent to the alternative writ of mandamus issued in the above entitled proceeding shows to the court—

"1. That the respondent admits the truth of the facts pleaded in said alternative writ.

"2. For a further return to the said alternative writ the respondent alleges that he owns and operates only one grain elevator in North Dakota or elsewhere; that the said elevator is the elevator mentioned in said alternative writ, and is situated at Grand Harbor, a small way station on the line of the Great Northern Railroad, containing a population of less than one hundred people; that there are two other elevators owned and operated by different owners independently of and in competition with each other; that there are about six hundred grain elevators, flat houses, and warehouses in said state of North Dakota at which grain is bought and shipped for profit, which said elevators, warehouses, and flat houses are owned and operated by over one hundred and twenty-five different owners independent of and in competition with each other; that the owners of said elevators, warehouses, and flat houses are individuals engaged in buying and shipping grain, millers who use their elevators to supply their mills with grain, farmers' shipping associations, elevator corporations, and individual farmers; that said elevators, flat houses, and warehouses vary in cost of construction from five hundred dollars to five thousand dollars, and vary in capacity from five thousand to fifty thousand bushels; that there are from two to ten elevators, warehouses, and flat houses operated and owned each by different owners and operators at every station in North Dakota at which grain is marketed; that land upon which it is practicable to erect other elevators at every station in North Dakota at which grain is marketed is unlimited in area and can be readily purchased at prices varying from one dollar and twenty-five cents per acre to forty dollars per acre; that respondent's said elevator cost, when constructed and fully equipped, about three thousand dollars; that the capacity of the same is about 80,000 bushels.

"That respondent's principal business is that of buying wheat at Grand Harbor, North Dakota, and shipping the same to and selling it at Minneapolis and Duluth, Minnesota, to which business that of storing grain for third persons has been a mere incident.

"That all grain purchased by respondent at his said elevator is purchased for the sole purpose of being shipped to and sold at and is shipped to and sold at Minneapolis and Duluth, Minnesota.

"That respondent in the conduct of his said business contracts with millers and other purchasers of grain at said Minneapolis and Duluth to sell and deliver to said persons at a future and fixed date certain quantities of wheat and operates and maintains his said elevator for the exclusive purpose of purchasing grain to fill said contract.

"That in seasons when the grain yield is light and railroad facilities are such as to enable grain to be moved rapidly there is space and storage capacity in respondent's elevator in excess of that used by respondent's grain, and particularly when respondent's contracts for the sale of grain are small, while

at other times, when the yield is enormous, as in the present year, respondent's contracts are large, and the quantities of grain presented for shipment are beyond the capacity of the railroads to move, there is not sufficient storage capacity in respondent's elevator to hold and store the grain purchased by respondent in the conduct of his said business.

"That there are located in Minneapolis and Duluth, Minnesota, a great many corporations, persons, and copartnerships engaged in a business known as the 'grain commission' business.

"That those grain commission houses have swarms of agents traveling throughout the state of North Dakota, going from town to town and farm to farm, purchasing grain from farmers in some instances and in others soliciting farmers to ship their grain to said houses at Minneapolis or Duluth, Minnesota, to be by the latter sold on commission.

"That none of said grain commission houses have or own any storage capacity in North Dakota.

"That if chapter 126 of the Laws of 1891 is valid and its effect is to compel respondent to receive all grain that may be tendered to him for storage by grain commission men, farmers, grain speculators, and others, without reference to the necessities or condition of respondent's business at any particular time, the entire storage capacity of respondent's elevator will be exhausted in storing grain for third persons, and the principal business of the respondent, to conduct which his capital was invested in said elevator, will be utterly ruined and annihilated for want of storage capacity to contain wheat purchased by him to fill contracts made by him in the conduct of his said business, and respondent subjected to suits for damages for non-fulfillment of his said contracts.

"That the relator only offered to pay respondent for the service which he requested him to perform, the rate fixed by chapter 126 of the Laws of 1891—that is, two cents per bushel; that respondent refused to perform the service for less than two and one half cents per bushel.

"That respondent refuses to comply with the provisions of said chapter 126 on the ground that it abridges his privileges and immunities as a citizen of the United States; that it deprives him of his liberty and property without due process of law, and denies to him the equal protection of the laws, and amounts to a regulation of commerce among the states.

"That for thirteen years last past the rate charged for the storage of grain has been uniform at all elevators, flat houses, and warehouses in North Dakota, and during that time did not exceed the following schedule: For receiving, elevating, insuring, delivering, and fifteen days' storage, two and one half cents per bushel; after the first fifteen days, one half cent per bushel for each fifteen days or part thereof, but not to exceed five cents per bushel for six months.

"That the average farm in North Dakota does not exceed in area 160 acres; that the average yield in grain of a quarter section of land in North Dakota does not exceed twenty-five hundred bushels; that a granary sufficient

in size to safely and securely store twenty-five hundred bushels of grain can be erected on any farm in North Dakota at a cost not exceeding one hundred and fifty dollars.

"That the business of respondent and all other persons, firms, and corporations engaged in the business of operating grain elevators, warehouses, and flat houses in North Dakota and the manner in which said business is conducted is not in any manner unwholesome or deleterious to the health, morals, welfare, or safety of the community or society.

"That the railroad and warehouse commissioners of North Dakota, on page 33 of their annual report to the governor for 1890, said: 'In view of the fact that after thorough investigation the board deem the charges allowed by section 22, chapter 187 (Laws of 1890) and also section 10 of said chapter, as unreasonable, the following rules of storage are recommended: 1, for receiving, elevating, insuring, delivering, and fifteen days' storage, two and one half cents per bushel; 2, after fifteen days, one half cent per bushel for each fifteen days or part thereof, but not to exceed five cents for six months.'

"That the rates referred to by said commissioners as unreasonable were less than the rate recommended by said board.

"That the respondent denies that the legislature has any power whatever to say whether he shall rent the bins in his elevator or not, and wholly denies the power of the legislature to say what he shall charge for the use of his said elevator or the bins therein.

"That since the enactment of section nine of chapter 126 of the Laws of 1891 the amount of grain shipped directly by farmers without the intervention of elevators, warehouses, or flat houses has been increasing, and in 1890, as respondent is informed and believes, nearly fifty per cent of the entire grain product of North Dakota was shipped to Minneapolis and Duluth, Minnesota, by farmers; that the amount of grain shipped in that manner is steadily increasing from year to year.

"That pursuant to section 7 of chapter 122, Laws of 1890, the railroad commissioners adopted and published the following rules to govern the distribution of cars and other freight, which rules are now in operation in said state of North Dakota, to wit:

"State of North Dakota,

"Office of Commissioners of Railroads.
"Rules for the distribution of cars between stations and shippers.

"1. In distributing cars to stations for grain loading they shall be distributed according to the daily average shipments from such stations.

"2. In distributing cars to shippers for grain loading at stations, agents shall first fill each shipper's order for one car to each. After this is done, the balance of the cars shall be distributed among shippers according to the amount of grain in sight offered for shipment by each shipper.

"3. Parties desiring to load grain on track shall be furnished cars and shall be allowed for loading time twenty-four hours from the time the car is set on the side track to complete loading and furnish shipping directions.

In case shipper fails to complete loading or furnish shipping directions within twenty-four hours, then, in such case, the railway company may collect upon such cars \$3.00 rental for each and every day or part of a day which such cars are delayed after twenty-four hours.

"The above rule as to time and rental charges shall also apply to grain delayed in unloading on track."

"In connection with said rules in said report said commissioners said: 'We believe that the railroads have labored faithfully to supply cars to shippers, in accordance with these rules, and, so far as their ability to supply the demand permitted, cars have been distributed in conformity therewith. From September 15 to December 15 the demand for cars is double the ability of the roads to supply, and as a necessary consequence delay in supplying cars must ensue. In all cases of complaint as to failure to get cars investigated this year, this has been the case, and cars have been supplied as soon as possible by the railroad companies.'

"The liberal policy of the railroads in the distribution of cars adopted this year has been of great benefit to the farmers of North Dakota."

"Wherefore respondent demands judgment quashing the alternative writ of mandamus dismissing this proceeding, and for his costs and disbursements laid out and expended in this action."

To this return Stoesser interposed a general demurrer, which was sustained, and Brass electing in open court to stand on his return, a peremptory writ of mandamus was allowed. From this judgment an appeal was taken to the supreme court of Dakota, which court affirmed the order and judgment of the district court, and remitted the record to that court. On May 28, 1892, final judgment was entered in the district court, making the judgment of the supreme court the judgment of the district court, and awarding a peremptory writ of mandamus to execute that judgment. Whereupon Brass sued out a writ of error to this court.

Messrs. A. B. Browne, A. T. Britton and J. F. McGee for plaintiff in error.

Messrs. Halbert E. Paine and C. D. O'Brien for defendant in error.

Mr. Justice Shiras delivered the opinion of the court:

In the 13th article of the constitution of the state of Illinois, adopted in 1870, all elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, were declared to be public warehouses, and it was made the duty of the general assembly to pass all necessary laws to give full effect to that article of the constitution. By an act approved April 25, 1871, and entitled "An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to article 13 of the constitution of the state," the legislature of Illinois provided that those who conducted such public warehouses located in cities containing not less than one hundred thousand inhabitants should procure licenses

and should give bond conditioned for compliance with the law; prescribed maximum rates for storage and handling grain; and declared certain penalties for the failure to procure licenses.

The validity of this law was upheld by the supreme court of Illinois (*Munn v. People*, 69 Ill. 80) and that judgment was affirmed by this court. *Munn v. Illinois*, 94 U. S. 113 [24: 77].

In June, 1888, the legislature of the state of New York passed an act entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this state," whereby maximum charges were fixed for elevating, receiving, weighing, and discharging grain, when the business was carried on in a city containing 130,000 inhabitants or upwards, and penalties imposed for disregard of the provisions of the statute. The owner of an elevator in the city of Buffalo was indicted, found guilty, and sentenced, in the superior court of Buffalo, for exacting charges for elevating grain in excess of the statutory rates. An appeal was taken to the court of appeals of the state of New York, which affirmed the judgment of the superior court of Buffalo. *People v. Budd*, 5 L. R. A. 559, 117 N. Y. 1. A writ of error brought the case to this court, where the judgment of the court of appeals was affirmed. *Budd v. New York*, 143 U. S. 517 [36: 247], 4 Inters. Com. Rep. 45.

The legislature of the state of North Dakota, by an act approved March 7, 1891, and entitled, "An act to regulate grain warehouses and the weighing and handling of grain, and defining the duties of the railroad commissioners in relation thereto," enacted, in the 4th section thereof, that "all buildings, elevators, or warehouses in this state, erected and operated, or which may hereafter be erected and operated by any person or persons, association, co-partnership, corporation, or trust for the purpose of buying, selling, storing, shipping, or handling grain for profit, are hereby declared public warehouses, and the person or persons, association, co-partnership, or trust owning or operating said building or buildings, elevator or elevators, warehouse or warehouses, which are now or may hereafter be located or doing business within this state, as above described, whether said owners or operators reside within this state or not, are public warehousemen within the meaning of this act, and none of the provisions of this act shall be construed so as to permit discrimination with reference to the buying, receiving, and handling of grain of standard grades, or in regard to parties offering such grain for sale, storage, or handling at such public warehouses, while the same are in operation;" and in the 5th section, "that the proprietor, lessee, or manager of any public warehouse or elevator in this state shall file with the railroad commissioners of the state a bond to the state of North Dakota, with good and sufficient sureties, to be approved by said commissioners of railroads, in the penal sum of not less than \$5000 nor more than \$75,000, in the discretion of said commissioners, conditioned for the faithful performance of duty as public warehousemen, and a compliance with all the laws of the state in relation there-

to," and in the 11th section thereof, "the charges for storing and handling of grain shall not be greater than the following schedule: For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel. Storage rates, after the first twenty days, one half cent for each fifteen days and fraction thereof, and shall not exceed five cents for six months. The grain shall be kept insured at the expense of the warehouseman for the benefit of the owner;" and by the 12th section it is provided that "any person, firm or association, or any representative thereof, who shall fail to do and keep the requirements as herein provided, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than two hundred dollars nor more than one thousand dollars, and be liable in addition thereto to imprisonment for not more than one year in the state penitentiary, at the discretion of the court."

In October, 1891, in the district court of the Second Judicial District of the state of North Dakota, in proceedings the nature of which sufficiently appears in the previous statement of facts, the validity of this statute was sustained, and the judgment of that court was, on error, duly affirmed by the supreme court of the state. *State v. Brass*, 2 N. D. 482.

In the cases thus brought to this court from the states of Illinois and New York, we were asked to declare void statutes regulating the affairs of grain warehouses and elevators within those states, but held valid by their highest courts, because it was claimed that such legislation was repugnant to that clause of the 8th section of article 1 of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several states, and to the 14th Amendment, which ordains that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In the case now before us the same contentions are made, but we are not asked to review our decisions made in the previous cases. Indeed, their soundness is tacitly admitted in the briefs and argument of the counsel of the plaintiff in error. But it is said that those cases arose out of facts so peculiar and exceptional, and so different from those of the present case, as to render the reasoning there used, and the conclusions reached, now inapplicable.

The concession, then, is that, upon the facts found to exist by the legislatures of Illinois and New York, their enactments were by the courts properly declared valid, and the contention is that the facts upon which the legislature of North Dakota proceeded, and of which we can take notice in the present case, are so different as to call for the application of other principles, and to render an opposite conclusion necessary.

The differences in the facts of the respective cases, to which we are pointed, are mainly as follows: In the first place, what may be called a geographical difference is suggested, in that the operation of the Illinois and New York statutes is said to be restricted to the city of Chicago in the one case, and to the cities of

Buffalo, New York, and Brooklyn in the other, while the North Dakota statute is applicable to the territory of the entire state.

It is, indeed, true that while the terms of the Illinois and New York statutes embrace in both cases the entire state, yet their behests are restricted to cities having not less than a prescribed number of inhabitants, and that there is no such restriction in the North Dakota law.

Upon this it is argued that the statutes of Illinois and New York are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the state of North Dakota and the small population of its country towns and villages are said to present no such opportunities.

The considerations mentioned are obviously addressed to the legislative discretion. It can scarcely be meant to contend that the statutes of Illinois and New York, valid in their present form, would become illegal if the law makers thought fit to repeal the clauses limiting their operation to cities of a certain size, or that the statute of North Dakota would at once be validated if one or more of her towns were to reach a population of one hundred thousand, and her legislature were to restrict the operation of the statute to such cities.

Again, it is said that the modes of carrying on the business of elevating and storing grain in North Dakota are not similar to those pursued in the eastern cities; that the great elevators used in transshipping grain from the Lakes to the railroads are essential; and that those who own them, if uncontrolled by law, could extort such charges as they pleased; and great stress is laid upon expressions used in our previous opinions, in which this business, as carried on at Chicago and Buffalo, is spoken of as a practical monopoly, to which shippers and owners of grain are compelled to resort. The surroundings in an agricultural state, where land is cheap in price and limitless in quantity, are thought to be widely different, and to demand different regulations.

These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed are matters for those who make, not for those who interpret the laws. When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances. It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked differences in the facts that called for regulations. But as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota. It may be true that, in the cases cited, the judges who expressed the conclusions of the court entered, at some length, into a de-

fense of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their validity. Such efforts, on the part of judges, to vindicate to citizens the ways of legislatures are not without value, though they are liable to be met by the assertion of opposite views as to the practical wisdom of the law, and thus the real question at issue, namely, the power of the legislature to act at all, is obscured. Still, in the present instance, the obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law, and did not interfere with Federal jurisdiction over interstate commerce.

Another argument advanced is based on the admitted allegation that the principal business of the plaintiff in error, in connection with his warehouse, is in storing his own grain, and that the storage of the grain of other persons is and always has been a mere incident, and it is said that the effect of this law will be to compel him to renounce his principal business and become a mere warehouseman for others. We do not understand this law to require the owner of a warehouse, built and used by him only to store his own grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit. Then he becomes subject to the statutory regulations, and he cannot escape them by asserting that he also elevates and stores his own grain in the same warehouse. As well might a person accused of selling liquor without a license urge that the larger part of his liquors were designed for his own consumption, and that he only sold the surplus as a mere incident.

Another objection to the law is found in its provision that the warehouseman shall insure the grain of others at his own expense. This may be burdensome, but it affects alike all engaged in the business, and, if it be regarded as contrary to sound public policy, those affected must instruct their representatives in general assembly met to provide a remedy.

The plaintiff in error, in his answer to the writ of mandamus, based his defense wholly upon grounds arising under the constitution of the state and of the United States. We are limited by this record to the questions whether the legislature of North Dakota, in regulating by a general law the business and charges of public warehouses engaged in elevating and storing grain for profit, denies to the plaintiff in error the equal protection of the laws or deprives him of his property without due process of law, and whether such statutory regulations amount to a regulation of commerce between the states. The allegations and arguments of the plaintiff in error have failed to satisfy us that any solid distinction can be found between the cases in which those questions have been heretofore

determined by this court and the present one. *The judgment of the court below is accordingly affirmed.*

Mr. Justice Brewer dissenting:

I dissent from the opinion and judgment of the court in this case. Reliance is placed in that opinion on *Munn v. Illinois*, 94 U. S. 113 [24:77] and *Budd v. New York*, 143 U. S. 517 [36:247], 4 Inters. Com. Rep. 45. In the dissenting opinion I filed in the latter case, I expressed, so far as was necessary, my views in reference to the general propositions laid down in the two cases, and I do not desire to repeat what I there said. It is a significant fact that in *Union Pac. R. Co. v. United States* ("Sinking Fund Cases") 99 U. S. 700, 747 [25:496, 511], and in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 569 [30:244, 248], 1 Inters. Com. Rep. 31, *Mr. Justice Bradley* and *Mr. Justice Miller*, who concurred in the judgment in *Munn v. Illinois*, each sought to limit and qualify the scope of the language used by the *Chief Justice* in that case. These are the words of *Mr. Justice Bradley*:

"The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

And this is the language of *Mr. Justice Miller*, delivering the opinion of the court:

"And in that case the court was presented with the question, which it decided, whether anyone engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

I desire, however, specially to notice the facts disclosed by this record, and to point out to what extent the decision of this court now goes. The case, coming from the supreme court of the state of North Dakota must be determined upon the record as it is presented. Nothing can be added to or taken from the facts as established by that record. The case was heard and determined upon a demurrer to the return made by the defendant to the petition and writ of mandamus, and of course upon such demurrer the facts stated in the return are to be taken as true. From that return it appears that along the line of the Great Northern Railroad in the state of North Dakota there are about six hundred grain elevators; that at Grand Harbor, a small way station on the line of that road, there are three elevators, one of them being that owned by the defendant; that defendant's elevator is a small one, with a capacity of 80,000 bushels, and costing about \$3000. For aught that appears, the elevator was on the private property of the defendant,

though contiguous to the railroad, and at the railroad station. It is further admitted:

"That respondent's principal business is that of buying wheat at Grand Harbor, North Dakota, and shipping the same to and selling it at Minneapolis and Duluth, Minnesota, to which the business of storing grain for third persons is and always has been a mere incident.

"That all grain purchased by respondent at his said elevator is purchased for the sole purpose of being shipped to and sold at and is shipped to and sold at Minneapolis and Duluth, Minnesota.

"That respondent in the conduct of his said business contracts with millers and other purchasers of grain at said Minneapolis and Duluth to sell and deliver to said persons at a future and fixed date certain quantities of wheat, and operates and maintains his said elevator for the exclusive purpose of purchasing grain to fill said contracts.

"That in seasons when the grain yield is light and railroad facilities are such as to enable grain to be moved rapidly there is space and storage capacity in respondent's elevator in excess of that used by respondent's grain, and particularly when respondent's contracts for the sale of grain are small, while at other times when the yield is enormous, as in the present year, respondent's contracts large, and the quantities of grain presented for shipment are beyond the capacity of the railroads to move, there is not sufficient storage capacity in respondent's elevator to hold and store the grain purchased by respondent in the conduct of his said business.

"That if chapter 126 of the Laws of 1891 is valid and its effect is to compel respondent to receive all grain that may be tendered to him for storage by grain commission men, farmers, grain speculators, and others without reference to the necessities or condition of respondent's business at any particular time, the entire storage capacity of respondent's elevator will be exhausted in storing grain for third persons, and the principal business of respondent, to conduct which his capital was invested in said elevator, will be utterly ruined and annihilated for want of storage capacity to contain wheat purchased by him to fill contracts made by him in the conduct of his said business and respondent subjected to suits for damages for non-fulfilment of his said contracts."

The rates which were established by law were as follows:

"1. For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel.

"2. After twenty days, one half cent per bushel for each fifteen days or part thereof, but not to exceed five cents for six months."

It appears from these admissions that the principal business of defendant was that of buying wheat and shipping it to Minneapolis and Duluth for sale, and that he operated and maintained his elevator for the exclusive purpose of purchasing grain to fill his contracts; and while at the time the elevator was not full and there was room for the storage of the grain tendered by the petitioner, and the de-

fendant had at times used vacant space in his elevator for the storage of grain of others, yet such use was a mere incident to and subordinate to his principal business of buying and selling grain, for which principal business he exclusively maintained and operated his elevator.

Now, my first objection is that by this decision a party is compelled by the mandate of the court to engage in a business which he never intended to engage in, and which he does not desire to engage in, to wit, the business of maintaining a public elevator. His business is that of buying and selling grain, and he operates and maintains the elevator, which he owns, for the exclusive purpose of carrying on that business. That he may have sometimes accommodated his neighbors by the use of his elevator for the storage of their grain, and thus to a limited extent engaged in that business, does not change the fact, as admitted, that his principal business was that of buying and selling, and that he operated and maintained that elevator exclusively for the carrying on of that business, or the other admitted fact that, if he is compelled, as he is compelled by this mandate, to receive grain as tendered so long as he has storage capacity unoccupied in his elevator, his principal business and that for which he built the elevator will be utterly ruined and destroyed.

The question is not whether, if he should receive and store in his elevator grain for others, he might not so far bring himself within the scope of the law as to be deemed for that transaction engaged in the business of maintaining a public elevator, and thus bound by the charges fixed by statute; but whether, when he maintains an elevator exclusively for his own business, the fact that at times he has used vacant room in it for the storage of the grain of other persons, compels him to receive grain when tendered irrespective of the injury which it does to his own business. And it is admitted that at the time of this tender, there was not sufficient storage capacity in his elevator to hold and store the grain purchased by him in the conduct of his business. And this is a matter of no trifling moment to one engaged in the business of buying and selling grain. He cannot know in advance when grain will be tendered at a price which will justify his purchase with a view to profit. The fact that to-day there may be storage capacity does not prove that to-morrow he may not need the entire capacity of his elevator. And yet, if, because to-day there is room in his elevator, he is bound to receive any grain that shall be tendered, he may to-morrow be unable to make purchase of the offered grain. It is a matter of common knowledge that grain is not put into and taken out of an elevator in an instant. And if once deposited the owner cannot be compelled to remove it, merely for the accommodation of the warehouseman, but may leave it there indefinitely, so long as he pays the legal charges. The petition was for a writ of mandamus commanding the defendant "so long as the capacity of his said elevator is sufficient for the purpose, to store such grain as may be tendered to him by the relator," and the decree

of the court was that the "writ issued as prayed for," and that is the decision which is affirmed by this court.

I dissent in the second place because the facts show, in the words of *Mr. Justice Bradley*, no "practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community." Along the line of this single road within the limits of this state there are about six hundred of these elevators, owned and operated by over one hundred and twenty-five different persons, varying in cost of construction from \$500 to \$5000; at every station there is land purchasable by any one at prices varying from \$1.25 to \$40 per acre, and a granary sufficient to store the average product of an ordinary Dakota farm can be erected at a cost of not exceeding \$150. So it is that when any farmer or other individual can at a cost of less than \$200 provide himself with all the facilities for storing and shipping the entire product of an ordinary farm, when along the line of a single railroad there are six hundred elevators already constructed, owned, and operated by one hundred and twenty-five different persons, when at every station at which grain is marketed there are from two to ten such elevators, it is held that there exists a monopoly such as justifies control by the public of the prices at which grain shall be stored in any one of these many elevators. If this be a monopoly, justifying public control of prices for service, I am at a loss to per-

ceive at what point the fact of monopoly will cease and freedom of business commence. For obviously elevators along the line of that road were as plentiful as other institutions of industry, and as easily and cheaply constructed, and therefore savoring no more of monopoly.

I dissent, in the third place, because by this law the elevator man is bound not merely to receive, store, and discharge the grain which is tendered to him, but also to insure and pay the cost of insurance, it matters not what that cost may be, whether more or less than he receives for the whole service. I do not care to enlarge upon this matter. If the legislature can compel a party, though confessedly to the disadvantage, injury, and even destruction of his own special business of buying and selling grain, to receive and store grain for whoever may demand it in an elevator which he is maintaining and operating for the exclusive carrying on of his own business at any price which it sees fit to allow, and at the same time compel him to advance the money to insure the property thus forced upon him, I can only say that it seems to me that the country is rapidly travelling the road which leads to that point where all freedom of contract and conduct will be lost. For these reasons, thus briefly stated, I am constrained to dissent from this opinion and judgment.

I am authorized to say that *Mr. Justice Field*, *Mr. Justice Jackson*, and *Mr. Justice White* concur in this dissent.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,

Piff. in Err.,

v.

VICTOR M. BACKUS, as Treasurer of Marion County, Indiana.

(See S. C. 154 U. S. 439, 38 L. ed. 1041.)

1. *Pittsburg, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1061, followed.

2. It is not within the province of this court to review any question as to the admission or rejection of evidence.

NOTE.—As to what is due "process of law," see note to *Pearson v. Yewdall*, 24: 436.

As to 15th Amendment to United States Constitution, its construction and effect, see note to *United States v. Reese*, 23: 563.

As to direct taxes, see note to *Scholey v. Rew*, 23: 99.

As to power of states to tax, see note to *Dobbins v. Erie County*, 10: 1022.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations, see note to *Providence Bank v. Billings*, 7: 939.

As to exemption from taxation; whether a contract or not; not implied, see note to *Tucker v. Furguson*, 22: 805.

As to when an injunction to restrain the collection of a tax will be granted, see note to *Dows v. Chicago*, 20: 65.

State and Federal power over commerce; what is a regulation of interstate commerce; license tax on peddlers, agents and drummers; police power.

The power of Congress to regulate commerce between the states attaches only upon the actual delivery of property to a common carrier for transportation, or the actual commencement of its

Mem. References in note are to U. S. Repts. L. ed.

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transfer to another state and continues until it has reached such other state and becomes mingled with the general mass of property therein. *Re Greene*, 52 Fed. Rep. 104.

Shipments between points within the same state do not constitute interstate commerce because made on a railroad which extends into another state. *Campbell v. Chicago, M. & St. P. R. Co.* 17 L. R. A. 443, 4 Inters. Com. Rep. 203.

A statute denying the right of a corporation of another state to bring an action within the state until it has filed its articles of incorporation therein is inoperative as to an action brought for the purchase price of goods sold within the state by commercial agents or drummers, as this constitutes interstate commerce. *Bateman v. Western Star Mill Co.* 4 Inters. Com. Rep. 260.

The imposition by the state of a franchise tax based upon the capital of a telegraph company employed within the state is not an imposition on interstate commerce. *People v. Campbell*, 70 Hun, 507.

The legislative regulation of tolls for the use of a bridge owned by a domestic corporation and connecting two states is not a regulation of interstate commerce. *Com. v. Covington & C. Bridge Co.* 14 Ky. L. Rep. 836, 54 Am. & Eng. R. Cas. 461.

Making a railroad company liable for fires set

tion of testimony in the state court which does not bear directly upon some matter of a Federal nature.

3. If an assessing board, seeking to assess for purposes of taxation a part of a road within a state, the other part of which is in an adjoining state, ascertains the value of the whole line as a single property, and then determines the value of that within the state, upon the mileage basis, that is not a valuation of property outside of the state, if no special circumstances exist to distinguish between the conditions in the two states such as terminal facilities of enormous value in one and not in another.
4. It is not necessary that the assessing board of a state in order to keep within the limits of state jurisdiction shall treat the part of a railroad within the state as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road.
5. Where an assessing board is charged with the duty of valuing a certain number of miles of railroad within a state forming part of a line of road running into another state, and assesses those miles of road at their actual cash value determined on a mileage basis, this is not placing a burden upon interstate commerce, beyond the power of the state, simply because the value of

that railroad as a whole is created partly—and perhaps largely—by the interstate commerce which it is doing.

6. The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately; it is the aggregate of those values plus that arising from a connected operation of the whole.
7. When a railroad runs into two states each state is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road.
8. While no state can impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it has the unquestioned right to place a property tax on the instrumentalities engaged in such commerce.
9. The rule of property taxation is that the value of the property is the basis of taxation; the value of property results from the use to which it is put and varies with the profitableness of that use.
10. The rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the state, this does not cast a burden on interstate commerce.

[No. 908.]

Argued March 27, 28, 1894. Decided May 26, 1894.

by its engines or on its right of way is not a regulation of commerce among the states. *McCandless v. Richmond & D. R. Co.* 18 L. R. A. 440, 38 S. C. 103.

A license fee imposed by a city upon each pole and a mile of wire erected by a telegraph company is not invalid as a restraint upon the instruments of interstate commerce and communication. *Philadelphia v. Postal Telegr. Cable Co.* 67 Hun, 21.

A state revenue law making the occupation of sample sellers and solicitors a privilege, and requiring all persons selling goods by sample to, or taking orders from consumers, to pay an annual license or privilege tax, is a tax upon interstate commerce in so far as it applies to nonresident drummers selling within the state, for nonresident principals, goods at the time situated or to be manufactured without the state. *Hurford v. State*, 91 Tenn. 669.

The ordinance of the city of Chicago requiring a license fee for steam tugboats navigating the Chicago river, which boats were engaged in the coasting and foreign trade and in towing vessels engaged in interstate commerce is invalid. *Harmon v. Chicago*, 147 U. S. 398 (37: 216).

State legislation prohibiting the sale of an article imitating or resembling butter cannot interfere with the sale of oleomargarine imported from another state, in the original package bearing a United States revenue stamp, by a person holding a United States license for its sale. *Waterbury v. Egan*, 3 Misc. 355.

A state law is void as an interference with interstate commerce in so far as it requires original packages of baking powder, not deleterious to health, manufactured in another state, by citizens thereof and imported into the former state, to be labeled in any particular manner, and imposes a penalty for such sale when not so labeled. *Re Ware*, 53 Fed. Rep. 783.

A state statute prohibiting the sale of seed unless the year in which it is grown is plainly marked on each package, except on a sale of seed in open bulk

by farmers to other farmers or gardeners, is void as to seed brought from another state and sold in original packages. *Re Sanders*, 18 L. R. A. 549, 52 Fed. Rep. 802.

The police power of a state is subordinate to that of Congress to regulate commerce between the states. *Com. v. Paul*, 10 Pa. Co. Ct. 332.

The power of Congress to regulate commerce among the states does not embrace commerce which is completely internal or between different parts of the same state. *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 102 (36: 672).

In the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state does not render that business foreign which is otherwise domestic. *Lehigh Valley R. Co. v. Pennsylvania*, *supra*.

A state statute requiring railway officers to assign the passengers to coaches or compartments set apart for the race to which they belong is a regulation of commerce, which, though valid as applied to domestic passengers, is unconstitutional as applied to interstate passengers. *State v. Hicks*, 44 La. Ann. 770.

The Maine statute which makes railroad tickets good for six years, with the right of the holder to stop off at usual stopping places, cannot be held to apply to a ticket purchased in Canada for a continuous passage over defendant's road from that Dominion through Vermont and New Hampshire into Maine, since, applied to such a case, the statute would be unconstitutional as interfering with both state and foreign commerce. *Lafarier v. Grand Trunk R. Co.* 84 Me. 286.

The regulation of the charges of a grain elevator is not a regulation of interstate commerce, although the grain passing through it is brought from another state. *Budd v. New York*, 143 U. S. 517 (36: 247), 4 Inters. Com. Rep. 45.

A statute prohibiting the shipment out of the state of oysters taken in the waters of the state, while they are in shells, and also prohibiting

IN ERROR to the Supreme Court of the State of Indiana, to review a decree of that court, affirming the decree of the superior court of Marion county, in that state, in favor of the defendant, Victor M. Backus, treasurer of said county, in an action brought by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, plaintiff, to restrain the collection of taxes upon the property of said company, etc. *Affirmed.*

The facts are stated in the opinion.

Mr. John T. Dye for plaintiff in error.

Messrs. Alonzo Greene Smith, Atty. Gen. of Indiana, William A. Ketcham, Albert J. Beveridge and John W. Kern for defendant in error.

Mr. Justice Brewer delivered the opinion of the court:

This case is similar to the two just decided, in that it was a suit brought by this plaintiff in the same court, challenging an assessment of its railroad property for the same year, by the same board, with the same result both in the trial and supreme court of the state. Hence it is useless to reconsider the questions decided in those cases as to the constitutionality of the act itself, or those which depend solely upon like testimony. There was, however, in the trial of this case a more elaborate effort to show that the state board included in its assessment the value of property outside

the state, and also that the valuation placed nominally upon the property within the state was largely based upon interstate business done by the plaintiff, and thus, as is claimed, to that extent, placed a direct burden upon interstate commerce, which, it is conceded, is beyond the power of the state to cast. It becomes necessary, therefore, to notice a little in detail the testimony which was received, as well as that which was excluded on the hearing.

It may be premised that there was much testimony of a character similar to that given in the other cases. Beyond that, there was a large amount of testimony received as well as

the taking of such oysters by any person who is not a resident of the state, is not unconstitutional as a regulation of interstate commerce. *State v. Har-rub*, 15 L. R. A. 761, 4 Inters. Com. Rep. 99, 95 Ala. 176.

A state statute prohibiting game birds to be killed for the purpose of conveying them out of the state is not an unlawful interference with interstate commerce. *State v. Geer*, 13 L. R. A. 804, 61 Conn. 144, 3 Inters. Com. Rep. 732.

N. Y. Laws 1846, chap. 62, imposing a duty upon foreign goods sold at auction, as applied to sales not in the original packages in which they were imported, but in the separate packages contained in such original packages, is not an unauthorized interference with commerce by the state. *People v. Wilmerding*, 62 Hun, 361.

A state statute compelling the shipment of freight within a certain time after delivery, under a penalty for default, is not an unconstitutional regulation of interstate commerce as to freight for shipment out of the state as it does not tend to trammel or obstruct, but to expedite such commerce. *Bagg v. Wilmington, C. & A. R. Co.* 14 L. R. A. 596, 109 N. C. 279.

A statute prohibiting the manufacture, sale or offer for sale, of any article in imitation of yellow butter, but providing that it shall not prohibit the sale of oleomargarine in its real character, free from anything that looks like butter, is not void as a regulation of commerce, even as applied to the sale of oleomargarine in the original packages in which it was brought from another state. *Com. v. Huntley*, 15 L. R. A. 839, 156 Mass. 236.

A merchandise broker may be required as a condition of obtaining a license for that business, to pay a license fee, and, in addition, 2½ per cent upon his gross commission from the business, including that which is wholly interstate. *Flicklen v. Shelby County Taxing Dist.* 145 U. S. 1 (36:801), 4 Inters. Com. Rep. 79.

A provision of the Federal Constitution prohibiting discrimination by states against the produce, etc., of other states, is not violated by *Mo. Rev. Stat. §§ 7211, 7212, 7217*, prohibiting the peddling of patent medicines from place to place without a license, and fixing the license fee for peddling. *State v. Smithson*, 106 Me. 149.

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One soliciting orders for goods from house to house cannot refuse to comply with the terms of a police ordinance regulating such business, which applies to all alike, on the ground that he is engaged in interstate commerce because he is working for a person domiciled in another state, and simply exhibits samples and takes orders which are filled by another agent or by express. *Titusville v. Brennan*, 14 L. R. A. 100, 3 Inters. Com. Rep. 735, 143 Pa. 642.

A city ordinance imposing a license on persons canvassing for goods or books within the city is an attempt to regulate interstate commerce in so far as it affects a canvasser for one doing business in another state, even though he has a branch office within the city to supply canvassers. *Re Nichols*, 48 Fed. Rep. 64.

A license fee demanded of a manufacturer's agent employed to sell goods by sample in Louisiana, the good being shipped directly from the factory in another state to the purchaser, is illegal as a tax on interstate commerce. *McClellan v. Pettigrew*, 44 La. Ann. 356.

Persons engaged in showing samples of goods manufactured by their principal at his residence in another state, and in taking orders for such goods, which are transmitted to the principal to be filled, cannot be compelled to pay a license tax by the state in which they are operating, whether they are within its statutory definition of peddlers or not. *Re Spain*, 14 L. R. A. 97, 47 Fed. Rep. 208.

A statute requiring express companies doing business in a state to pay a license tax of \$500 where they operate less than 100 miles and \$1000 for over 100 miles, is unconstitutional as an attempted regulation of interstate commerce. *Com. v. Smith*, 92 Ky. 38.

A state may, until legislation on the subject by Congress, authorize the erection of a bridge across a navigable river within the state not in the line of general commerce. *State v. Leighton*, 83 Me. 419.

The police power of a state cannot be exercised over interstate transportation of subjects of commerce. *Com. v. Chesapeake & O. R. Co.* 3 Inters. Com. Rep. 308.

A state cannot prohibit the running of freight trains on Sundays, so far as they are engaged in in-

some offered and rejected for the purpose of showing what was presented to the board for consideration, the method by which it reached its conclusions, and the elements which entered into its estimate of value. The principal witness relied on in respect to these matters was the secretary of state, a member of the board. By him it was proved that no witness was sworn and examined, and no inquiry made in that way, as to the value of this property. It appeared that the return made by the company was before the board for consideration. The court ruled out an offer to prove that outside of such return no books, papers, or documents, except Poor's Manual and the Investor's Guide, were produced before the board, or considered by it in making the assessment; that Poor's Manual was used by it for data upon which to base the assessment; and specifically that this was the only evidence which it had as to the number of miles owned and leased by the plaintiff, the state in which they were located, and the various incumbrances upon the different lines of road included in the system belonging to the plaintiff. It was shown that plaintiff appeared before the board by its officers, with such statements as they desired to make, and also that other individuals (especially an attorney representing Marion

county, one of the counties through which the road of the plaintiff runs) appeared and made arguments. A series of questions was put to the witness, of which this is a sample:

"Q. In the assessment of the Cincinnati, La. Fayette & Chicago Railway, extending from Templeton, Indiana, to the Illinois state line," (one of the lines in plaintiff's system and included in the assessment) "in arriving at the basis for the estimate of the value which you placed upon the main line of that road, did you consider the market value of any stocks; and, if so, of what stocks did you consider the market value?"

—but the court ruled the question out on the ground that it was an attempt to inquire into the mental processes of members of the board. At the time counsel for the defendant stated:

"We desire to let the record show at this point, may the court please, that the defendant will interpose no objection to any question asked by the plaintiff as to whether or not the state board of tax commissioners assessed and valued any bonds, stocks or anything else outside of the state, and that we will not object to any question asked any member of the state board of tax commissioners as to whether or not that board assessed anything else than

terstate commerce. *Com. v. Chesapeake & O. R. Co. supra.*

A state statute prohibiting freight trains running on Sunday between sunrise and sunset, except with livestock or perishable freight, or to complete a trip which can be finished before 9 A. M., is invalid as a regulation of commerce, so far as it applies to interstate freight trains. *Norfolk & W. R. Co. v. Com.* 18 L. R. A. 107, 3 Inters. Com. Rep. 671, 88 Va. 95.

A contract of shipment to a city in the same state as the place of shipment is not interstate commerce, although the yards in which the freight is unloaded extend into another state, and the freight is actually unloaded in such other state, and the place of business of the consignee is also therein. *Scammon v. Kansas City, St. J. & C. B. R. Co.* 41 Mo. App. 194.

A package of intoxicating liquors in the possession of a carrier in transit from one state to another for delivery in the latter is interstate commerce and under the exclusive jurisdiction of Congress; and state process for its seizure before broken or delivered to the consignee is void. *State v. Intoxicating Liquors*, 3 Inters. Com. Rep. 581, 88 Me. 158.

Ark. Act of April 3, 1889, to regulate the sale of wine in Arkansas, in so far as it authorizes the sale of wine made from grapes grown on premises within the state, and prohibits the sale of wine, made out of grapes grown out of the state, violates the Federal Constitution. *State v. Deschamps*, 3 Inters. Com. Rep. 676, 53 Ark. 490.

A state cannot, under the guise of exerting its police powers or of enacting inspection laws, make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other states. *Brimmer v. Rebman*, 138 U. S. 78 (34: 862), 3 Inters. Com. Rep. 485; *Voight v. Wright*, 141 U. S. 62 (36: 638).

A state act making it a misdemeanor to sell cattle without inspection, before slaughter within the state, violates the commerce clause of the Federal Constitution. *State v. Klein*, 3 Inters. Com. Rep. 673, 126 Ind. 68.

The exaction of a license fee for the privilege of purchasing goods to be shipped to another state is 4 INTER S.

not unconstitutional as a tax upon interstate commerce. *Rothermel v. Meyerle*, 9 L. R. A. 303, 3 Inters. Com. Rep. 315, 136 Pa. 250.

A license tax on peddlers is not an unconstitutional regulation of commerce. *Re Wilson*, 12 L. R. A. 624, 8 Mackey, 341; *State v. Emert*, 11 L. R. A. 219, 3 Inters. Com. Rep. 527, 103 Mo. 241.

A law which imposes a license tax on peddlers to an attempted regulation of commerce and unconstitutional so far as it applies to one going from house to house selling by samples, forwarding the orders to his principal in another state, and on receipt of the goods delivering them personally. *Ex parte Murray*, 3 Inters. Com. Rep. 574, 98 Ala. 78; *McLaughlin v. South Bend*, 10 L. R. A. 357, 126 Ind. 471.

The solicitation of orders for books within a city by an agent who is, like his principal, a citizen of another state to which all orders are sent to be filled, such agent neither delivering the books nor collecting any money, constitutes interstate commerce and an ordinance requiring a license for doing such business is void. *Re White*, 11 L. R. A. 284, 3 Inters. Com. Rep. 531, 43 Fed. Rep. 913.

One bringing goods into Kentucky from another state for the purpose of peddling them is liable, the same as a citizen of Kentucky, to pay a peddler's license imposed by the Kentucky statute, and to all the penalties for refusing to do so. The statute does not violate the interstate commerce clause of the United States Constitution. *Rash v. Farley*, 91 Ky. 344.

A tax on the privilege of selling fertilizers is a tax on the fertilizers and therefore invalid, so far as it relates to fertilizers brought from other states, being a tax on interstate commerce. *American Fertilizing Co. v. North Carolina Board of Agriculture*, 11 L. R. A. 179, 3 Inters. Com. Rep. 532, 43 Fed. Rep. 609.

A state statute which requires from the agent of an express company not incorporated by the laws of that state a license from the auditor of public accounts before he can carry on any business for such company in the state, and imposing a fine for the violation of the statute, is repugnant to the power of Congress to regulate commerce among the states, where a part of the business

railroad track and rolling stock inside of the state of Indiana."

The plaintiff did not, however, apparently care to take advantage of this offer. Other questions were put to the witness, like the following:

"In assessing the Indianapolis & St. Louis Railroad, you placed the main track at \$27,900 per mile, while you assessed the main track of the Terre Haute & Indianapolis Railroad at \$21,800 per mile, being \$6000 per mile less than the track of the St. Louis division of the three C's & St. L. or the I. & St. L. railroad. Now, in making this assessment, \$21,800 per mile, or \$27,900 per mile upon the main track of the St. Louis division of the three C's & St. L., did you or not consider the gross earnings of the three C's & St. L. railway, including earnings derived from carrying freight and passengers from points within to points without the state of Indiana or through the state of Indiana, while engaged as a common carrier in interstate commerce?"

—but the court sustained objections to all of them. The witness was also asked, but not permitted to answer:

"Q. Did you fix the value upon the St.

Louis division of the three C's & St. L. railway—I mean did the board—as returned to the auditor of state separately or did you value that road as a part of the three C's & St. L. system in Ohio and in Indiana, and did you, having reached a unit of value by considering the whole system, distribute that unit of value according to mileage over the operated and leased lines and parts of roads in Indiana of the plaintiff?"

Another series of questions was propounded, of which the following is one:

"Q. Did you or not, in assessing and fixing the value of the St. Louis division and of the Chicago division and of the leased and operated lines of the three C's & St. L. railway in the state of Indiana, place or add anything to the value of said lines by reason of the fact that it had a franchise?"

Objections were made by the defendant to these questions, which were sustained, but afterwards, when the witness was again on the stand the objections were withdrawn, whereupon the plaintiff withdrew all the questions except the one which we have last quoted, and to that the witness answered, "We did not; no, sir."

These references are probably sufficient to

done by the agent is interstate business. *Crutcher v. Kentucky*, 141 U. S. 47 (35: 649).

A state tax on the business of buying and selling "futures" is not a tax on interstate commerce, although the business is carried on by the agent of a citizen of another state, who solicits orders within the state imposing the tax, to be executed out of it. *Alexander v. State*, 10 L. R. A. 869, 86 Ga. 246.

A state statute which requires railroads to provide separate accommodations for the white and colored races is within the power of the state, and is not a regulation of interstate commerce. *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 567 (33: 784), 3 Inters. Com. Rep. 801.

A state statute compelling railroad companies to furnish double decked cars for sheep, under a penalty for failure to do so and limiting the price per carload, is void as an attempted regulation of commerce, when applied to interstate shipments. *Stanley v. Wabash, St. L. & P. R. Co.* 3 L. R. A. 549, 3 Inters. Com. Rep. 176, 100 Mo. 435.

N. Y. Laws 1897, chap. 116 as amended by N. Y. Laws, 1898, chap. 198, relating to the heating of steam passenger railroad cars, are police regulations, and are not unconstitutional as being interstate commerce regulations. *People v. New York, N. H. & H. R. Co.* 55 Hun, 409.

A license tax assessed, under the Pennsylvania act, against a railroad company which is a corporation of Virginia, for keeping an office in Philadelphia for the use of its officers, stockholders, agents and employes, is unconstitutional as a tax upon interstate commerce, when the company is engaged in interstate commerce. *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114 (34: 394), 3 Inters. Com. Rep. 178.

The Kentucky statute requiring resident agents of foreign express companies to obtain a license from the state auditor, and to pay the fee therefor, is not void as an attempt to regulate interstate commerce. *Crutcher v. Com.* 99 Ky. 6, 40 Am. & Eng. R. Cas. 29.

The business of an agent being to solicit passenger traffic out of California into and through other states to New York city, is a part of interstate commerce, which cannot be restricted or taxed by a municipal corporation. *McCall v. California*, 136 U. S. 104 (34: 391), 3 Inters. Com. Rep. 181.

4 INTER S.

A state statute prohibiting the sale of goods by hawkers or peddlers is not void as a regulation of commerce, where there is no discrimination against nonresidents or goods from out of the state. *Com. v. Gardner*, 7 L. R. A. 666, 133 Pa. 284.

A state tax on stove range agents selling goods which are in the state, not taking orders as drummers, is not unconstitutional as a regulation of interstate commerce. *Hynes v. Briggs*, 41 Fed. Rep. 468.

A state statute requiring a license from every peddler or itinerant trader by sample or otherwise, unless he is a disabled soldier of the state, is unconstitutional as a regulation of commerce. *Wrought Iron Range Co. v. Johnson*, 3 L. R. A. 273, 3 Inters. Com. Rep. 146, 84 Ga. 754.

An ordinance requiring a license tax from peddlers and declaring that all persons selling goods from house to house by retail, from samples or otherwise, shall be deemed peddlers, is, so far as relates to sales made for residents or other states, void as a regulation of commerce in violation of the Constitution of the United States. *Re Kimmel*, 3 Inters. Com. Rep. 114, 41 Fed. Rep. 775.

A state statute requiring a privilege tax of an express company for doing business in the state is unconstitutional, as the business is an agency of commerce. *United States Exp. Co. v. Hemmingway*, 39 Fed. Rep. 60.

A general license tax on a telegraph company doing business in different states affects its entire business, interstate as well as domestic, and is unconstitutional. *St. Louis v. Western U. Teleg. Co.* 39 Fed. Rep. 59.

A tax, under state laws, for the privilege of using the streets, on each telegraph or telephone pole erected or used by any company which is not, by ordinance, taxed for city purposes on its gross income, is a regulation of commerce and void. *St. Louis v. Western U. Teleg. Co. supra*.

The imposition of a license tax on a foreign traveling agent, selling goods by sample for his principal doing business without the state, is a regulation of interstate commerce and invalid. *State v. Agree*, 33 Ala. 110; *Ft. Scott v. Pelton*, 39 Kan. 764; *Asher v. Texas*, 123 U. S. 129 (32: 368), 2 Inters. Com. Rep. 241.

fully present the questions for consideration. It will not be claimed that it is within the province of this court to review any question as to the admission or rejection of testimony which does not bear directly upon some matter of a Federal nature. It will be noticed that no testimony was ruled out showing, or tending to show, what was in fact valued and assessed by the state board. There was also direct testimony that no franchise belonging to the plaintiff was estimated in making the assessment. The inquiry, therefore, in view of the testimony received and that offered and rejected is narrowed to these two matters: First. If an assessing board, seeking to assess for purposes of taxation a part of a road within a state, the other part of which is in an adjoining state, ascertains the value of the whole line as a single property and then determines the value of that within the state, upon the mileage basis, is that a valuation of property outside of the state, and must the assessing board, in order to keep within the limits of state jurisdiction, treat the part of the road within the state as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road. Second. Where an assessing board is charged with the duty of valuing a certain number of miles of railroad within a state forming part of a line of road running into another state, and assesses those miles of road at their actual cash value determined on a mileage basis, is this placing a burden upon interstate commerce, beyond the power of the state, simply because the value of that railroad as a whole is created partly—and perhaps largely—by the interstate commerce which it is doing?

With regard to the first question, it is assumed that no special circumstances exist to distinguish between the conditions in the two states, such as terminal facilities of enormous value in one and not in another. With this assumption the first question must be answered in the negative. The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. This is something which does not exist, and cannot exist, until the combination is formed. A notable illustration of this was in the New York Central Railroad consolidation. Many years ago the distance between Albany and Buffalo was occupied by three or four companies, each operating its own line of road, and together connecting the two cities. The several companies were united and formed the New York Central Railroad Company, which became the owner of the entire line between Albany and Buffalo, and operated it as a single

road. Immediately upon the consolidation of these companies, and the operation of the property as a single, connected line of railroad between Albany and Buffalo, the value of the property was recognized in the market as largely in excess of the aggregate of the values of the separate properties. It is unnecessary to enter into any inquiry as to the causes of this. It is enough to notice the fact. Now, when a road runs into two states each state is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values and attempt to extract from the total value of the entire property that which would exist if the miles of road within the state were operated separately. Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of that road is partly attributable to the portion of the road in Indiana and partly to that in Ohio, and each state has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, how can equity be secured between the states, and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taxing a mileage share of that in Indiana is not taxing property outside of the state.

The second question must also be answered in the negative. It has been again and again said by this court that while no state could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce. See among many other cases, *Marye v. Baltimore & O. R. Co.* 127 U. S. 117 [32: 94]; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18 [35: 618], 3 Inters. Com. Rep. 595.

The rule of property taxation is that the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitability of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the state. An attempt to do so would be entering upon

a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt. Take for illustration, property whose sole use is for purposes of interstate commerce, such as a bridge over the Ohio between the states of Kentucky and Ohio. From that springs its entire value. Can it be that it is on that account entirely relieved from the burden of state taxation? Will it be said that the taxation must be based simply on the cost, when never was it held that the cost of a thing is the test of its value? Suppose there be two bridges over the Ohio, the cost of the construction of each being the same, one between Cincinnati and Newport, and another twenty miles below and where there is nothing but a small village on either shore. The value of the one will, manifestly, be greater than that of the other, and that excess of value will spring solely from the larger use of the one than of the other. Must an assessing board in either state, assessing that portion of the bridge within the state for purposes of taxation, eliminate all of the value which flows from the use, and place the assessment at only the sum remaining? It is a practical impossibility. Either the property must be declared wholly exempt from state taxation or taxed at its value, irrespective of the causes and uses which have brought about such value. And the uniform ruling of this court, a ruling demanded by the harmonious relations between the states and the national government, has affirmed that the full discharge of no duty entrusted to the latter

restrains the former from the exercise of the power of equal taxation upon all private property within its territorial limits. All that has been decided is that, beyond the taxation of property, according to the rule of ordinary property taxation, no state shall attempt to impose the added burden of a license or other tax for the privilege of using, constructing, or operating any bridge, or other instrumentality of interstate commerce, or for carrying on of such commerce. It is enough for the state that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws, and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the state. Neither is this an attempt to do by indirection what cannot be done directly—that is, to cast a burden on interstate commerce. It comes rather within that large class of state action, like certain police restraints, which, while indirectly affecting, cannot be considered as a regulation of interstate commerce, or a direct burden upon its free exercise. We answer this question, therefore, in the negative.

These are the only matters which seem to distinguish this case from the two preceding, and, therefore, the judgment of the supreme court of Indiana is affirmed.

Mr. Justice Jackson did not hear the arguments in this case or take part in its decision.

ILLINOIS SUPREME COURT.

CHICAGO, BURLINGTON & QUINCY R. CO., *Appl.*,

v.

CHARLES L. JONES.

(See S. C. 24 L. R. A. 141, 149 Ill. 361.)

1. A statute prohibiting more than fair and reasonable rates by a railroad corporation, being merely declaratory of a common law rule, although penal, does not deprive the company of its property without due process of law, because the statute does not fix any limit of the rates,—especially where a provision is made in the same statute for the fixing of rates by commissioners.
2. There is no unconstitutional delegation of power to railroad commissioners by a statute authorizing them to fix reasonable maximum rates of charges for freight and passenger traffic, where their schedule is not final but is made merely *prima facie* evidence of the reasonableness of the rates established.
3. Making a schedule compiled by commissioners *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges for railroad carriage does not infringe upon the right of trial by jury.
4. Provisions in a statute as to unlawful discrimination in rates will, even if unconstitutional, not make invalid other provisions as to reasonableness of rates.
5. Only transportation within the state, and that which is not a part of any continuous transportation without the state, is within the provisions of sections 1, 7, 8, and 11 of the Act of May 2, 1873, and these do not therefore affect interstate commerce.
6. The power of railroad commissioners to make a schedule of reasonable maximum rates does not impair the obligation of the contract of a railroad company, under the Act of 1852, which authorized its board of directors to establish rates of toll from time to time, but also provides that the company's by-laws shall not be repugnant to the constitution and laws of the state.
7. A schedule of rates cannot be excluded from evidence under the Illinois statutes when accompa-

NOTE.—The above case very fully presents the authorities on the subject of state regulation of carrier's rates. See, on the same subject, *Chicago & N. W. R. Co. v. Dey* (C. C. S. D. Iowa) 1 L. R. A. 4 INTER 8. 744; *Pensacola & A. R. Co. v. State* (Fla.) 3 L. R. A. 661; *St. Louis & S. F. R. Co. v. Gill* (Ark.) 11 L. R. A. 452, and note; *Burlington, C. R. & N. R. Co. v. Dey* (Iowa) 12 L. R. A. 436.

nied by a regular certificate of the commissioners as to its publication on the ground that it never took effect because never published as required by statute, since the statutes make the schedule and accompanying certificate prima facie evidence that the schedule offered is a schedule of the commissioners.

8. A statute changing a rule of evidence is applicable to a pending action.

9. An amendment to a declaration charging a common law liability or implied contract obligation to repay money obtained by wrongful overcharges, states a new cause of action within the rule as to the statute of limitations, where the original counts sought to recover treble damages as a statutory penalty.

Decided April 2, 1894.

APPEAL by defendant from a judgment of the Circuit Court for Knox County in favor of plaintiff in an action brought to recover back overcharges of freight which had been exacted of plaintiff by defendant for the carriage of livestock. *Affirmed.*

Statement by **Magruder, J.:**

This was an action in debt, brought by appellee, Charles L. Jones, against appellant, the Chicago, Burlington & Quincy Railroad Company, under the Act of 1878, to recover penalties for alleged overcharges on shipments of livestock from points on appellant's road in this state to the Union Stock Yards, Chicago. The suit was brought in the circuit court of Knox county on October 17, 1882. On May 25, 1883, appellee filed a declaration consisting of two special counts. The first count alleged that the railroad and warehouse commissioners made and published prior to October 2, 1878, as required by law, a schedule of reasonable maximum rates for appellant; that appellee shipped over appellant's road, subsequent to that date, certain cars of livestock from certain points on its road to Chicago; that appellant charged and received from appellee certain rates of freight, which were in excess of the rates fixed in the commissioners' schedule, whereby, by force of the statute, an action accrued to appellee, to recover three times the amount of the overcharge, and a reasonable attorney's fee. The second count was the same in form, except that it alleged a second schedule made and published by the commissioners prior to December 2, 1881, and certain shipments made, and freights charged and received, in excess of the commissioners' rates, subsequent to that date. On June 8, 1883, appellant filed four pleas to the declaration. The first two pleas set out at length the corporate organization of appellant, and the several special charters of the different companies forming it, by consolidation; that, by these charters, appellant was given power by the legislature to fix its own rates of freight and fare; and that the statute under which the suit was brought was in violation of the obligation of the contract between it and the state. The third plea was *nil debet*; and the fourth, that the cause of action did not accrue within two years. On June 11, 1883, the cause was removed to the circuit court of the United States, but on September 8, 1890, was remanded, and redocketed in the state court. In February, 1891, appellee filed an amended declaration, which consisted of 191 special counts. All of these counts, ex-

cept the last, declared on single shipments on different dates, and were the same in form. Each of the first 124 counts averred the making and publication by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for appellant prior to October 2, 1878,—the rate fixed by the schedule,—the rate charged, and the excess, and that thereby, by force of the statute, a cause of action accrued to the plaintiff for three times the alleged overcharge, and an attorney's fee. The remaining counts, except the last, were the same in form, except that they averred the making of a second schedule prior to December 2, 1881, and shipments subsequent to that date. The last count did not count on the statute, but averred certain shipments, and that the rates charged and received were unreasonable, and that thereby the defendant became indebted to appellee for the alleged overcharge above a reasonable rate. To this declaration, appellant filed seven pleas. The first and second, to all the counts except the last, set up appellant's charters, and the right claimed by it to fix its own rates, and that the statute sued on was a violation of the obligation of its contract with the state, substantially as in the first and second pleas to the original declaration. The third plea was *nil debet*. The fourth and seventh pleas, to all the counts except the last, averred that the causes of action alleged did not accrue within two years before the commencement of the suit. The sixth plea averred that the cause of action set out in the last count did not accrue to the appellee within five years before the filing, or obtaining leave to file, that count. Appellee joined issue on the third, fourth, and seventh pleas, and filed a demurrer to the first, second, and sixth pleas, the fifth having been withdrawn. The demurrer raised two questions: (1) Whether appellant's first and second pleas, setting up its charter provisions, constituted a defense; and (2) whether the cause of action set up by the last additional count was a different cause of action from that declared on in the original declaration. The court sustained appellee's demurrer to the first and second pleas, and overruled his demurrer to the sixth. Issues were subsequently joined, and a trial was

had by a jury. On the trial, appellee gave evidence showing the various shipments made by him for two years prior to the commencement of the suit, and the amount of freight paid on each, and to establish that the rate charged was more than a reasonable rate, and the alleged overcharges, and gave in evidence (1) a schedule of maximum rates, purporting to have been made by the railroad and warehouse commissioners for appellant, dated September 1, 1873, consisting of a classification of freight, and a tabulation of rates referring to this classification, with a certificate of the railroad and warehouse commissioners attached, as to the dates of publication; (2) a like schedule of reasonable maximum rates, purporting to have been made by the railroad and warehouse commissioners for appellant, dated December 1, 1881, and also having a certificate of the railroad and warehouse commissioners attached, as to the dates of publication. To the admission of these schedules in evidence, appellant objected, on the grounds, among others, (1) that the statute on which the suit was brought was unconstitutional and void; (2) that the provision of the statute making the commissioners' schedule prima facie evidence of reasonable maximum rates was unconstitutional and void; (3) that the schedule was not published as required by the statute, and therefore never went into effect as a schedule. Among the instructions asked by appellant, and refused by the court, were (1) an instruction that, under the pleadings and evidence, the plaintiff was not entitled to recover; (2) an instruction that in arriving at their verdict the jury should disregard the schedule of September, 1873; (3) an instruction that in arriving at their verdict the jury should disregard the schedule of December, 1881. The jury rendered a verdict in favor of appellee for \$2368.60, and the court subsequently assessed appellee's attorney's fee at \$1200. A motion for a new trial was entered, and overruled, and judgment was rendered in favor of appellee for the amount of the verdict and costs. From this judgment, appellant has appealed to this court.

Messrs. Herrick & Allen for appellant.
Messrs. J. B. Cessna and Willoughby & Barnes for appellee.

Magruder, J., delivered the opinion of the court:

The questions presented by this record concern the validity of the system under which for twenty years or more, the rates of railroad charges for the transportation of passengers and freight have been controlled and regulated by this state, through the medium of a board of railroad and warehouse commissioners. The principal points raised by the demurrers to the pleas, by the objections to the introduction of evidence, and by the refusal of instructions, relate to the constitutionality of the act of the legislature of this state, approved May 2, 1873, in force July 1, 1873, entitled "An Act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and

freights on railroads in this state, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal an act entitled 'An Act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this state for the transportation of freights on said roads,' approved April 7, A. D. 1871." 2 Starr & C. Anno. Stat. p. 1961; Rev. Stat. 1885, chap. 114, p. 951, §§ 124-133. Section 1 provides: "If any railroad corporation," etc., "shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight, . . . the same shall be deemed guilty of extortion, and upon conviction thereof shall be dealt with as hereinafter provided." Section 6 provides: "If any railroad corporation shall, in violation of any of the provisions of this act, ask, demand, charge, or receive of any person or corporation any extortionate charge or charges for the transportation of any passengers, goods, merchandise, or property, . . . the person or corporation so offended against may, for each offense, recover from such railroad corporation, in any form of action, three times the amount of the damages sustained by the party aggrieved, together with costs of suit and a reasonable attorney's fee, to be fixed by the court," etc. Section 9 is as follows: "The railroad and warehouse commissioners are hereby directed to make, for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of the charges for the transportation of passengers and freights, and cars on each of said railroads; and such schedule shall, in all suits brought against such railroad corporations wherein is in any way involved the charges of any such railroad corporation for the transportation of any passengers or freight or cars, or unjust discrimination in relation thereto, to be deemed and taken in all courts of this state as prima facie evidence that the rates therein fixed are reasonable maximum rates of charges for the transportation of passengers and freight, and cars upon the railroads for which said schedules may have been respectively prepared. Said commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedules. When any schedule shall have been made or revised as aforesaid, it shall be the duty of said commissioners to cause publication thereof to be made for three successive weeks in some public newspaper published in the city of Springfield in this state. All such schedules heretofore or hereafter made purported to be printed or published as aforesaid, shall be received and held in all such suits as prima facie evidence of the schedules of said commissioners, without further proof than the production of the schedules desired to be used as evidence, with a certificate of the railroad and warehouse commissioners that the same is a true copy of a schedule prepared by them for the railroad company or corporation therein named, and that the same has been published as required by law, stating the name of the paper in which the

same was published, together with the date of such publication."

1. The first ground upon which counsel for appellant attack the act is that it is void for uncertainty, in not defining the offenses for which the penalties provided for are imposed. The basis of this attack is found in the words: "If any railroad corporation," etc., "shall charge," etc., "more than a fair and reasonable rate," etc. It is said that it is uncertain what a fair and reasonable rate is as the determination of that question will depend upon a variety of considerations, such, for instance, as the character of the freight, the necessity of dispatch, the cost of cleaning and unloading cars, the risk of liability, as affected by the value of the article as carried, the volume of business, the amount of car room required, the difficulty of the service, the special attention demanded, etc.; that the offense of charging more than a fair and reasonable rate can only be defined when the jury, in each particular case, shall decide from the evidence before them what is a fair and reasonable rate; that the statute, being penal in its character, should describe the offense in terms which are free from ambiguity; and that the enforcement of a statute whose meaning is thus doubtful violates that provision in the Federal and state constitutions which declares that no person shall be deprived "of life, liberty, or property without due process of law." The difficulties which stand in the way of determining what are reasonable rates also stand in the way of embodying in a legal enactment such an exact definition as is insisted upon. If the legislature, in the act passed by it, fixes particular rates or charges, strict compliance therewith may work hardship, in view of the impossibility of always providing in advance for the effect of varying circumstances and conditions. The first section of the statute is merely declaratory of a well-known principle of the common law. At common law the common carrier was obliged to receive and carry all goods offered for transportation, upon receiving a reasonable hire (*Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 18 Am. Rep. 457; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31); and the court was to judge of the reasonableness of the freight charges. *Gard v. Callard*, 6 Maule & S. 70; *Lowden v. Hierons*, 2 Moore, 102; *Bazendale v. Great Western R. Co.* 5 C. B. N. S. 330. As common carriers must carry all freight offered to them and can only make a reasonable charge for so doing, it follows that the statute is only an expression of what was the law without the statute. Undoubtedly, the legislature has the power to declare what is a reasonable compensation, or to fix the reasonable maximum rates of charges. *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841. But in the absence of statutory regulation upon the subject, the courts must decide what is reasonable. *Dow v. Beidelman*, *supra*; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45. This being so, we are unable to see how

the statute here deprives the appellant of its property without due process of law. If the legislature has failed to fix a reasonable rate, then the courts must decide for the railroad companies, when controversies arise, what is a reasonable rate. *Chicago, B. & Q. R. Co. v. Iowa*, *supra*.

But we held in *Chicago, B. & Q. R. Co. v. People*, 77 Ill. 443, that the first section of this statute should be construed in connection with the eighth, and that the latter section, by providing for the making, by the railroad and warehouse commissioners, of a schedule of reasonable maximum rates for each of the railroad corporations in the state, furnished a uniform rule for the guidance of the railroad companies. In that case we said: "When that is done there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed." It is true that the taking of higher rates than those fixed by the commissioners' schedule of rates is not the exact form of statutory offense, and the taking of such higher rates might not subject to the penalties of the statute, upon the making of proof that they were fair and reasonable. Still, as we view it, to constitute the offense really designed and intended by the statute, regarding it in its whole scope and purpose, the rates taken must have been in excess of the schedule rates." This construction of the two sections, as related to each other, is not forbidden by the character of the act as a penal statute. Although penal laws are to be construed strictly, yet "the object in construing penal as well as other statutes is to ascertain the legislative intent." *United States v. Hartwell*, 73 U. S. 6 Wall. 395, 18 L. ed. 832. The statutory counts of the declaration in the case at bar contain an averment that a schedule of rates had been established by the board of commissioners, and that the defendant had received compensation in excess of those rates. It thus avoids the defect for which the declaration in *Chicago, B. & Q. R. Co. v. People*, *supra*, was condemned. Upon this branch of the case, counsel for appellant rely upon the case of *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, 19 Fed. Rep. 679, decided by the circuit court of the United States, sitting in Tennessee; but a comparison of the statute of Tennessee which was under consideration in that case with the Illinois statute under which the present suit is brought will show that they differ from each other in many respects. In *Stone v. Farmers Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, the Supreme Court of the United States passed upon the validity of a statute of Mississippi passed in 1884, and entitled "An Act to provide for the regulation of freight and passenger rates in this [that] state, and to create a commission to supervise the same and for other purposes," which is similar, in many of the essential features, to the Illinois Act of 1873. It was objected to the Mississippi act that it was void for want of sufficient certainty, and the case of *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, *supra*, was referred to in support of the objection. But Chief Justice Waite, in delivering the opinion of the court in the *Stone*

Case, says of the Mississippi statute: "It is difficult to understand precisely on what ground we are expected to decide that this statute is so inconsistent and uncertain as to render it absolutely void on its face.

We find nothing in it to show that the statute, as it now stands, is altogether void and inoperative." See also *Stone v. Yazoo & M. V. R. Co.* 62 Miss. 607, 52 Am. Rep. 193. We are not convinced that it is our duty to hold said Act of 1873 void for uncertainty in defining the offense for the commission of which it imposes the penalties therein mentioned.

2. It is claimed that the provision contained in said section 8 which authorizes the commissioners to fix for each of the railroads in the state a schedule of reasonable maximum rates is unconstitutional, as being an attempted delegation of legislative power. The constitutional provisions on this subject are as follows: "And the general assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state." Const. art. 11, § 12, 1 Starr & C. Anno. Stat. p. 163. "The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." Const. art. 11, § 15, 1 Starr & C. Anno. Stat. p. 164. The power to regulate and control the charges of railroad companies, or other agencies engaged in public employments, is legislative, and not judicial. Independently of such constitutional provisions as are above quoted, it is now the settled doctrine in this country that the legislatures of the states have the power to regulate and settle the freight and passenger charges of railroad companies; and the charges for services of other employments which are public in their character, subject only to such restraints as are imposed by charter contracts, and by the authority of Congress to regulate foreign and interstate commerce. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45. This doctrine is not here controverted. It is admitted that if, in the Act of 1873, the legislature had prescribed, in definite and specific figures, reasonable maximum rates of charges, the law would have been valid. By an Act approved April 15, 1871, the legislature of Illinois classified the railroads in the state into four classes, and provided that those in the first class should be limited to 2½ cents per mile, those in the second class to 3 cents per mile, those in the third to 4 cents per mile, and those in the fourth class to 5½ cents per mile, as compensation for the transportation of any person with a certain amount of ordinary baggage. Ill. Laws 1871, p. 640. We held this law to be valid. *Ruggles v. People*, 91 Ill. 256. The Supreme Court of the United States

affirmed the decision. *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812.

The objection made to the Act of 1873 is that it is not such an act as was the Act of 1871, which was repealed on March 31, 1874. 2 Starr & C. Anno. Stat. p. 2368. The Act of 1873 is said to be invalid because, instead of establishing reasonable maximum rates of charges, it is supposed to delegate the power to establish such rates to the railroad and warehouse commissioners. It has been held, in a number of cases, that statutes which create boards of commissioners, and authorize them to make schedules of rates for railroad companies, are not invalid for the reason here urged. The doctrine of these cases is that the functions of such boards are administrative, rather than legislative; that the authority conferred upon them relates merely to the execution of the law; that a grant of legislative power to do a certain thing carries with it the power to use all proper and necessary means to accomplish the end; and that, as the reasonableness of rates changes with circumstances, and legislatures cannot be continuously in session, the requirement that the statute itself shall fix the charges might preclude the legislature from the use of the agencies necessary to perform the duty imposed upon it by the constitution; in short, that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself. *State v. Chicago, M. & St. P. R. Co.* 38 Minn. 281; *Georgia R. Co. v. Smith*, 70 Ga. 694; *Tilley v. Savannah, F. & W. R. Co.* 5 Fed. Rep. 641; *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866; *State v. Fremont & E. M. Valley R. Co.* 22 Neb. 313, 23 Neb. 117; *People v. Harper*, 91 Ill. 857; 8 Am. & Eng. Enc. Law, p. 911.

In *State v. Chicago, M. & St. P. R. Co.* *supra*, the eighth section of the Minnesota statute, which was there held to be constitutional, provided that the railroad and warehouse commissioners should have the power, in case the tariffs of rates, fares, charges, or classifications filed and published by the railroad companies should be unreasonable, to change them, and make them reasonable, and compel the carriers to adopt them as thus changed, and, upon refusal, to enforce compliance by mandamus; and said section also declared that it should be unlawful for any common carrier to charge a higher or lower rate than that fixed and published by the commission. In that case the supreme court of Minnesota interpreted the eighth section to mean that the rates recommended and published by the commission in the manner required by the act, were not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what were lawful or equal and reasonable rates, and that, in proceedings to compel compliance, no issue could be made, or inquiry had, as to the equality and reasonableness of the rates in fact. It was there conceded by counsel that the legislature could declare the schedule of rates fixed by the commission to be *prima facie* evidence of what was equal and reasonable, but the court held that the legislature

had the power to create a commission whose judgment or determination as to what was reasonable should be final and conclusive. The Minnesota case was taken to the Supreme Court of the United States, and the judgment therein rendered was reversed upon the ground that the Minnesota statute, as construed by the supreme court of that state, conflicted with the constitutional provision forbidding the states to deprive persons of their property without due process of law. *Chicago, M. & St. P. R. Co. v. Minnesota*, 184 U. S. 418, 38 L. ed. 970. In the latter case, Mr. Justice Blatchford, in delivering the opinion of the court, said of the statute: "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice." From this decision, *Justices* Bradley, Gray, and Lamar dissented, and held, in their dissenting opinion, that there was no good reason why the legislature might not delegate the duty of regulating and fixing the charges, so as to make them equal and reasonable, to such a board of commissioners as was provided for in the Minnesota statute.

Subsequently, in the case of *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, the case of *Chicago, M. & St. P. R. Co. v. Minnesota*, supra, was reviewed and explained. The doctrine of *Munn v. Illinois*, supra, and of the other cases known as the "*Granger Cases*," in 94 U. S. 155-181, 24 L. ed. 94, 102, was adhered to; and it was held that the Minnesota law had been declared invalid because it had been construed by the supreme court of that state "as providing that the rates of charges for the transportation of property by railroads, recommended and published by the commission, should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates."

We understand the doctrine of *Chicago, M. & St. P. R. Co. v. Minnesota*, supra, and of *Budd v. New York*, supra, to be as follows: The legislature has the power to directly fix the rates of charges. It has the right to declare what is reasonable. When it does so, its declaration is conclusive as to the reasonableness of the rates, and a charge beyond the maximum fixed by it must be regarded as unreasonable. But, where the legislature creates a commission to regulate the rates of charges, such commission has no power to make a schedule of rates which shall be final and conclusive evidence as to the reasonableness of the charges is unconstitutional, because judicial inquiry is thereby cut off. We do not, however, understand the Federal cases to hold that an act of a state legislature may not be valid, if, while omitting to itself fix the maximum rates, it cre-

ates a commission with authority to make schedules which shall be prima facie evidence of the reasonableness of the rates. Where the schedule is only made prima facie evidence, the court, in a suit against the carrier, can inquire and determine what is a reasonable rate; and the defect which was found to exist in the Minnesota law is thus obviated. Such is the character of the Illinois Act of 1873, which provides, in section 8, that the schedule made, published, and certified by the commissioners shall, in all suits brought against the railroad corporations, involving their freight and passenger charges, etc., be "deemed and taken, in all courts of this state, as prima facie evidence that the rates therein fixed are reasonable maximum rates of charges," etc. One of the criticisms made upon the construction given by the supreme court of Minnesota to the statute in that state is expressed in *Chicago, M. & St. P. R. Co. v. Minnesota*, supra, in the following words: "The supreme court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely prima facie equal and reasonable." The Mississippi statute, which was held to be a valid law in *Stone v. Farmers Loan & T. Co.* supra, contained a provision that the determination of the commissioners should be received in the courts as prima facie evidence that such determination was right and proper. So, also, the Iowa statute, which was held not to be unconstitutional as a delegation of legislative power in *Chicago & N. W. R. Co. v. Dey*, supra, provided that the schedule made by the commissioners should be prima facie evidence of the reasonableness of the rates therein charged, in all suits brought against the railroad corporations.

Under the constitutional provisions above quoted, the legislature of this state has the right, and it is its prerogative, if it chooses to exercise it, to pass a law establishing or fixing reasonable maximum rates of charges. When it passed the Act of 1873, it did not choose to exercise the power thus conferred upon it. That act does not establish reasonable maximum rates, nor does it delegate to the board of railroad and warehouse commissioners the power to establish such rates. When a board is authorized to make a schedule of rates, and their schedule is merely given the force and effect of prima facie evidence as to the reasonableness of the rates in a suit involving the question of such reasonableness, there is no delegation to the board of the legislative power to establish rates. The legislature thereby merely refrains from the exercise of its constitutional power, and, by leaving the question as to the reasonableness of the rates open, makes room for the exercise by the courts of their jurisdiction upon the subject. The final tribunal of arbitrament is not the judiciary, but the legislature. But "when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there, then resort may be had to

the courts, to inquire judicially whether the charges are reasonable." *Chicago, M. & St. P. R. Co. v. Minnesota*, 184 U. S. 462, 33 L. ed. 983. The decision in *Chicago, M. & St. P. R. Co. v. Minnesota*, *supra*, does not base the invalidity of the Minnesota statute upon the ground that the provision making the schedule of the commission final and conclusive as to the reasonableness of the rates was a delegation of legislative power to the commission. Nor do we deem it necessary to decide whether such a provision would amount to a delegation of legislative power, or not. But, if it be conceded that making the schedule of the commission final and conclusive as to the rates is a delegation of legislative power, it is sufficient to say, in the present case, that the Act of 1873 does not give to the schedule any such final and conclusive effect. We are therefore of the opinion that the act is not unconstitutional for the second reason urged upon our attention by counsel.

3. It is argued that the provision of the statute making the schedule of the commissioners prima facie evidence that the rates therein fixed are reasonable maximum rates of charges is unconstitutional and void, not only as depriving the carriers of their property without due process of law, but as infringing upon the right of trial by jury. We do not think that this objection should be sustained. In the first place, the act does not deprive the railroad corporations of the right to have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of the acts of the commissioners in fixing the rates of charges. In the next place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence. 2 Rice, Ev. pp. 806, 807; *Com. v. Williams*, 6 Gray, 1; *State v. Hurley*, 54 Me. 562. Such provisions are not unusual. Cases have arisen in this state under a statute making the fact of injury caused by sparks from a locomotive passing along the road prima facie evidence of negligence, and no question has ever been raised as to the validity of the statute. *Pittsburg, C. & St. L. R. Co. v. Campbell*, 86 Ill. 448; *St. Louis V. & T. H. R. Co. v. Funk*, 85 Ill. 480; *Toledo, W. & W. R. Co. v. Larmon*, 67 Ill. 68; *Rockford, R. I. & St. L. R. Co. v. Rogers*, 62 Ill. 346; *Chicago & A. R. Co. v. Clampt*, 63 Ill. 95; *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389. Acts making tax deeds prima facie evidence of the regularity of the proceedings antecedent to the deed have been held to be valid. 2 Rice, Ev. p. 607; *Hand v. Ballou*, 12 N. Y. 541; *Delaplains v. Cook*, 7 Wis. 54; *Allen v. Armstrong*, 16 Iowa, 508; *Wright v. Dunham*, 13 Mich. 414; *Gage v. Caraher*, 125 Ill. 451. See also *Williams v. German Mut. F. Ins. Co.* 68 Ill. 387. Cases referred to by counsel, which involve the validity of acts providing for references to auditors or referees, and making the findings of facts by them in their reports prima facie evidence of the facts in trials before juries, will be found to be clearly distinguishable from the case at bar. The supreme court of

Iowa has decided that a provision making the schedule of the commission prima facie evidence of the reasonableness of the rates of charges, as contained in a statute of that state similar to the said Act of 1873, was not obnoxious to the objections here urged against it, saying: "The provision of the statute that the rates fixed by the commissioners shall be regarded as prima facie reasonable is not of an unusual character, and was enacted in the exercise of the undoubted power of the state to prescribe rules of evidence in all proceedings under the laws of the state." The law presumes the acts of officers of the state to be rightfully done, and gives them faith accordingly. This rule is not unlike the provision of the statute complained of by the plaintiff." *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L. R. A. 486. See also *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599.

4. It is contended that the statute has been held to be unconstitutional as to interstate shipments, and that, therefore, it is void as a whole. This contention is based upon the decisions of this court in *People v. Wabash, St. L. & P. R. Co.* 104 Ill. 476, and *Wabash, St. L. & P. R. Co. v. People*, 105 Ill. 286, and of the Supreme Court of the United States in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244. In the Illinois cases the action was to recover for unjust discrimination in carrying the same class of freight from Peoria to New York city for a less sum of money than similar freight was carried from Gilman to New York city; Peoria being a greater distance from New York than Gilman, and being 86 miles further west in Illinois upon the defendant company's road from a station near the eastern boundary of Illinois, than Gilman. The judgments in the Illinois cases were reversed by the United States Supreme Court in the *Wabash, St. L. & P. R. Co. case*, *supra*, because of the interpretation placed by this court upon those sections of the Act of 1873 which relate to unjust discrimination, and not because the United States Supreme Court considered the Act of 1873 invalid, as amounting to an attempted regulation of commerce. The latter court, in the *Wabash, St. L. & P. R. Co. case*, *supra*, said: "It might admit of question whether the statute of Illinois now under consideration was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the state." The question whether the Illinois statute was or was not so designed by its framers was not as carefully considered in the above cases as it would have been, had it not been for the construction therein placed upon the previous decisions of the Federal Supreme Court. The latter decisions were then understood as holding that a state law prohibiting unjust discrimination in the rates of charges for the transportation of property between points wholly within the state, whether it was a part of a continuous carriage to a point out of the state, or not, was not invalid, in the absence of congressional action upon the subject, and when construed as the Act of 1873 was construed in the Illinois cases. With

such understanding of the Federal rulings, this court held that, while the provisions of the Act of 1873 relating to unjust discrimination were inoperative upon that part of the contract of shipment which had reference to the transportation outside of the state, they were binding and effectual as to so much of the transportation as was within the limits of the state. In the opinion of the majority of the court (*Chief Justice Waite and Justices Bradley and Gray dissenting*) in *Wabash, St. L. & P. R. Co. v. Illinois*, *supra*, *Mr. Justice Miller* said: "It cannot be denied that the general language of the court in these cases, upon the power of Congress to regulate commerce, may be susceptible of the meaning which the Illinois court places upon it." In the same opinion the same learned justice, in speaking for the majority, while stating that they were bound by the construction given by this court to the Illinois statute, and that this court had so construed the statute as to make it apply to commerce among the states, also said: "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid." Looking, however, at the provisions of the Act of 1873 which have reference to unjust discrimination, in the light of the construction given to them in the Illinois cases above referred to, the Federal Supreme Court held those decisions invalid, as applied to unjust discrimination in the rates of charges for the transportation of property within the state, when such transportation was part of a continuous carriage from a point within to a point without the state, upon the ground that such construction made the provisions conflict with the constitutional grant to Congress of power to regulate interstate commerce. This court might be inclined to consider the question whether the construction announced in said cases and accepted by the United States Supreme Court, may not have been incorrect, and unauthorized by the language of the act, if the present suit had arisen under those sections of the act which have reference to unjust discrimination. But the case at bar arises under the provisions which prohibit the charge of more than fair and reasonable rates. This action is brought for damages growing out of alleged charges of unreasonable rates for the transportation of property between points lying wholly within the state, and not being part of a continuous transportation to any point outside of the state. It is within the power of the legislature to so amend the act as clearly to limit the provisions concerning unjust discrimination to commerce carried on within the state.

Counsel claim that the provisions relating to interstate commerce are so intimately connected with those relating to commerce carried on wholly within the limits of the state as not to be separable, the one from the other, and that, as the act has been declared invalid when applied to interstate commerce, it must also be invalid as applied to state commerce. Upon this point, reference is made to cases

holding that words of limitation cannot be introduced into a penal statute, so as to make it specific, when, as expressed, it is general only. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 568; *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *Baldwin v. Franks*, 120 U. S. 678, 80 L. ed. 766. If the doctrine of these cases is applicable to the case at bar, it is only applicable to the sections of the Act of 1873 relating to unjust discrimination; and the effect of its application would be to hold those sections void, as affecting transportation within the state, because they had been held void as affecting interstate transportation, but the effect would not be to invalidate the act, so far as it relates to charges of fair and reasonable rates alone. Where a part of a statute is unconstitutional, the remainder will not be declared unconstitutional also, if the two are distinct and separable, so that the latter may stand, though the former becomes of no effect. The constitutional and unconstitutional provisions may sometimes be contained in the same section, but do not necessarily fall together, unless they "are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."

... If a statute attempts to accomplish two or more objects, and is void as to one, it may still be, in every respect, complete and valid as to the other. ... A legislative act may be entirely valid as to some classes of cases, and clearly void as to others." *Cooley*, *Const. Lim.* 6th ed. pp. 211, 213; *Dupee v. Swigert*, 127 Ill. 494. An examination of the Act of 1873 in the light of these principles of construction will show that parts of the act relate to the prevention of unjust discrimination between persons and places in the rates of charges for transportation, while other parts relate to the prevention of charges that exceed fair and reasonable rates. Sections 2 and 3 of the Act relate more particularly to unjust discrimination, and their aim is "against favoritism,—against charging one shipper more than another for the like service under like conditions." *Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill. 250; *Illinois Cent. R. Co. v. People*, 121 Ill. 304. Section 1, in connection with sections 7 and 8, concerns the question whether the rate charged a passenger or shipper is reasonable or not, irrespective of the charge that may be made against another passenger or shipper, or at another point. It is easy to see that there is a difference between extortion and discrimination. Hence, we think that the provisions of the act upon the two subjects can be separated and disconnected from each other so that those portions relating to reasonable charges may stand, even if those portions relating to unjust discrimination fall. Whether the latter do or must fall, or not, we do not decide. It is to be noted, however, that in *Indianapolis, D. & S. R. Co. v. Ervin*, and *Illinois Cent. R. Co. v. People*, *supra*, this court treated the whole of the Act of 1873 as valid, as applied to commerce wholly within the

state. The *Wabash, St. L. & P. R. Co. cases*, 104 Ill. 476, 105 Ill. 286, arose under the sections relating to unjust discrimination; and it was those sections which were therein construed as being "broad enough to include unjust discrimination in the rates of charges for the transportation of property from a point within to a point without the state." The provisions of the act relating to fair and reasonable rates were not construed as being broad enough to prohibit charges of more than reasonable rates for transportation outside of the state, or within it, as part of a carriage beyond the state. Therefore, the question whether these provisions were intended to apply only to transportation between points lying wholly within the state, and disconnected from a continuous carriage to a point outside of the state, is not a question which is settled in the decisions of the *Wabash, St. L. & P. R. Co. cases*. After a careful study of the terms of the act, we are of the opinion that the first section, read in connection with the title, and sections 7, 8, and 11, applies only to charges of reasonable rates for such transportation within the state as is not a part of a continuous transportation without the state, and therefore does not infringe upon the power of Congress to regulate interstate commerce. The title of the act is "An act to prevent extortion . . . in the rates charged for the transportation of passengers and freights on railroads in this state," and not on railroads outside of this state. The railroad corporations forbidden by section 1 to charge more than reasonable rates are thus therein described: "Any railroad corporation organized or doing business in this state under any act of incorporation, or general law of this state, now in force, or which may hereafter be enacted, or any railroad corporation organized, or which may hereafter be organized under the laws of any other state, and doing business in this state." Section 11 provides that the term "railroad corporation," contained in the act, shall be taken to mean all corporations, etc., now or hereafter owning or operating "any railroad, in whole or in part, in this state," and to apply to all persons, whether incorporated or not, "that shall do business as common carriers upon any of the lines of railway in this state," etc. Section 1 forbids the charging of more than reasonable rate for the transportation of passengers or freight or cars "upon any railroad within the state." Section 8 directs the railroad and warehouse commissioners to make "for each of the railroad corporations doing business in this state" a schedule of reasonable maximum rates of charges for the transportation of passengers and freight and cars "on each of said railroads." It is quite manifest that the schedule thus required to be made is of more importance in determining what are reasonable rates of charges than in determining whether there has been unjust discrimination. In section 8 the discriminating rates, charges, etc., therein referred to, are made *prima facie* evidence of unjust discrimination, without mention of the schedule. If the greater distance (from Peoria to New York) and the shorter distance (from Gilman to New York)

are given, and the fact is ascertained that the charge for transportation over such greater distance is less than the charge therefor over such shorter distance, a discrimination is at once established, whether the whole of the distances be regarded, or the proportional parts thereof in this state. Given the facts of the distances, whether without or within the state, and of the actual charges, and the question of discrimination is determined, though reference to the schedule may be made as to the injustice of the discrimination to the individual. But it could not have been the intention of the legislature that this schedule should be *prima facie* evidence of what were reasonable maximum rates of charges for transportation outside of the state, or for such transportation within it as might be a part of a continuous transportation from within to without. Other states would have their own laws and commissioners, and methods of ascertaining rates. The railroad and warehouse commissioners named in schedule 8 are Illinois officials, appointed by the governor, with jurisdiction limited to this state, and without power or opportunity to gather the data for fixing reasonable rates of transportation outside of the state, or within the state, as connected with a continuous carriage to a point beyond its limits. The act establishing the board of railroad and warehouse commissioners provides that only railroads incorporated or doing business in this state shall make sworn statements of their affairs to said commissioners. 2 Starr & C. Anno. Stat. pp. 1956-1958. Section 7 of the Act of 1878 requires the commissioners to ascertain whether the provisions of the act have been violated by "any railroad corporation in this state," and for that purpose "to visit the various stations upon the line of each railroad." We construe these features of the act to indicate that, so far as the provisions relating to the charges of reasonable rates are concerned, it was not the intention of the legislature to make them apply to any other kind of transportation than that which should occur wholly within the boundaries of this state, or to any other kind of contracts than those for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states. Consequently, we hold the provisions relating to charges of reasonable rates to be valid.

5. The statute granting power to the railroad commissioners to make a schedule of reasonable maximum rates for appellant is alleged to be a violation of appellant's charter, so as to impair the obligation of its contract with the state, and therefore the act is said to be void as to appellant. This point is settled adversely to appellant by the cases of *Ruggles v. People*, 91 Ill. 256, and *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812. In the former case, one of the questions submitted by the stipulation was whether a law establishing a reasonable maximum rate of charges for the transportation of passengers on railroads in this state was such a constitutional law as appellant "was bound to obey, . . . notwithstanding the provisions of its charter;" and it was there held

that the law was valid, and that the legislature has the power to fix a maximum rate of charges for corporations exercising a business public in its character, and that such regulation does not impair the obligation of the contract in their charters. In *Ruggles v. Illinois*, *supra*, the provisions of appellant's charter are fully set out. It is not denied that, by consolidation and statutory provisions, appellant acquired the powers and franchises granted to the Central Military Tract Company by an act to incorporate the latter company passed on February 15, 1851, and by an act to amend said act passed on June 19, 1852. By section 3 of said Act of 1851, said company was thereby "created and incorporated for the purpose of organizing under an act entitled 'An Act to Provide for a General System of Railroad Incorporations,' in force November 5, 1849," and was "entitled to have and exercise the powers and privileges, and be subject to the liabilities therein enumerated." The General Law of 1849, in clause 10 of section 21 thereof, conferred upon railroad companies organized thereunder the right "to regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for any passenger and his ordinary baggage shall not exceed three cents a mile, unless by special act of the legislature, and shall be subject to alteration as hereinafter provided." It also provides, in section 32, that "the legislature may, when any such railroad shall be opened, for use, from time to time, alter or reduce the rates of toll, fare, freight, or other profits upon such roads; but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent per annum on the capital actually paid in; nor unless on an examination of the amounts received and expended, to be made by the secretary of state, he shall ascertain that the net income derived by the company from all sources from the year then last past shall have exceeded an annual income of fifteen per cent upon the capital of the corporation actually paid in." The sixth section of the Act of 1852 is as follows: "The said company shall have power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business, and interest of the company: provided, that the same be not repugnant to the Constitution and laws of the United States or of this state, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same, as they shall from time to time, by their by-laws determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, and all other matters and things respecting the use of said road, shall be in conformity to such rules and regulations as the said board of directors shall from time to time determine." It is now claimed by the ap-

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pellant that it still has the right, under its original charter of 1851, of fixing rates, subject only to a limit of three cents a mile on passengers, and that the state has no power to interfere, except to keep the annual profits down to 15 per cent per annum on the paid-up capital, and that the Act of 1873, giving the commissioners power to make a schedule of maximum reasonable rates for appellant, ignores these limitations upon the power of the state to regulate its charges. Although the Act of 1852 is entitled "An Act to Amend the Charter of 1851," it is a complete charter in itself. It contains provisions not found in the General Railroad Law of 1849. The plea alleges that it was accepted by appellant, and it was evidently intended and accepted as a substitute for the charter of 1851. In *Ruggles v. Illinois*, *supra*, it was contended by appellant that the Act of 1852 repealed sections 21 and 32 of the old charter, with the limitations therein contained as above set forth, and that under section 6 of the Amending Act of 1852, as above set forth, appellant could establish its own rates of fare and freight, free from legislative interference. In that case the Supreme Court of the United States declined to decide whether section 6 of the Amending Act repealed clause 10 of section 21 and section 32 of the original charter or not. But they held that, under said section 6, no by-law could be established by the directors that did not conform to the laws of the state, whether such laws were in force when the amended charter was granted, or came into operation afterwards; that the power of the company for the regulation of its own affairs was, in express terms, subjected to the legislative control of the state; that the by-laws fixed the rates, and no by-law could be made that was at all repugnant to the laws of the state; that only such charges could be collected by appellant as were allowed by the laws of the state; that, in the absence of legislation, the power of the directors over the rates is subject only to the common law limitation of reasonableness, but that the state may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property; that when a maximum is so established the rates fixed by the directors must conform to its requirements,—otherwise, the by-laws would be repugnant to the laws. Adopting the views thus expressed by the Federal Supreme Court, we are of the opinion that there is nothing in appellant's charter which relieves it from the obligation to submit to the provisions of the Act of 1873 upon the subject of reasonable rates, and that the act does not impair the obligation of any contract alleged to be contained in appellant's charter.

6. It is claimed that the schedule of 1873, which was admitted in evidence, was not published as required by statute, and that for that reason it did not go into effect. The copy of the schedule of September 1, 1873, introduced by the plaintiff, was accompanied by the following certificate, which was attached to it: "Office of the Railroad and Warehouse Commission, Springfield, Illinois. State of Illinois, Sangamon County—

ss.: We, the undersigned, railroad and warehouse commissioners in and for the state of Illinois, do hereby certify that the foregoing is a true copy of 'A Schedule of Reasonable Maximum Rates of Charges for the Transportation of Passengers and Freight and Cars,' together with a classification of freight, explanatory, and forming a part, of said schedule, revised and prepared by the railroad and warehouse commission for the Chicago, Burlington & Quincy Company; that said 'Classification of Freight' and schedule has been published as required by law in the Illinois State Journal, a weekly newspaper published in the city of Springfield, in said state, in the issues of said paper dated, respectively, September 8, 10, 17, and 24, and October 1, A. D. 1878, as revised, and was in force from and after September 1, A. D. 1878, and remained in force until December 1, A. D. 1881. Witness our hands this 7th day of February, A. D. 1891. John R. Wheeler, Isaac N. Phillips, W. R. Crim, Railroad and Warehouse Commissioners. Attest: J. H. Paddock, Secretary."

This certificate shows that publication of both the classification and the schedule was made, not only for three successive weeks, but for five successive weeks, and that, consequently, the provision in section 8 as to publication was fully complied with. The trial court was authorized to admit it, and, when admitted, it was "prima facie evidence of the schedules of said commissioners." At the close of plaintiff's evidence the defendant introduced another certificate of the commissioners, dated December 1, 1891, and other evidence, for the purpose of showing that the classification of freights, which recited on its face that it formed a part of each schedule, was published on September 8, 10, and 17, and that the schedule for appellant, which refers to the classification as forming a part of it, was published on September 17 and 24, and October 1. The classification was published three successive weeks, and the schedule was published three successive weeks; but the point is made that, as the schedule referred to the classification, the latter was a part of the former, and that when the schedule was published, on September 17, 24, and October 1, the classification should have been published, as a part of it, and in the same issues of the newspaper with it. As the classification was for all the railroads, and a schedule was made for each, it is a question whether it was necessary to republish the classification with each schedule, it having already been published for the time required by law. The classification was on file in the office of the commissioners, and the schedules referred to it, and the roads could have access to it. The certificate, however, as above set forth, was merely prima facie evidence that the schedule introduced was that of the commissioners. Other evidence might be introduced to show that it was their schedule. This evidence was furnished by the defendant itself. Its own proof showed that the copy introduced was a copy of the schedule prepared and adopted for it by the commissioners. It is not contended that the defendant did not have notice

of the schedule of September, 1878, irrespective of any publication of it.

But even if it be true that the schedule could not go into effect until it was published in the manner required by the law, and that the separate publication of the classification and the schedule was not in compliance with section 8, we still think that the certificate above set forth was sufficient. The case below was not tried until November 30, 1891. By act approved June 30, 1885, the legislature amended said section 8, and in the amended section provided as follows: "All such schedules heretofore or hereafter made shall be received and held in all such suits as prima facie the schedules of said commissioners without further proof than the production of the schedule desired to be used as evidence, with a certificate of the railroad and warehouse commissioners, that the same is a true copy of a schedule prepared by them for the railroad company or corporation therein named." 3 Starr & C. Anno. Stat. p. 1029. The certificate of February 7, 1891, conforms to the requirement of section 8, as thus amended. No man or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens, and do not constitute a part of any contract. They are subject to control and modification by the legislature, whether affecting proof of existing rights, or rights subsequently acquired. Changes in them may be made applicable to existing causes of action. Cooley, Const. Lim. 6th ed. p. 451; *Gage v. Caraher*, 125 Ill. 447.

7. Appellee assigns as a cross-error the overruling of his demurrer to the sixth plea of the defendant. This plea was to the last additional count of the amended declaration, and averred that the causes of action therein set out did not accrue to the plaintiff within five years next before the filing, or the obtaining of leave to file, said last additional count, or the substitute therefor. The question is whether the amendment, or the last count of the amended declaration, sets up a new cause of action. If it does, the demurrer to the plea was properly overruled. If it does not, the amendment takes effect from the commencement of the suit. Where an amendment sets up no new matter or claim, but merely restates in a different form the cause of action set out in the original declaration, it relates to the commencement of the suits, and the statute of limitations is arrested, at that point; but, where the amendment introduces a new or different cause of action, it is treated as a fresh suit, begun at the time when such amendment is filed, and the statute is arrested at the latter date. *Baker v. Missouri Pac. R. Co.* 84 Mo. App. 98. In this case the two counts of the original declaration, and all the additional counts of the amended declaration, except the last, sought to recover the treble damages allowed by the statute for a violation of its provisions; and to these counts the two years statute of limitations was properly pleaded, as, in this state, actions for a statutory penalty must be brought within two years next after the cause of action accrued. The last amended count, filed more than seven years

after the filing of the original declaration, sought to recover damages for the violation of defendant's common law liability as a carrier for charging more than reasonable rates. To this count the five years statute of limitations was applicable. It is conceded by appellee that he cannot recover treble damages for unreasonable charges, except for those paid by him during the two years prior to the beginning of the suit, and that the object of the amended count is to recover single damages for the three years immediately preceding the two years for which treble damages are claimed. We think that the amended count introduced a new cause of action. The original declaration declares specially on the statute for the recovery of a statutory penalty; alleges, on the ground of action, the charge of rates in excess of those fixed by the schedule of the commissioner; and concludes: "Whereby, and by force of the statute, . . . an action hath accrued . . . to demand and recover of the defendant three times the amount of said sum of money," etc., "with reasonable attorney's fee, in a sum to be fixed by the court." The amended count is based on an alleged common law liability, or on an implied contract to repay money obtained by wrongful overcharges. Before it was filed the cause of action set forth in it had been barred by the five years statute of limitations. If a new suit had been begun for the same cause of action at the time of the amendment, it could not have been maintained, and there is no more reason why the cause of action should be enforced when embodied in an amended declaration

than when forming the subject-matter of a new suit. Although an amendment may properly be allowed, it does not necessarily, when allowed, have the effect of relating back to the date of bringing the suit, for the purpose of determining questions of limitation. An amendment which introduces a cause of action barred by limitation is ineffectual to avoid the statutory bar. *Gibbons v. The Steamboat "Fanny Barker,"* 40 Mo. 258; *Baker v. Missouri Pac. R. Co. supra*; *People v. Judge of Newaygo Circuit Ct.* 27 Mich. 188; *Melvin v. Smith,* 13 N. H. 463; *Illinois & St. L. R. & Coal Co. v. People,* 19 Ill. App. 141. Where the original declaration sets up overcharges upon certain shipments, and the amended declaration sets up overcharges on other and different shipments, the causes of action are not the same. *Illinois Cent. R. Co. v. Cobb,* 64 Ill. 140; *Phelps v. Illinois Cent. R. Co.* 94 Ill. 548; *North Chicago Rolling Mill Co. v. Monka,* 107 Ill. 340. Here the original declaration seeks to recover penalties for overcharges on shipments made subsequent to November 2, 1880, while the last additional count of the amended declaration declares for damages on account of overcharges on shipments made prior to October 17, 1880. We are of the opinion that there was no error in overruling the demurrer to the sixth plea.

One or two other minor objections are urged, but, after a careful consideration of them, we are satisfied that they are not well taken.

The judgment of the circuit court is affirmed.

MINNESOTA SUPREME COURT.

STATE of Minnesota v. C. E. CORBETT.

(See S. C. 24 L. R. A. 496.)

*1. Laws 1888, chap. 66, entitled "An act to regulate the sale and redemption of transportation tickets of common carriers and to provide punishment for the violation of the same," is not unconstitutional, either as "class legislation" granting special privileges to carriers.

2. Or as a delegation of the police power of the state to grant licenses to engage in a business.

3. Or as an interference with interstate commerce.

4. Or (at least as to tickets purchased after the pas-

age of the act) as depriving a citizen of his property "without due process of law."

5. If a business, as that of common carriers, is a proper subject of police regulation, so are its incidents and accessories; as, for example, the issue and sale of transportation tickets.

6. The word "owner," as used in the act, includes all those who operate a railroad or steamboat in the transportation of passengers; as, for example, lessees, receivers and the like.

Decided May 25, 1894.

CERTIFICATION by the District Court for Ramsey County for the opinion of the Supreme Court of a demurrer to an in-

*Headnotes by MITCHELL, J.

NOTE.—As to validity of statutes against ticket brokerage or "scalping" see *Burdick v. People* (Ill.) 24 L. R. A. 152 and note.

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diction for selling railroad tickets contrary to law, after the entering of an order sustaining the demurrer. *Order reversed.*

The facts are stated in the opinion.

Messrs. H. W. Childs, Atty. Gen., Pierce Butler and C. W. Bunn for the state.

Messrs. Horton & Denegre, for defendant:

The law is unconstitutional as class legislation.

It places in the exclusive control of a privileged class the right to buy and sell a certain kind of personal property. It is not questioned but that a railroad ticket is property.

Hoffman v. Northern Pac. R. Co. 45 Minn. 53.

As property easily transferred and assigned it is merchantable. The privilege granted under the law is the exclusive right to sell railroad tickets and the donee of this privilege is the railroad company. A railroad corporation as such can only act through agents. It is difficult then to perceive how a burden is placed upon them by the provisions of a law which directs that they operate in the natural way through agents, licensed by themselves, and make redemption of their unused tickets, or parts of tickets, in most instances at a profit to themselves and in no cases at a loss. The agent licensed under this act is but a creature of the railroad who creates and exterminates him at pleasure. The state can license only such as the railroad selects. The privilege of selling the property rights in a railway ticket is thus limited to the appointees of the railroad, and thereby raises in them a favored class with privileges that no others can enjoy.

Everybody has the right to dispose of his property as he will so long as he does not interfere with his neighbor.

Arrowsmith v. Burlingim, 4 McLean, 497.

The law secures to every citizen the right to do with his own what he will.

Giozza v. Tiernan, 148 U. S. 662, 87 L. ed. 601.

The law is in violation of section 1, article 14, of the Amendments to the Constitution of the United States, in that it deprives the citizen of his liberty and property without due process of law.

A ticket even though purchased from one not a licensed agent entitles the holder to travel thereon and such a contract is valid and can be enforced.

Sleeper v. Pennsylvania R. Co. 100 Pa. 259, 49 Am. Rep. 380.

The general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others.

Cooley, Const. Lim. 181.

The only possible justification that can be found for this law is the police power of the state. This term means simply "the power of the state to impose those restraints upon private rights which are necessary for the general welfare of all and is but the power to enforce the maxim *sic utere tuo ut alienum non laedas*."

Rippe v. Becker (Minn.) 22 L. R. A. 857; *Willis v. Standard Oil Co.* 50 Minn. 297.

The legislature certainly cannot give to an act the character of a police regulation by calling it such.

Tiedeman, Pol. Powers, § 186.

The business is legal.

Hirschfield v. Dallas, 29 Tex. App. 242.

A man's business if legal, is one of his most sacred property rights. In destroying the business of ticket brokerage, this law
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takes from the ticket broker his property in a manner otherwise than by the law of the land and deprives him of the liberty guaranteed him in the bill of rights.

Tiedeman, Pol. Powers, § 102; *Dent v. West Virginia*, 129 U. S. 115, 121, 32 L. ed. 623, 625; *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226; *Wynshamer v. People*, 18 N. Y. 878, 484.

In order to prohibit the prosecution of a trade altogether, the injury to the public which furnishes the justification for such a law must proceed from the inherent character of the business.

Tiedeman, Pol. Powers, § 102; *People v. Marx*, 99 N. Y. 877, 52 Am. Rep. 34; *Bertholf v. O'Reilly*, 74 N. Y. 509, 80 Am. Rep. 323; *Slaughter-House Cases*, 83 U. S. 16 Wall. 86, 106, 21 L. ed. 394, 418; *Live Stock D. & B. Assn. v. Crescent City, L. S. L. & S. H. Co.* 1 Abb. U. S. 888; *People v. Gillson*, 109 N. Y. 889; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 485, 469, 24 L. ed. 527, 529; *Ex parte Garland*, 71 U. S. 4 Wall. 333, 18 L. ed. 366; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 457, 33 L. ed. 970, 980, 3 Inters. Com. Rep. 209.

It has never been questioned and the scalper law of Illinois is to-day a dead letter.

People v. Gilbert, 25 Chicago Legal News, 812.

The Texas law was declared unconstitutional in *State v. Mercer*, Houston Daily Herald of October 6, 1893.

The law is in violation of section 8, article 1, of the Constitution of the United States, which provides: "That Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

Warren v. Charlestown, 2 Gray, 84; *Slauson v. Racine*, 18 Wis. 399; *Allen v. Louisiana*, 108 U. S. 80, 26 L. ed. 318; *Burkholts v. State*, 16 Lea, 71; *Western U. Teleg. Co. v. Texas*, 62 Tex. 630; *Jones v. Jones*, 104 N. Y. 234; *Pom. Const. Law*, § 378; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *North River S. B. Co. v. Livingston*, 3 Cow. 713; *People v. Raymond*, 84 Cal. 492.

The power to regulate interstate commerce is exclusively vested in Congress, and any attempts to do so on the part of the states are void. It makes no difference in what language the statute is framed, its purpose must be determined by its nature and reasonable effect.

Leisy v. Hardin, 135 U. S. 100, 127, 34 L. ed. 128, 138, 3 Inters. Com. Rep. 36; *Hannibal & St. J. R. Co. v. Husen*, *supra*; *Hall v. DeCuir*, 95 U. S. 485, 489, 24 L. ed. 547, 548; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595; *Chy Lung v. Freeman*, 92 U. S. 275, 28 L. ed. 550; *Henderson v. Wickham*, 93 U. S. 259, 23 L. ed. 543.

This law attempts to destroy the rights of property in tickets owned in this state though purchased and to be used upon railroads in another state; it attempts to destroy the right of property in tickets purchased in this state and for use upon railroads in another state; it attempts to prevent the transfer and regulate the redemption of tickets sold in another

state for use in this state; it attempts to legislate against a business established for the purpose of conducting ticket agencies for the sale of tickets upon railways operated in the different states of the Union. All of which said purposes are interstate commerce, and in so far as this law interferes with or regulates any of the same it contravenes the interstate commerce clause of the Constitution.

McCall v. California, 186 U. S. 104, 84 L. ed. 391, 8 Inters. Com. Rep. 181.

Mitchell, J., delivered the opinion of the court:

The defendant was indicted for selling on October 18, 1893, a railroad ticket of the Northern Pacific Railroad Company from St. Paul to Little Falls, in this state, contrary to the provisions of section 2, chapter 66, Laws, 1893, entitled "An act to regulate the sale and redemption of transportation tickets of common carriers and to provide punishment for the violation of the same," approved April 19, 1893. The trial court, having sustained a demurrer to the indictment, has certified the case to this court, pursuant to Gen. Stat. 1878, chap. 117, § 11. We think the statute contemplates that the report and certificate of the trial judge should indicate the particular questions of law which he deems so important and doubtful as to require the decision of this court. In the present case the "memorandum" of the judge, which is incorporated in his report, is the only thing which points out the questions of law upon which he desires our opinion, and it is apparent from this that the only question which he considered or passed upon in sustaining the demurrer was the constitutionality of the statute under which the indictment was found. We shall, therefore, confine ourselves to the consideration of the objections raised to the validity of that statute. These objections may be all summed up as follows: (1) It is "class" legislation, in that it gives to persons named by the carriers the exclusive privilege of conducting the business of dealing in transportation tickets. (2) It delegates to the carriers the police power of licensing persons to conduct the business of dealing in such tickets. (3) It deprives the citizen of his property in such tickets without due process of law. (4) It is an unlawful interference with interstate commerce. (5) It discriminates between incorporated and non-incorporated carriers of passengers, because section 7 imposes a penalty on the former, and not on the latter, for refusing to redeem unused tickets.

Before examining the provisions of the act, or entering upon the consideration of these objections, it may be well to refer briefly to a few elementary principles applicable to such cases. That the transportation of passengers by common carriers is a proper subject of police regulation by the state is unquestioned; and, if a business itself is the subject of police regulation, then so are all its incidents and accessories. That the matter of the issue and transfer of tickets, as evidences of the contracts of the carriers, is an incident and accessory of the business, needs no argument. And, where a business is a proper subject of

the police power, the legislature may, in the exercise of that power, adopt any measures, not in conflict with some provision of the constitution, that it sees fit, provided only they are such as have some relation to, and some tendency to accomplish, the desired end; and, if the measures adopted have such relation or tendency, the courts will never assume to determine whether they are wise, or the best that might have been adopted. *State v. Donaldson*, 41 Minn. 74; *Rippe v. Becker* (Minn.) 22 L. R. A. 857. Furthermore, courts are not at liberty to declare a statute unconstitutional because, in their opinion, it is opposed to the fundamental principles of republican government, unless those principles are placed beyond legislative encroachment by the constitution; or because it is opposed to a spirit supposed to pervade the constitution, but not expressed in words, or because it is thought to be unjust or oppressive, or to violate some natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights are protected by the constitution. Except where the constitution has imposed limitations upon the legislative power, it must be considered as practically absolute; and to warrant the judiciary in declaring a statute invalid they must be able to point out some constitutional limitation which the act clearly transcends.

With these elementary propositions in mind, we proceed to consider the evils, or supposed evils, which the legislature designed to remedy, and the measures which they have adopted to accomplish that end. It was commonly asserted and believed (to what extent correctly is not important) that spurious and stolen tickets, and tickets which had expired by limitation, or that were not transferable, were often put on the market to such an extent as to work great frauds upon both the public and the carriers; that frequently those selling such tickets were irresponsible, so that the party defrauded had no redress; that the business of trafficking in such tickets often furnished an inducement to railway employes to steal tickets, or issue spurious ones, and put them on the market. It was also commonly believed that, in order to evade statutes designed to secure uniformity of rates and to prevent discriminations, some carriers of passengers were in the habit of placing large blocks of their tickets with "scalpers," ostensibly not their agents, for sale at cut rates. To remedy these and similar abuses, real or supposed, this statute was passed. That all its provisions have some relation to, and tendency to accomplish, this end, is quite clear. Do they transcend any constitutional limitation upon legislative power? It seems to us that most of the objections to the act—certainly the first two—are based upon a radical misconception of its provisions, and of the character of transportation tickets as property. Counsel for the defendant seems to assume—First, that such tickets are vendible chattel property, which are the legitimate subject of barter and sale, the same as any other chattels, and, second, that this statute is designed to be a "license law," in the ordinary sense of that term.

With these two premises assumed, the task of successfully assailing the validity of the act is a very easy one. While a "railroad ticket" is, in one sense, "property," yet it is not merchandise or a chattel. It is merely the evidence of the contract of the carrier to transport the holder between the points, and on the condition, therein named. Treating it as the contract itself, it is in the nature of a chose in action. No one with whom a carrier makes such a contract has any inherent constitutional right to insist that it should be assignable. At common law, all choses in action were nonassignable, and if the legislature had deemed it necessary, in order to prevent the supposed evils, to provide that all transportation tickets should be nontransferable, or even to prohibit the issue of tickets altogether, and require carriers of passengers to collect fare in cash, we fail to see why they had not the power to do so.

Again, the act has not the first element of a "license law" in the common meaning of the term. It must be borne in mind that these tickets are the contracts, or evidences of the contracts, of the carriers, and hence, in the nature of things, can in the first instance be issued or sold only by the carriers themselves, who, as a matter of course, have the exclusive right to appoint their own agents for that purpose. Now, what the act provides is that the carriers shall only issue or sell their tickets through agents appointed in a particular manner, and the evidence of whose appointment has been authenticated by certain formalities. While the certificate of a compliance with these requirements, issued by the state, is called a "license," yet it is merely the evidence of the appointment of the agent, its purpose being to secure and preserve public written evidence of that fact, so as to prevent evasions of the law, and to enable every one who buys a ticket to ascertain whether the person with whom he is dealing actually represents, and has authority to bind, the carrier. The agent is given no authority to sell or deal in tickets of other carriers, but only authority to sell the ticket of the carrier appointing him, and providing him the certificate of such authority. So far from granting any special privileges to the carrier, it imposes a burden upon him—First, by limiting his right to issue or sell tickets to agents provided with a certificate from the state of their authority; and, second, by requiring him to repurchase or redeem unused tickets. And then, in order to prevent the frauds already referred to, the act prohibits entirely the sale, barter, or transfer, within the state, of the whole or any part of any ticket, or other evidence of the holder's right to travel on any railroad or steamboat, whether situated or operated within or without the state, except by the agent of the carrier possessing the certificate of authority provided for in the first section of the act.

The fact that the purchaser of a ticket is prohibited from selling it to whom he pleases does not "deprive him of his property without due process of law." The disposition of property may always be limited or regulated where public interests so require. The ticket is not destroyed or taken from the holder, nor

is his right to ride on it at all limited. The only limitation is upon his right to transfer it. If he wishes to ride on it, which is the purpose for which a ticket is presumably bought, he can do so; but, if he does not use it, his only course is to require the carrier who issued it to redeem it. As already suggested, a man has no constitutional right to insist that these contracts for transportation shall be transferable; and if the legislature had seen fit to declare that they should not be, and that they could only be used by the party to whom they were originally issued, they might have done so, even without making any provision at all for their redemption by the carrier if not used. This might not be true as to tickets, by their expressed or implied terms transferable, purchased before the passage of the act; but as to the tickets issued and purchased after that it is unquestionably true, for the statute becomes a part of the contract expressed in the ticket, and is inherent in the property in it. *Ogden v. Saunders*, 25 U. S. 12 Wheat. 218, 6 L. ed. 606.

The indictment in this case charges defendant with selling the ticket nearly six months after the passage of the act, and, if the law should be regarded as invalid as to tickets issued and purchased before it was passed, it was for the defendant to plead and prove that he comes within the class of persons as to which the law is invalid, and that this ticket was one as to which the statute does not operate. A law may be entirely valid as to some persons and some acts, and invalid as to others, and its invalidity can be raised and taken advantage of only by those who show that they have a right to question the act. They must show that their rights are taken away by the law, and that as to them, in the particular case, there is a higher law in the constitution which supersedes the statute. In Indiana and Illinois the courts have upheld statutes similar to the one under consideration in all material respects, except that they provide that the acts shall not prohibit any person who has purchased a ticket from any agent authorized as by the act provided, with the bona fide intention of traveling upon the same, from selling it to any other person. *Fry v. State*, 68 Ind. 552, 30 Am. Rep. 288; *Burdick v. People*, 24 L. R. A. 152, 149 Ill. 600.

In these cases the courts lay some stress upon this provision. But we are unable to see how the absence of it affects the validity of the act, or how, at least as to tickets issued after its passage, it deprives a person of his property "without due process of law." The law may, in that respect, be more drastic; but if the legislature thought that such an exception would open the door to evasions of the law, and that the evils aimed at could be effectually remedied only by absolutely prohibiting any sale of tickets within the state except by the carrier himself, through his agents authorized in the manner provided, we think it was competent for them to so declare.

Neither is there anything in the objection that, while the act prohibits the sale of any tickets except in the manner prescribed, it only provides for the redemption of unused

tickets of railroads or steamboats situated or operated, in whole or in part, within the state. This limitation of the provisions as to redemption may have been because of the supposed inability of the state to compel redemption by foreign or nonresident steamboats or railway companies; but, as the sale of all tickets might have been prohibited without any provision for their redemption, the act does not deprive the holder of a ticket of a nonresident carrier simply because it leaves him, in case he does not use it, to such remedies, if any, as may be given him by the law of the domicile of the carrier. It is hardly necessary to suggest that it is just as necessary, in order to prevent frauds on the public, to regulate the sale, within the state, of tickets of "nonresident" carriers as of "resident" ones. We may add, in passing, that section 5 of the Act makes it the duty of a carrier within the state to redeem tickets sold by it in "any manner," no matter whether sold within or without the state; also, that the word "owners" is evidently used in a comprehensive sense, so as to include all who are operating a railroad or steamboat, whether as owners of the property, or as lessees, receivers, or the like. What has been said fully covers the first three objections to the statute.

There is clearly nothing in the objection that the act unlawfully interferes with interstate commerce. In the first place, the question is not in this case, because the ticket is not for an interstate ride. But, even if it was, there would be nothing in the point. The law is not a revenue law, and is not designed to, and does not, regulate interstate commerce at all. It is a mere police regulation of the sale and transfer of tickets, designed to protect the public from frauds, and its interference, if any, with interstate

commerce, is purely incidental and accidental. The grant of power to Congress to regulate interstate commerce was never designed to, and does not at all interfere with, police power of the states to promote domestic order, to prevent crime, and to protect the lives and property of its citizens, although such regulations may indirectly operate upon and affect interstate commerce. Such regulations are valid in spite of their operation on commerce, and the right to pass them does not originate from any power in the state to regulate commerce. The books are so full of cases to this effect that the citation of authorities in support of the proposition is unnecessary.

Neither is there anything in the last objection. If defendant is correct in his construction of section 7,—that it only imposes a penalty, in favor of the state, upon incorporated carriers for a refusal to redeem unused tickets,—this is not an objection which he is in position to raise, as it does not affect him. If any owner of a railroad or steamboat situated or operated, in whole or in part, within the state, refuses to redeem his ticket, as provided in section 5, the purchaser has his civil remedy, wholly independently of section 7. Even if the latter section should be declared wholly invalid, on the objection of an incorporated carrier, it would not affect the validity of the balance of the act.

We have endeavored to give this case the consideration which its importance deserves, and are not able to see that any of the objections urged against the validity of the act are well founded. With the policy or wisdom of it we have nothing to do.

Order sustaining the demurrer is reversed, and the cause remanded.

Buck and Canty, JJ., absent.

INTERSTATE COMMERCE COMMISSION.

IN THE MATTER OF

THE FORM AND CONTENTS OF RATE SCHEDULES, AND THE AUTHORITY FOR MAKING AND FILING JOINT TARIFFS.

Decided September 8, 1894.

REPORT AND OPINION OF THE COMMISSION.

By the Commission:

The various difficulties connected with the form and contents of tariff schedules, the importance of uniformity in their arrangement and simplicity in their statements, and the duty of bringing them into conformity with the requirements of the statute, have been matters of concern to the Commission from the time of its organization. In the first Annual Report to Congress the conditions existing be-

fore the Act to Regulate Commerce was enacted are described in the following language:

"Then their rates were changed at pleasure and without public notification; their dealings to a large extent were kept from the public eye, the obligation of publicity not being recognized; and the public were therefore without the means of judging whether their charges for railroad service were reasonable and just or the contrary."

"But the publications actually made only

increased the difficulties. Railroad rates difficult enough to be understood by the uninitiated when printed plainly in one general tariff with classification annexed, became mysterious enigmas when several different tariffs were printed, as was the case in some sections; some relating to competitive points and others to what were called local points, and each referring to voluminous and perhaps different classifications, which were printed but not posted, and which were observed or disregarded at will in the rates as published. Such unsystematic and misleading publications naturally led to many overcharges and controversies, and naturally invited and favored special rates and injurious preferences."

Subsequently, in the same report, referring to the tariffs which had been filed by the carriers under the 6th section of the Act, the Commission said:

"But though the carriers make and file their tariffs as required by the Act, there is no general uniformity to the tariffs or to the classifications, either in form or general method of preparation. This is unfortunate for several reasons, but especially because the public, who have to deal with many carriers, are likely to be confused between the different methods of giving information, and possibly to be misled in some cases. The difficulty of making use of them for the purposes of the Commission is also greatly enhanced by the want of uniformity, and the Commission would be very glad to correct it if that were possible."

And in concluding this report the Commission made several recommendations, among which was the following:

"The Commission ought also to have the authority and the means to bring about something like uniformity in the method of publishing rates, which is now in great confusion, and to carefully examine, collect, and supervise the schedules, contracts, etc., required by the law to be filed."

When the Second Annual Report was submitted, measures were pending before Congress for enlarging the powers and duties of the Commission in regard to railway tariffs, and the following comment was deemed a sufficient reference to the subject:

"Much still remains to be done in order to assure a complete and adequate supervision of the transportation schedules furnished by the carriers. No uniformity in form has yet been reached, nor has any general system been adopted under which they are prepared. Amendments to the Act, now pending in Congress, are designed to enable the Commission to enforce the adoption of better and more systematic methods which are greatly needed."

By an amendment approved March 2, 1889, the 6th section of the Act was changed in several important respects and the following provision inserted:

"The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient."

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The authority conferred by this enactment has not heretofore been exercised through definite and formal orders, because the Commission has believed it more expedient to promote the correction of rate sheets by calling the attention of individual carriers to particular defects, and by general suggestions to railway officials which have been so far adopted as to accomplish much improvement in the construction of tariff schedules. The obligations imposed by the statute, and knowledge of the power possessed by the Commission, were reasonably expected to secure substantial observance of the law in this regard, without resort to specific and mandatory directions. It was thought preferable to bring about reforms in the arrangement and contents of public tariffs through the voluntary action of railroad managers, rather than by issuing explicit and compulsory orders.

In pursuance of this policy, and to obviate the necessity of a voluminous correspondence concerning matters of detail, the Commission instructed its Auditor to prepare a statement of its views regarding the general features of tariff construction which would effect compliance with the amended statute. This statement was published in pamphlet form in December, 1891, and widely distributed to railroad officials having charge of the preparation of rate sheets, and to other persons presumably interested in such an announcement. It set forth at considerable length the various questions involved, and stated quite fully the information which should be given to the public in the published schedules of carriers subject to the Act. If the directions contained in this publication had been followed, no further action by the Commission in respect to this provision of the law would seem to be required. While, however, a general willingness has been displayed by railway managers to comply in minor details with the suggestions then made, the Commission has been somewhat disappointed in its expectations concerning matters of primary importance, and has long been impressed with the imperfections and omissions of many of the rate sheets which are in current use. Such defects are especially observed in the arrangement and recitals of joint tariffs under which the greater portion of interstate traffic is carried on. In numerous instances these tariffs fail to give the names of participating carriers—the parties to the agreement—, omit any statement as to routes employed in effecting the transportation, and are otherwise wanting in information believed to be of consequence to the public and required by the statute to be disclosed.

There has been some failure, we apprehend, to recognize the full purpose of these provisions which relate to the construction and publicity of tariff schedules. Many railroad offi-

cials apparently suppose that the sole object in view is to acquaint shippers and passengers with the scale of charges which carriers may lawfully impose for the services they are called upon to perform. This conception is clearly inadequate, for it takes no account of the relation of such requirements to the general scheme of public regulation. Beyond the information to which the individual patron of the railroads was deemed entitled, Congress intended that the agency entrusted with the duty of administering the law should be supplied with the means of becoming familiar with the entire body of rates throughout the country, to the end that complaints of injustice and exaction might be more intelligently considered, and relative reasonableness in transportation charges more effectually secured. This purpose was pointed out by the Commission in its report of an investigation concluded in March, 1889, wherein, among other comments, the following observations were made:

"It is proper to add, however, that the requirement of publication found in the law is based upon many other considerations besides that of affording information to local shippers. The necessity of establishing and maintaining a steady, uniform, open tariff rate is of paramount importance, in view of the evils which the Act to Regulate Commerce attempts to correct, and obviously the first and most efficient method of regulation is the requirement of constant publicity."

Re Atlanta & W. P. R. Co. 2 Inters. Com. Rep. 480, 3 I. C. C. Rep. 75.

This opinion was expressed, it should be remembered, concerning the 6th section of the Act as it existed before the amendments of March 2, 1890, were adopted, and without reference to the added authority at that time conferred upon the Commission to "determine and prescribe the form in which the schedules" of rates and charges "shall be prepared and arranged." The enlarged obligations created by these amendments were plainly designed to aid the enforcement of the law in other respects, as well as to furnish individual shippers with more accurate knowledge respecting the rates and regulations of public carriers.

The reciprocal duties arising under this section must be regarded as fundamental to the purpose of the whole enactment. Any system of laws adapted to the regulation of interstate commerce will include the requirement of a common standard of compensation, and provide alike for its easy comprehension and its suitable publicity. The charges for railway transportation should be uniform to all and readily understood by all. The publication of tariffs in convenient form, adequate in statement and properly authenticated, is essential to the enforcement of reasonable rates and impartial treatment. So far as possible the schedules should be simple in arrangement,

ample in their disclosures and free from ambiguity. Otherwise the opportunity is afforded for evading the law by discriminating practices and unjust exactions. This is peculiarly true of joint tariffs issued by two or more carriers whose connected roads are operated as a single and continuous line. The increased and often enormous mileage which is thus brought under a common control, the great volume of traffic which thereby receives speedy and uninterrupted movement, and the temptations to favoritism arising from competition between rival systems, render it specially necessary that the public schedules under which business of this character is conducted should answer all the requirements of the statute. That many of the joint tariffs now employed are not in accord with these provisions is practically admitted by railway managers. They are often faulty in form, imperfect or ambiguous in disclosures, and generally lacking in proper evidence of their authenticity. When such a tariff is filed by one of the associated lines only, as is usually the case, if the participating carriers are not designated and no proof of their concurrence is furnished, it is quite possible for the latter to avoid liability, when charged with criminal misconduct in respect of a joint rate so issued, by denying knowledge of its existence or consent to its publication, although the fact that they carried traffic apparently under that tariff may be clearly established. If a connecting carrier, which joins in the transportation of freight received from the initial carrier, is prosecuted for violating the joint rate published by that initial carrier alone, there can be no conviction without proof, often impossible to obtain, that such connecting carrier agreed to the joint rate in question or authorized its promulgation. On the other hand, if it is assumed that the connecting carrier is not a party to the joint rate so issued, for want of assent thereto or concurrence therein, and the charge of unlawful conduct is based upon the acceptance of less than its own local tariff, such connecting carrier may refute the accusation by asserting that it had consented to the joint schedule issued by an initial carrier and was in fact a party thereto. Thus the ground of defense can be shifted to meet the theory of the prosecution, and a given carrier actually guilty of wrong doing may secure immunity from punishment, through inability to determine, before its disclosure is forced, whether it is or is not bound by the joint tariff which another carrier has published and filed. When such avenues of escape and evasion are afforded by the rate sheets in common use, there must be something at serious fault in their contents and construction. Defects in tariff schedules provide opportunity for inhibited practices which might not otherwise be available, and tend to

defeat in greater or less degree the beneficial purposes of publicity. More than this, they indicate a measure of disrespect for the law and a disposition to avoid its wholesome restraints. They render its enforcement in many cases impracticable, weaken the authority of its various restrictions, and not unfrequently prove an aid to prohibited and inequitable dealings between shipper and carrier.

Without enlarging upon these considerations or specifying in greater detail the reasons for dissatisfaction with existing methods, it is sufficient to say that the Commission has believed for some time that the authority conferred by the amendment of 1889 should be more directly and formally exerted, with the view of securing rate sheets and joint schedules which shall meet the requirements of the statute. Desiring to proceed with all needful caution, and not unmindful of the difficulties involved in any adequate scheme of tariff construction, it was deemed suitable to acquaint the principal railroad managers with the purpose of the Commission and to invoke the aid of their practical experience. To this end the following circular letter was issued at the date therein named:

INTERSTATE COMMERCE COMMISSION.

Washington, January 20, 1894.

"Dear Sir:

The Commission having determined to prescribe the form of schedules of rates and charges required by the Act to Regulate Commerce to be kept open to public inspection, in accordance with authority conferred by the sixth section thereof, and desiring that while fully meeting the requirements of the law the form adopted shall not be unnecessarily burdensome to the railways by reason of the expense or otherwise, it is thought proper to invite the carriers subject to the Act to send representatives to a conference to be held at the office of the Commission in Washington, on Monday, February 12, 1894, when opportunity will be afforded to offer suggestions regarding the preparation of such a form (especially suggestions as to a form for joint tariffs) as will comply with the requirements of the statute. In the meantime the Commission will be glad to receive suggestions by letter from those interested.

Respectfully yours,
WM. R. MORRISON,
Chairman."

In response to this invitation a large number of traffic officials assembled at the office of the Commission on the 12th of February, 1894, and the subject was discussed at considerable length during that and the succeeding day. An understanding was then reached that a subsequent conference should be held, at which the representatives of the railroads, who were to consult with each other in the meantime, would submit to the Commission some feasible plan for accomplishing the main ends desired. This second conference was held pur-

suant to the following call issued March 2, 1894.

INTERSTATE COMMERCE COMMISSION.

Washington, March 2, 1894.

"Dear Sir:

Pursuant to a call issued on January 20, 1894, a conference was held at the office of the Commission on February 12 and 13, ultimo, for the purpose of affording the representatives of the carriers an opportunity to offer suggestions regarding the form in which schedules of rates should be arranged to meet the requirements of the statute. A copy of the proceedings of the conference is herewith enclosed for your information. At the request of those present a second conference will be held at the office of the Commission in Washington, on Wednesday, March 14, 1894, at 11 a. m. at which you are invited to be present.

Respectfully,
WM. R. MORRISON,
Chairman."

The proceedings of these two conferences, which have been published in full from the stenographers' minutes and mailed to the principal traffic officials of the country, disclose the views of those present concerning the objects sought to be accomplished by the Commission, and the feasibility of various suggested plans for simplifying the forms and improving the construction of tariff schedules.

It seemed to be generally conceded by the railroad representatives who attended these meetings that the rate sheets now employed are unsatisfactory in many respects and fall short of the standard contemplated by the statute. The disposition was repeatedly avowed to make such changes and corrections as might be required by the Commission, though much stress was laid upon the difficulties involved in any radical departure from existing methods. While the discussion at these conferences extended to a wide range of topics, and much of it was of an informal character, there were three subjects which received special consideration, and which are entitled to more or less prominence in this report. These are (1) "Proportional tariffs," as they are called; (2) The designation on joint tariff sheets of the carriers which are parties thereto and the routes formed by their connected lines, and (3) The evidence that joint tariffs filed and published by one carrier are assented to and binding upon the participating carriers.

The first of these questions relates to a certain rule or principle of rate making, rather than to the medium by which charges are made known to the public; the others relate to the contents of the published rate sheet and the proof of its authenticity.

The employment of proportional tariffs appears to be very extensive, and they are applied to a large percentage of interstate business. Such tariffs establish rates of carriage which are lower between given points when the traf-

fic has undergone transportation before reaching the first point, or is to be further transported after reaching the second, than the rates charged on like traffic which originates at one of such points and terminates at the other. The rates from New York to Chicago, subject to the Official Classification, may be cited as an illustration, viz:

	Classes.					
	In Cents Per 100 Lbs.					
	1	2	3	4	5	6
Regular Rates	75	65	50	35	30	25
Proportional Rates	70	61	47	33	29	24

The higher rate is charged on shipments destined to Chicago, the lower proportional rate is accepted for the carriage between those cities when the shipments are consigned to points beyond Chicago. Traffic from the Atlantic seaboard to the various Mississippi river crossings is also governed, to a very great extent, by a similar system of charges. The eastern lines have not been accustomed to publish rates to points west of the Mississippi; on such business they advertise and accept a lower rate for hauling to the river than they exact on shipments terminating at the river points. A somewhat different but quite frequent use of the proportional method is described by the following illustration: One railway between Chicago and Kansas City, for instance, has a line of its own west of the Missouri river reaching into the corn producing region of Kansas. Another railway from Chicago terminates at Kansas City, yet desires to participate in the grain traffic originating in the same corn belt west of the Missouri. The first named road, extending through to Chicago, naturally desires to route by its own rails the traffic shipped to that market; and, being able to make through rates over its own line, refuses to join in rates from Kansas points to Chicago *via* its line to the river and thence *via* the line of its competitor. The latter, however, by means of a low proportional tariff from Kansas City can allow the former its full local rates to that point, and still compete for the business by making through rates to Chicago equally low with those made by the road having its own through line.

Various reasons are assigned by the railroads for resorting to this method of establishing rates. The use of proportional tariffs, it is claimed, furnishes the basis for arriving at the total through rates for a large section of country, when it is impracticable to publish such rates in full by reason of the great number of roads and routes which are or may be employed in effecting the transportation. It is also asserted that cases not unfrequently arise where one carrier will refuse to unite with other carriers, whose lines are physically connected with its own, in forming through routes and pub-

lishing joint rates for through traffic. Under these circumstances the proportional plan is alleged to be necessary in order that the carrier which is unable to secure such an arrangement may nevertheless make the same through rates as are offered by competing lines. It is likewise generally urged that proportional tariffs are beneficial to the public, because they supply the advantages of through routes and through rates to many localities which could obtain them in no other way.

We deem it unsuitable, however, to make any further observations at this time upon the subject of proportional tariffs, and purposely refrain from expressing any opinion as to their lawfulness under the Act to Regulate Commerce for two reasons. One reason is that this proceeding is specially directed to an improvement of the framework and phraseology of published schedules, including evidence of authority for filing joint tariffs, and does not necessarily include the consideration of rate making rules and practices. Our present concern is with the "forms" of tariff-sheets which are required to be filed and exhibited to the public, rather than with the principles upon which charges are adjusted in the first instance. Rates must be fixed before they can be announced, and the policy which governs their application to varying circumstances of carriage is something quite different from the means devised for ensuring their proper publicity. The other reason for reserving the subject of proportional tariffs for further consideration arises from the fact that a similar question is directly involved in another proceeding, now pending before the Commission, upon the petition of a party claiming to be aggrieved by the operation of this method of rate construction. Our views respecting tariffs of this description will be more appropriately made known in the decision of that case.

The failure to apprise the public and the Commission, by announcement upon the printed schedules or otherwise, of the names of participating carriers responsible for the rates named in joint tariffs, and the routes by which traffic may be consigned at those rates, occasions much uncertainty and confusion, and constitutes a considerable obstacle to the enforcement of the statute. This defect in the form of published tariffs should be corrected to the fullest practicable extent. It is extremely desirable that joint schedules applied to the traffic of connecting lines should definitely name all the participating roads and indicate the various routes by which they undertake to afford transportation at designated rates. Theoretically at least, such a disclosure is necessary to a complete statutory joint tariff. If this information is withheld, the printed schedule must in every case be open to some degree

of criticism; it omits something which apparently ought to be stated, and leaves to inference or conjecture that which should be distinctly announced.

While it seems feasible in all cases to exhibit upon the printed joint tariff the names of the roads which unite in the joint rates thereby offered to the public, publication of the various routes formed by their combined lines may be found burdensome by many carriers and this requirement will not be insisted upon at this time. The explanations made and reasons advanced by the gentlemen who attended the recent conferences, together with well-known facts of which we may take official cognizance, incline us to this conclusion. In some sections of the country the carriers have entered into association with each other for the purpose, among other things, of establishing a system of rates throughout the territory which they serve, and are in effect operating under a "common arrangement" in respect to transportation charges between the numerous points in such territory. The scale of charges thus fixed is given general publicity and is in the nature of a standing proposition between the members and to all other carriers to receive and forward the various classes of freight at the rates agreed upon by the association. To require every joint tariff in such cases to show in detail all the different routes which are available to shippers would be a somewhat burdensome exaction without corresponding advantage to the public. The difficulty appears to be still greater where an outside line desires to use association rates, in connection with its own, in naming charges to points in association territory; under circumstances of that nature, the enumeration of the various routes to the large number of possible destinations would be a considerable hardship if not a practical impossibility. But in the great majority of cases we believe it is entirely practicable to set forth upon the published tariffs not only the names of the participating carriers, but also the routes operated by them under the joint rates filed in pursuance of their mutual agreement. For the present, however, the publication of routes will not be exacted by a definite and unqualified order, though we may rightfully expect that this information will be given in future joint tariffs, unless conditions exist which fairly excuse a relaxation of the rule. It is our desire to exercise the authority conferred upon us in aid of the substantial purpose of the law, rather than to insist upon the technical observance of its provisions.

The third subject discussed at these conferences admits of somewhat more exact and satisfactory treatment. It was freely admitted by the railroad officials in attendance that the Commission should be furnished with proof of the authority under which joint tariffs are

published and filed. Such tariffs necessarily imply an agreement between two or more carriers by virtue of which they offer their united services at the rates therein named. They must have entered into contract relations with each other, by express stipulation or mutual understanding, which impose upon the several parties thereto the obligation to accept, for the transportation proposed by them, the aggregate charge stated in their advertised schedules. If such contracts were in writing and filed with the Commission, as other written contracts are required to be filed, the instrument itself would be the best evidence of their arrangement, and no occasion would arise for additional proof. But such agreements are very rarely, if ever, reduced to writing. Almost invariably they rest in parol; quite often they are mere understandings between traffic managers, having no more definite basis than long continued custom or the doctrine of implied consent. When a joint tariff is published under such circumstances by one of the constituent roads there is no producible evidence, under the existing practice, that the other interested roads have assented to the rates thus announced. If one carrier files a tariff purporting to establish joint rates with other carriers when no agreement therefor—express or implied—exists between them, such carrier transcends its authority, misrepresents the facts and misleads the public; if there is an agreement between them, the evidence thereof should be a matter of record or otherwise readily obtainable. These propositions are wholly undisputed; indeed, there seems to be a unanimous concession that joint tariffs filed with the Commission as required by law should be accompanied in every instance with suitable proof of their authenticity.

Without commenting on the various plans suggested for accomplishing this purpose, it may be said that the most practicable method, all things considered, appears to be one brought forward at these conferences, by which each party to a joint tariff, other than the party filing the same, shall immediately upon the issuance thereof send to the Commission a written statement or certificate indicating its acceptance of and concurrence in the rates and charges named in such joint tariff. It is assumed that the carrier which publishes a tariff of this kind would ordinarily send copies of the same to all other carriers expected to participate in the joint service thereby announced, and it must be entirely feasible for the carriers receiving such a tariff to forward to the Commission official notice that they assent to the arrangement and are parties thereto. Thus by a simple and convenient process every party to a joint tariff will be identified, and the liability of each participating carrier will be capable of easy and suitable proof. The ex-

trème difficulty in many cases of showing the authority for each joint tariff upon the face of the printed document, and the practical objections to other proposed plans, warrant the Commission in sanctioning this method, at least to the extent of testing its merits by actual use. Its adoption will, therefore, be required.

The further consideration which we have endeavored to give this subject of tariff construction leads to a reaffirmance of the general principles laid down in the pamphlet of December 1, 1891, above referred to. The recommendations then made by the Commission are still believed to be founded upon correct views of the law and the obligations imposed by its provisions. We yield to the representations of railroad officials who contend that joint tariffs cannot in every case contain a statement of all the routes to which they relate, and we approve the plan for authenticating such tariffs by separate certificates filed with the Commission, as a suitable and effective method of accomplishing the main purpose of the statute in this regard. This mode of furnishing authority for filing joint tariffs is expected to be applied as well to future amendments or supplements to such tariffs, and also to classification sheets and other documents for the issuance of which some evidence of authorization should be supplied. Except as indicated above, the directions published in 1891 are intended to be repeated.

The Commission has no desire to enjoin the observance of needless formalities, or to subject any carrier to unnecessary expense. We appreciate the difficulty of preparing rate sheets which approximate a perfected standard and cover every point to which criticism might be directed. Nor is it by any means easy to formulate specific rules which shall govern the details of tariff construction and serve as an unvarying pattern in all cases. For this reason among others the order founded upon the present inquiry will be confined to general injunctions, except as to matters which obviously require more definite disposition. So far as specific directions are now given they are in accord with the declarations of railway officials at the conferences called by the Commission and in line with resolutions adopted by the Freight Committees of the Trunk Line and Central Traffic associations.

If the instructions contained in the pamphlet of December, 1891, are fairly observed, the grounds of complaint will be mainly removed. As those instructions are now modified in respect to routes in exceptional cases, they constitute a body of rules which traffic officials can follow without hardship or difficulty.

In addition to the matters already mentioned, attention is invited to the suggestions relating to numbering, titles, amendments and sup-

plements, manner of changing and abrogating current tariffs, and other features of more or less importance in the construction of rate sheets. Copies of the pamphlet will be sent out with this report, and compliance with its directions will hereafter be required. By following those directions we believe that railway managers can greatly improve their published schedules and speedily bring them into substantial conformity with the demands of the statutes. Such a result will prove alike beneficial to the carriers and advantageous to the public.

We summarize this review in the following order:

Order.

The Commission having under consideration the rate sheets, schedules and joint tariffs which, under the 6th section of the Act to Regulate Commerce, are required to be filed in its office and to be kept open to public inspection, and having discussed the subject with a large number of traffic officials, who, for that purpose, met the Commission in response to its invitation; and having, as the result of such conference, made and filed the foregoing report and opinion; and being convinced that the directions contained in the pamphlet published December first, 1891, should be complied with, in order to bring such rate sheets, schedules, and joint tariffs into conformity with the statute, and to correct the defects and omissions which are now observed in such publications: and having found and decided among other things that evidence of authority for making and filing joint tariffs should in all cases be furnished to the Commission:

It is Ordered, That all common carriers subject to the Act to Regulate Commerce shall, in all future issues of their rate sheets, schedules and joint tariffs, including all future amendments and supplements to existing joint tariffs, comply with and conform to the general rules laid down in said pamphlet of December 1, 1891, as modified by this order.

It is Further Ordered, That all joint tariffs hereafter filed, and all future amendments and supplements to existing joint tariffs, be hereafter so arranged and printed as to show distinctly the names of the several parties thereto.

And it is Further Ordered, That all common carriers subject to the Act which shall hereafter be named as parties to any joint tariff filed and published by another carrier, or as parties to any amendments or supplements to existing joint tariffs, shall forthwith upon the publication thereof file with the Commission a statement or certificate showing their acceptance of and concurrence therein and making themselves parties thereto, which said state-

ment or certificate shall be substantially in the following form:

To the Interstate Commerce Commission,
Washington, D. C.

This is to certify that the Co.
assents to and concurs in the publication and
filing of the schedule described below, and
hereby makes itself a party thereto.

Dated.....

DESCRIPTION OF SCHEDULE.				
Kind	Number	Date of Issue	Date Effective	Issued By (Name of Road.)
Tariff				
Supplement				
Amendment				
Circular				
Classification.				

(Sign)

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

UNION PACIFIC R. CO., *Appts.*,

v.

UNITED STATES.

(See S. C. 50 Fed. Rep. 812.)

- Judicial notice will be taken of the fact that there is no inherent difficulty in stringing several independent lines of telegraph on the same poles.
- The Pacific Railroad acts, requiring the railway companies to erect and maintain a line of telegraph along their right of way, do not impose upon the company the duty of maintaining a separate line of poles upon which to string its wires, where a telegraph company lawfully in possession of a line of telegraph on the railroad right of way, and operating the same for commercial and other purposes, by contract with the railway company provides that the latter may maintain upon the former's poles wires devoted to its exclusive use, and the latter has offices at convenient points and operators expressly required to send over such wires all such messages of a governmental or commercial character as are directed to be sent, and the right to string such additional wires as may be deemed essential or convenient.
- The provisions of the contract of July 1, 1881, between the Union Pacific Railway Company and the Western Union Telegraph Company, giving the latter access to the former's station-houses, with some of its wires and the right to avail itself of the service of the employees of the railway company, at most afford to the telegraph company some facilities for competing with the railway company in the matter of transacting a commercial business, which it would not enjoy if compelled to maintain independent offices, and do not amount to a transfer or surrender of the telegraphic franchise of the railway company, which, notwithstanding them, retains its right and capacity to do a commercial business.
- The condition of the business of the respective parties to a contract for a telegraph line on a railroad right of way several years after the agreement was made cannot control in determining the purpose of the parties in making it, nor its true interpretation.
- The provisions of the contract of July 1, 1881, between the Union Pacific Railway Company and the Western Union Telegraph Company looking to the exclusive right of the latter to maintain a line of telegraph upon the railroad right of way, do not render the contract voidable on the grounds of public policy, as they do not bind the railway company absolutely to exclude other telegraph companies from the right of way or withhold all facilities for the construction of competing lines, as they provide for the grant of such exclusive right only to the extent that the railway company may legally do so.
- The privilege given the United States Telegraph Company to erect and maintain a line of telegraph upon the rights of way of the Pacific railroad companies by Act of Congress of July 2, 1864, providing that such telegraph company "and their associates" may construct a line of telegraph between the Missouri river and San Francisco, and authorizing such railroad companies to enter into an arrangement with it for the transfer of its line to the line of road in fulfillment of the obligation of the railroad companies to construct and maintain a line of telegraph,—is not personal, but may be shared by another corporation becoming lawfully associated with the United States Telegraph Company in the work of constructing a transcontinental line;—especially one with which such telegraph company became lawfully united by the process of consolidation.
- The privilege granted to the United States Telegraph Company by Act of Congress of July 2, 1864, to enter into arrangements with the Pacific railroad companies for the construction and maintenance of a line of telegraph upon the railroad right of way, in discharge of the obligation of the railroad companies to construct and maintain such a line, must be presumed to have been conferred with full knowledge of the charter powers of the grantee to consolidate with other corporations engaged in like business, and is not personal so as to become lost by the merger of such telegraph company with the Western Union Telegraph Company, but passed to and became vested in the consolidated company.
- The mingling indiscriminately of matters of legal and equitable cognizance in the same complaint, and the enforcement in a single suit of all the rights and duties mentioned, is not authorized by the Act of Congress of Aug. 7, 1888, § 4, providing in effect that to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines belonging to the railroad and telegraph companies mentioned in the Pacific Railroad companies acts, and to have them possessed, used, and operated in conformity with the statutes, it is made the duty of the attorney general by proper proceedings to prevent any unlawful interference

with the rights and equities of the United States, to have legally ascertained and adjudicated all alleged rights of all persons and corporations claiming any control or interest in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, and to have set aside all contracts and their provisions entered into by such companies unlawfully and beyond their powers.

9. The duty enjoined upon the Union Pacific Railroad Company by Act of Congress of Aug. 7, 1888, § 1, of operating by itself alone through its own corporate officers its telegraph lines, may and should be enforced by mandamus if in fact violated.
10. The duty enjoined by the Act of Congress of Aug. 7, 1888, § 2, upon the Pacific railroad companies, of affording equal facilities to all connecting lines of telegraph without discrimination against any, should be enforced in the mode prescribed by § 8,—of application to the Interstate Commerce Commission, which is required to proceed by mandamus, rather than by bill in equity, as the remedy provided is exclusive.
11. The United States government as the holder of a lien upon the Pacific railroads and telegraph lines is entitled, under the Act of Congress of Aug. 7, 1888, to maintain a bill in equity to have its rights and equities in and to the telegraph

property along the right of way of the Union Pacific Railway Company judicially ascertained, and to have the rights of other persons and corporations therein also ascertained and adjudicated, and, incidental thereto, to have set aside and annulled all provisions of contracts that are unlawful and in any manner impeach the security of the United States, cloud its title, or prejudice its rights.

12. The Attorney General of the United States in a suit to enforce the duty imposed upon the Pacific railroad companies by Act of Congress of Aug. 7, 1888, § 2, of affording equal facilities to all connecting lines of telegraph without discrimination, has, if such suit can be maintained, the burden of showing that some telegraph company has placed itself in a position to demand of the railway company the same facilities accorded to other companies, and that such demand has been refused, as it cannot be presumed that the railroad company intends to disregard its duty.
13. The United States government cannot demand that a contract, affecting property upon which it has a lien, and which is valid when made shall be annulled *in toto* upon the subsequent passage of a statute rendering some of its provisions not involving the others invalid.

Decided January 29, 1894.

A PPEAL by defendants from a decree of the Circuit Court of the United States for the Northern District of Nebraska in favor of complainant in a suit brought to cancel a contract between the defendant railroad company and the defendant telegraph company by which it was alleged that the railroad company had transferred to the telegraph company its franchise to operate an electric telegraph and to compel the railroad company to operate such telegraph through its own officers and employes. *Modified.*

Statement by **Thayer**, District Judge:

This was a bill exhibited by the Attorney General in behalf of the United States under the provisions of an Act of Congress approved August 7, 1888 (25 Stat. at L. 382) which by its title is declared to be supplementary to the Pacific Railroad acts of July 1, 1862, and July 2, 1864. *Vide* 12 Stat. at L. 489, and 13 Stat. at L. 356. The material portions of the Act of August 7, 1888, are as follows:

"Be it enacted by the senate and house of representatives of the United States of America in Congress assembled, that all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan or credit for the construction of either railroad or telegraph lines, which, by the acts incorporating them, or by any Act amendatory, or supplementary thereto, are required to construct, maintain, or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines shall forthwith and henceforward, by and through their own respective corporate officers and employes, maintain and operate for railroad, governmental, commercial and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph

franchises conferred upon them and obligations assumed by them under the acts making the grants as aforesaid.

"Sec. 2. That whenever any telegraph company which shall have accepted the provisions of title sixty-five of the Revised Statutes shall extend its line to any station or office of a telegraph line belonging to any one of said railroad or telegraph companies, referred to in the first section of this Act, said telegraph company so extending its line shall have the right and said railroad or telegraph company shall allow the line of said telegraph company so extending its line to connect with the telegraph line of said railroad or telegraph company to which it is extended at the place where their lines may meet, for the prompt and convenient interchange of telegraph business between said companies; and such railroad and telegraph companies, referred to in the first section of this Act, shall so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company or corporation whatever, and shall receive, deliver and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination for or against any one of such connecting lines; and such exchange of business shall be on terms just and equitable.

"Sec. 3. That if any such railroad or telegraph company referred to in the first section of the Act, or company operating such railroad or telegraph line shall refuse or fail, in whole or in part, to maintain and operate a telegraph line as provided in this Act and acts to which this is supplementary, for the use of the government or the public, for commercial and other purposes, without discrimination, or shall refuse or fail to make or continue such arrangements for the in-

terchange of business with any connecting telegraph company, then any person, company, corporation, or connecting telegraph company may apply for relief to the Interstate Commerce Commission, whose duty it shall thereupon be, under such rules and regulations as said Commission may prescribe, to ascertain the facts, and determine and order what arrangement is proper to be made in the particular case, and the railroad or telegraph company concerned shall abide by and perform such order; and it shall be the duty of the Interstate Commerce Commission, when such determination and order are made, to notify the parties concerned, and, if necessary, enforce the same by writ of mandamus in the courts of the United States, in the name of the United States, at the relation of either of said Interstate Commerce Commissioners: provided, that the said commissioners may institute any inquiry, upon their own motion, in the same manner and to the same effect as though complaint had been made.

"Sec. 4. That in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this Act, and to have the same possessed, used and operated in conformity with the provisions of this Act and of the several acts to which this Act is supplementary, it is hereby made the duty of the Attorney General of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this Act, and under the acts hereinbefore mentioned, and under all acts of Congress relating to such railroads and telegraph lines, and to have legally ascertained and firmly adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company or corporation."

The Union Pacific Railway Company, which is named as one of the defendants in the bill, was formed in January, 1880, pursuant to section 16 of the Act of July 1, 1862, by the consolidation of three pre-existing railroad corporations, to wit, the old Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway & Telegraph Company. The consolidated company now operates a line of railroad from Council Bluffs, Iowa, to Ogden, Utah, known as the main line; also, a line from Kansas City, Mo., to Denver, Colo., and a line from Denver north to a junction with the main line at Cheyenne. Prior to the consolidation in January, 1880, the Union Pacific Railroad had built the main line from Council Bluffs to Ogden, together with a line of telegraph along its right of way; the Kansas

Pacific Railway Company (which was first called the Leavenworth, Pawnee & Western Railroad, subsequently the Union Pacific Railroad, Eastern Division, and lastly the Kansas Pacific Railway Company) had built the line of railroad from Kansas City to Denver, and under a contract with the Western Union Telegraph Company of date October 1, 1866, had caused a line of telegraph to be erected on its right of way. Prior to the consolidation the Denver Pacific Railway & Telegraph Company had built a line of railroad and telegraph from Denver to Cheyenne, acting in that behalf under a contract with the Kansas Pacific Railway Company, whereby the former company acquired so much of the Kansas Pacific Company's subsidy as pertained to that part of its line between Denver and Cheyenne. The contract between the two companies, last mentioned, was authorized by an Act of Congress approved on March 3, 1869 (15 Stat. at L. 324). The Leavenworth, Pawnee & Western Railroad Company (afterwards termed the Kansas Pacific Railway Company) accepted the provisions of the ninth section of the Pacific Railroad acts of July 1, 1862, and July 2, 1864, which acceptance entitled it to receive, and it did in fact receive, a large subsidy from the government for constructing the line of railroad from Kansas City to Cheyenne via Denver, and the Union Pacific Railroad Company received a like subsidy for building the main line from Council Bluffs to Ogden.

The foregoing facts were stated substantially in the bill of complaint. It further charged, in substance, as follows: That by the Act of July 1, 1862, the Union Pacific Railroad Company became and was bound to build and maintain, and to operate by its own servants and agents, a line of telegraph for commercial and governmental purposes between Omaha and Ogden, but that on September 1, 1869, and on December 20, 1871, said railroad company had unlawfully leased to the Atlantic & Pacific Telegraph Company "all its telegraph lines, wires, poles, instruments, and offices, and all of its property pertaining to the business of telegraphy," for the full period of its corporate existence; and that the consolidated company had thereafter, on July 1, 1881, entered into a contract with the Western Union Telegraph Company (which had, in the mean time, become the successor of the Atlantic & Pacific Telegraph Company) whereby it had "surrendered its franchise and alienated its powers under its charter" to said Western Union Telegraph Company, and that under said contract the Western Union Telegraph Company had entered into possession and control of the lines of telegraph between Omaha and Ogden. The bill also charged that under the provisions of the Pacific Railroad acts of July 1, 1862, and July 2, 1864, the United States had a lien upon the railway and telegraph lines aforesaid, and the earnings of each, with all appurtenances, to reimburse it for aid extended in constructing the same, but that the Union Pacific Railway Company, by the contract of July 1, 1881, with the Western Union Telegraph Company, had "attempted to relieve

itself from the duty of maintaining and operating telegraph lines for railroad, governmental, commercial, and all other purposes and, had refused to exercise the obligations assumed by it under the aforesaid acts;" that the United States "had been deprived by said contract of its security and indemnity fund;" that the earnings from said telegraph business had been appropriated by the Western Union Telegraph Company, which had taken possession, for its own use, of the right of way and materials donated by the United States; that the Union Pacific Railway Company "had surrendered its telegraphic franchises to the telegraph company;" that it "had avoided and refused to perform its duties; that it had refused to connect with other lines, or to afford any facilities for the exchange of telegraph business except with the Western Union Telegraph Company; that it had refused to do any telegraph business for the United States or for the general public, and had thereby granted a monopoly of the telegraph business along its lines to the Western Union Telegraph Company, and had deprived the people of the United States of the benefits of free competition, contrary to the Pacific Railroad acts aforesaid and the supplementary Act of August 7, 1888. The bill further averred that since the passage of the Act of August 7, 1888, the Union Pacific Railway Company had continued to act in accordance with the provisions of the contract of July 1, 1881, and that it had done so, subsequent to the passage of that Act, under pretense of complying with an injunction which the Western Union Telegraph Company had obtained on February 14, 1889, in the United States Circuit Court for the District of Nebraska, restraining the Union Pacific Railway Company "from doing any act or thing contrary to the provisions of that contract." The bill of complaint disclosed the various proceedings that had been taken in said injunction suit (which is characterized as a collusive suit) and among other things averred, in substance, that it was therein claimed by the Western Union Telegraph Company that prior to October 1, 1886, the United States Telegraph Company had moved its telegraph line in the state of Kansas upon the right of way of the Kansas Pacific Railway Company under an arrangement with the Kansas Pacific Railway Company which was authorized by an Act of Congress approved July 2, 1864 (13 Stat. at L. 373); that the Western Union Telegraph Company had succeeded to all the rights of the United States Telegraph Company, and on October 1, 1886, had entered into a contract with the Kansas Pacific Railway Company, in pursuance of which it had completed the line of telegraph along the Kansas Pacific Railway to Denver, and that the line so constructed was duly accepted by the United States as a fulfillment of the obligation of the Kansas Pacific Railway Company to erect a line of telegraph. With respect to this claim on the part of the Western Union Telegraph Company, the bill filed by the United States charged, in substance, that the United States Telegraph Company did not remove its constructed line, under the aforesaid arrangement, upon the right of

way of the Kansas Pacific Railway Company; that the Western Union Telegraph Company did not complete a line of telegraph along that road to Denver, as claimed; and that the United States had neither accepted such line of telegraph from the Western Union Telegraph Company, nor dealt with nor recognized either it or the United States Telegraph Company as the builder of said line. The bill finally charged that all of the aforesaid contracts with the Western Union Telegraph Company were beyond the power of the railway company to make, and against public policy, and in violation of the Pacific Railroad acts and the Act of August 7, 1888.

The prayer of the bill was in accordance with the fourth section of the Act of August 7, 1888: "That the court ascertain and finally adjudge the rights of all persons and corporations in any manner claiming any contract or interest of any kind in said telegraph lines or property, or exclusive rights of way upon the lands of said railway company, or any of them, and that upon the hearing and order or final decree be entered, canceling and annulling said contract and all provisions of contracts relating to the alienation of said telegraph lines or the control and management thereof," and that said railway company "be decreed and compelled to maintain and operate said telegraph lines according to law." Answers were filed by the railway company and the telegraph company, which admitted the execution of the several contracts referred to in the bill, but denied that the contracts of July 1, 1881, and October 1, 1886, were invalid. The defendants further denied, in substance, that the railway company had transferred or surrendered its telegraphic franchise to the telegraph company, or that it had divested itself of the power to perform its charter obligations to the government or to the public with respect to maintaining a telegraph line, or that it had at any time failed or refused to discharge its obligations in that behalf. On the final hearing the circuit court entered a decree canceling and annulling all of the contracts with the Western Union Telegraph Company and the Atlantic & Pacific Telegraph Company that have been heretofore referred to. It further decreed that the Union Pacific Railway Company "put an end to all relations with the Western Union Telegraph Company not equally allowed to other persons and corporations operating . . . telegraphs, that it at once resume possession of its offices, poles, wires, instruments, and all of its other property belonging to the business of telegraphy, along such of its main and branch lines as were aided by the government under the Act of July 1, 1862, . . . and henceforth, by the through its own corporate officers and employes, maintain and operate for railroad, governmental, commercial, and other purposes such telegraph lines and instruments, and . . . exercise, by itself alone, all the telegraphic franchises conferred upon it under the several acts granting to it subsidies." The decree further required the railway company to afford equal facilities to all telegraph companies without discrimination, and to receive, deliver, and

exchange business with connecting telegraph companies on equal terms, and to afford equal facilities to all, without discrimination for or against any. It further commanded the railway company to construct and provide such lines of telegraph and instrumentalities as would be adequate to enable it to carry out the provisions of the decree aforesaid, and also commanded the Western Union Telegraph Company to forthwith vacate all offices of the railway company without removing therefrom, until further order, any property which had theretofore been jointly used by the two defendants.

The opinion of the circuit court is reported in 50 Fed. Rep. 28, 41.

Argued before Caldwell, *Circuit Judge*, and Thayer, *District Judge*.

Messrs. John F. Dillon, John M. Thurston, and W. R. Kelly, for appellant, Union Pac. R. Co.

Mr. Rush Taggart for appellant, Western U. Tele. Co.

Mr. Lawrence Maxwell, Jr., Solicitor General, for the United States.

Thayer, District Judge, delivered the opinion of the court:

The chief question to be considered on this appeal is whether the United States is entitled to have the contract of July 1, 1881, between the Union Pacific Railway Company and the Western Union Telegraph Company, canceled and annulled, either because it was originally illegal and beyond the power of the Union Pacific Railway Company, or because its provisions are now repugnant to the Act of August 7, 1888 (25 Stat. at L. 382). Subordinate to this general inquiry are the questions whether the contract of October 1, 1866, between the Western Union Telegraph Company and the Kansas Pacific Railway Company, is invalid, and some questions pertaining to the scope, purpose, and effect of the Act of August 7, 1888. It is claimed by the government, and is not denied by the appellants, that the Pacific Railroad acts of July 1, 1862, and July 2, 1864, imposed on the various constituent railroad companies who now compose the Union Pacific Railway company the duty, among others, of constructing and maintaining on their several rights of way a line of telegraph for governmental, commercial, and other purposes. It was held both by *Mr. Justice Brewer* in this case, and by *Mr. Justice Miller* and *Judge McCrary* in other cases where the same question was involved, that the obligation thus imposed on the several railroad companies to construct and maintain telegraph lines could not be lawfully avoided by leasing their lines of telegraph, after their construction, to some other corporation, to be by it maintained and operated. *Id.* 50 Fed. Rep. 32; *Western U. Tele. Co. v. Union Pac. R. Co.* 3 Fed. Rep. 423, 721, 725; *Atlantic & P. Tele. Co. v. Union Pac. R. Co.* 1 Fed. Rep. 745, 749. This latter proposition does not seem to be controverted by the appellants, or either of them; therefore, it must be taken as conceded that the lease granted by the

Union Pacific Railroad Company to the Atlantic & Pacific Telegraph Company on September 1, 1869, and the supplementary agreement of December 20, 1871, between the same companies, which are referred to in the bill of complaint, were each beyond the power of the railroad company to execute, and for that reason were and are of no binding force or efficacy. The nineteenth section of the Pacific Railroad Act of July 1, 1862 (12 Stat. at L. 489) and the fourth section of the Act of July 2, 1864 (13 Stat. at L. 378) provided a means by which the old Union Pacific Railroad Company and the Kansas Pacific Railway Company might respectively relieve themselves of the obligation to construct and maintain a telegraph line along their respective rights of way. When the Act of July 1, 1862, was passed, the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company were operating a line of telegraph across the plains, from the Missouri river to San Francisco, about on the proposed route of the main line of the Union Pacific Railway Company, under a contract with the government which had been entered into pursuant to an Act of Congress approved June 16, 1860 (12 Stat. at L. 41) entitled "An Act to Facilitate Communication Between the Atlantic and Pacific States by Electric Telegraph." The nineteenth section of the Act of July 1, 1862, provided, in substance, that an arrangement might be made with said last named telegraph companies, by the railway companies mentioned in said Act, to move their line of telegraph upon the railroad right of way, and that if such an arrangement was entered into, it should be considered a fulfillment of the obligation of the railroad company to construct and maintain a line of telegraph; and, even in the absence of such an arrangement, it authorized the aforesaid telegraph companies to move their line upon the railroad right of way. In like manner the fourth section of the Act of July 2, 1864, which latter Act empowered the United States Telegraph Company to construct a telegraph line between the Missouri river and San Francisco, authorized the United States Telegraph Company to enter into an arrangement with either of the railway companies mentioned in the Pacific Railroad Act of July 1, 1862, whereby its telegraph line might be erected on the railroad right of way, and, if so erected, should be held and considered a fulfillment of the railroad company's obligation to construct and maintain a telegraph line. This latter Act, though general in its terms, evidently had in view an arrangement between the United States Telegraph Company and the Kansas Pacific Railway Company, whereby the latter should be relieved of its telegraphic obligation, as the line of the United States Telegraph Company was projected to run through Kansas. With respect to the opportunity thus afforded to the several railway companies to fulfill their telegraphic obligations to the United States otherwise than by actually constructing and maintaining a telegraph line for governmental and commercial purposes, it is sufficient to say, that it does not appear to be

claimed by the appellants, or either of them, that the old Union Pacific Railroad Company ever availed itself of the opportunity thus afforded it, so far as the main line between Omaha and Ogden is concerned. On the contrary, it built a telegraph line of its own, on the north side of its right of way, between the points aforesaid, and the three telegraph companies heretofore named (the Pacific, the Overland, and the California State) moved their line upon the south side of the right of way, in accordance with the statute aforesaid, but not under any such "arrangement" or agreement with the railway company as would suffice to relieve the latter of its obligation to maintain a telegraph. The case is different, however, with respect to the Kansas Pacific Railway Company. It is argued with much force that the latter company entered into an arrangement with the United States Telegraph Company, which arrangement was subsequently embodied in the contract of October 1, 1866, with the Western Union Telegraph Company, the successor of the United States Telegraph Company, whereby, under the fourth section of the Act of July 2, 1864, *supra*, it fulfilled its obligation to maintain a telegraph line at least between Kansas City and Denver. We shall discuss the merits of this contention further on, but at present, with the foregoing summary of the points conceded, and in the light of such concessions, we turn to consider whether the contract of July 1, 1881, which superseded all other contracts, was a valid agreement.

Before stating the provisions of that contract it will be well to describe the situation as it existed when the same was entered into. At that time the Western Union Telegraph Company, as the successor of the Overland, the Pacific, and the California State Telegraph Companies, was lawfully in possession of, and was the owner of a line of telegraph upon the railroad right of way between Omaha and Ogden. The Western Union Telegraph Company had in fact furnished the means to build, and had built, that line of telegraph across the plains, and had caused it to be moved upon the railroad right of way, through the agency of the three telegraph companies last named. On July 1, 1881, the Western Union Telegraph Company had also succeeded to all the rights of the Atlantic & Pacific Telegraph Company, which was the lessee of the Union Pacific's telegraph line under the lease of September 1, 1869. In a suit which had theretofore arisen between the Atlantic & Pacific Telegraph Company and the Union Pacific Railway Company it had been decided that the last mentioned lease was invalid; but, as it appeared in the course of the suit that the railway company had received for such lease 17,800 shares of the telegraph company's stock, from which it had realized from four to six hundred thousand dollars, the court had enjoined the railway company from taking possession of the telegraph line then in the possession of the Atlantic & Pacific Telegraph Company under the invalid lease until there had been an accounting and until the consideration for the lease had been re-

stored. *vide* 1 Fed. Rep. 745, 752. This injunction was in full force on July 1, 1881. The railway company did not have possession of the telegraph line between Council Bluffs and Ogden, and could not acquire possession of that line except on the condition last indicated. Prior to July 1, 1881, litigation had also arisen with respect to the telegraph line on the right of the Kansas Pacific Railway Company. The Union Pacific Railway Company, after the consolidation, had threatened to take possession of that line, which had been erected and was being operated by the Western Union Telegraph Company under the contract of October 1, 1866, with the Kansas Pacific Railway Company, heretofore mentioned. The Western Union Telegraph Company had applied for and obtained an injunction against the railway company to restrain its threatened action. With reference to that litigation it is sufficient to say, at present, that on July 1, 1881, the injunction was in full force, but under conditions which permitted the railway company to have the exclusive use of one wire between Kansas City and Denver for railroad and commercial business. *vide* 3 Fed. Rep. 417, 423, 721, 736.

In this posture of affairs the contract of July 1, 1881, was executed. As the contract is lengthy, we shall only undertake to state its material provisions, and according to their legal effect, rather than in the language of the parties. It recites, in the first instance, that it is entered into "for the purpose of providing telegraphic facilities for the parties thereto, and maintaining and operating the lines of telegraph along the Union Pacific Railway in the most economical manner, in the interest of both parties, and for the purpose of fulfilling the obligations of the railway company to . . . the United States and the public in respect to the telegraphic service required by the Act of Congress of July 1, 1862, and the amendments thereto." The parties then agreed, in substance, as follows: That all existing suits (being those heretofore mentioned) should be dismissed, and that the contract should operate as a release and discharge of all claims, debts, and liabilities arising and accruing under pre-existing contracts between the parties, which were then in litigation; that the railway company should assure to the telegraph company as far as it legally could do so, the exclusive right of way along its railroad, and any extensions and branches thereof, for the construction and maintenance of lines of telegraph, and that the railway company would not transport men and material for the construction of a line or lines of telegraph to be operated in competition with the Western Union Telegraph Company, except at its regular local rates, nor furnish such competing lines facilities for construction that it could lawfully withhold, nor stop its trains or distribute material at other than regular stations; that no employé of the railway company should be employed by, or have any connection with, any other telegraph company than the Western Union Company; and that the latter company should have the exclusive right, as against any other telegraph

company, to occupy and connect with the railway company's depots or station houses for commercial telegraph purposes. Concerning the mode of keeping up, maintaining, and renewing the existing lines of telegraph then on the railroad right of way, the contract contained the following stipulations: That the railway company should, at its own expense, furnish all the labor in that behalf required, except a foreman; that the telegraph company should provide a foreman, skilled in the work of construction and repair, to direct and supervise such work; and that each party should pay one half the cost of poles, wire, insulators, tools, and other materials used for the maintenance, renewal, or repair of telegraph lines along all of the railway company's roads, branches, and extensions, until three wires for the exclusive use of each party had been provided between Council Bluffs and Ogden,—two for the exclusive use of each party between Kansas City and Denver, and one for the exclusive use of each party on all other portions of the railway company's road. The contract in this respect further provided that the railway company should transport free of charge, and distribute along the line of its railroad, all poles and other materials that were required in the work of maintenance, renewal, and reconstruction, also all employés and laborers who were engaged in such work, and that the telegraph company, on its part, should supply telegraph instruments and local batteries to work the line, and blanks and stationery for commercial telegraph business. With respect to the mode of operating the telegraph lines aforesaid, the contract contained the following provisions: That at all telegraph stations of the railway company its operators should receive and transmit such commercial or public messages as were offered, and should account for the tolls paid thereon to the telegraph company, but that at the end of each month the telegraph company should return to the railway company one half of such receipts at its offices, excepting only tolls paid on ocean cable messages and tolls paid for the transmission of messages over other lines of telegraph than Western Union lines; that the telegraph company should also furnish, free of charge, one wire between Omaha and Kansas City, over which the railway company might transact its railroad business between those points and at intermediate places on the Missouri river, including Council Bluffs; that either party might maintain offices along the Union Pacific Railway where they then had offices, and might establish additional offices, but that the telegraph company should not establish independent offices at any point along said railroad within one mile of an office previously established by the railway company unless the latter company consented, and the railway company's operators should not compete with the telegraph company at points where the latter maintained independent offices, by cutting rates, or by active efforts to divert business from the telegraph company. It was further stipulated by the parties as follows: That if any person, or officer of the government, tendered a message to a railway

telegraph operator at any station between Council Bluffs and Ogden, and required its transmission over the wires of the railway company, it should be so sent, at rates fixed by the railway company. It was also stipulated, in substance, that in addition to the three wires between Council Bluffs and Ogden, and the two wires between Kansas City and Denver, and the one wire on other portions of its road, which were to be set apart, or were to be strung and maintained, for the exclusive use of the railway company, the railway company might string such other wires for its exclusive use, and at its own cost, as it saw fit; and the like privilege was accorded to the telegraph company. It was also stipulated that a competent superintendent of the telegraph lines aforesaid should be appointed by the railway and telegraph companies, and that both should contribute to pay for his services. The foregoing contract was to continue in force for 25 years, and was to supersede all previous contracts relating to said telegraph lines including the contract of October 1, 1866, between the Western Union Telegraph Company and the Kansas Pacific Railway Company, but it was agreed that if the contract of July 1, 1881, was not kept in good faith by the railway company, then the superseded contracts should be revived and considered in force. Since the foregoing agreement was entered into, and in accordance with its provisions, the lines of telegraph formerly erected on the railway company's right of way between Omaha and Ogden have been entirely reconstructed in a very substantial manner, and at great cost to the parties. In the process of reconstruction, all of the wires have been strung on a new line of poles erected on the north side of the right of way, a portion of which wires are exclusively used by the railway company and the remainder by the telegraph company. Some of the telegraph company's wires connect with the depots and station houses of the railway company, but many of its wires run into independent offices of the telegraph company, and are not so connected.

It is claimed by the United States (and this contention seems to have prevailed in the circuit court) that this contract was originally beyond the power of the Union Pacific Railway Company, and therefore invalid, because the railway company thereby transferred or surrendered its telegraphic franchise to the Western Union Telegraph Company, and disabled itself to discharge its obligations to the government and the public; secondly, that the contract is in restraint of trade and against public policy, and for that reason is illegal and void.

With reference to this contention it should be remarked, at the outset, that when the contract of 1881 was executed, and long prior thereto, the Western Union Telegraph Company was lawfully in possession of a line of telegraph on the railroad right of way, and was operating the same for commercial and other purposes. It was there with the express sanction of Congress under the nineteenth section of the Act of July 1, 1862, and neither acquired nor claims to have acquired

its right to operate its existing wires under the said contract. Looking at the provisions of the agreement, it is also noteworthy that it imposes no limitations or restrictions upon the right of the railway company to operate a telegraph for commercial, governmental, and other purposes. It has wires which are devoted to its exclusive use, telegraphic offices at convenient points along its road, operators to work its wires, who are expressly required to send over the same all such messages of a governmental or commercial character as are directed by the senders to be so sent, and the right to string such additional wires as may at any time be deemed essential or convenient to meet the demands made upon it for telegraphic service. It surely cannot be maintained that in addition to the foregoing facilities the railway company must maintain a separate line of poles on its right of way and at its own expense, for when Congress authorized other telegraph companies to go upon this right of way, as it did by the Act of July 1, 1862, and again by the Act of July 24, 1866 (14 Stat. at L. 231) it must have foreseen that it would be convenient, economical, and often necessary for such companies and the railway company to string their wires on the same poles, and we will not impute to Congress an intention to ignore all considerations of convenience and economy, especially in view of the magnitude and importance of the enterprise which it aimed to foster. We may well take judicial notice of the fact that there is no inherent difficulty in stringing several independent lines of telegraph on the same poles. That method of construction in no wise interferes with the efficiency of lines that are so built, while it is often a convenient, and always an economical, arrangement. We think, therefore, that the Pacific Railroad acts did not impose on the railway company the duty of maintaining a separate line of poles upon which to string its wires, and that its failure to do so cannot be regarded as any evidence of an abandonment of its public duties.

Perhaps the strongest evidence of an intent on the part of the Union Pacific Railway Company to part with its telegraphic franchise is to be found in those provisions of the contract whereby the telegraph company gained access to the railway company's station houses with some of its wires, and the right to avail itself of the services of employees of the railway company; but on a careful scrutiny it will be seen that the most that can be alleged against these provisions is that they afforded to the telegraph company some facilities for competing with the railway company in the matter of transacting a commercial business, which it would not have enjoyed if it had been compelled to maintain independent offices at all of such points, and to man them with its own operators. These provisions cannot be said to have amounted to a transfer or surrender of the telegraphic franchise, because, notwithstanding these provisions, the railway company still retained its right and capacity to do a commercial business. Moreover, it does not occur to us that there are any provisions in the Pacific Railroad acts which

made it the duty of the railway company to withhold from any telegraph company that was authorized to occupy its right of way any facility for the convenient and economical operation of its line, merely because it would enable such company to compete more successfully with the railway company in the transaction of a telegraph business. Congress had offered to relieve the railway company of the entire burden of constructing and maintaining a telegraph line, if it would arrange with one of these telegraph companies to move its line upon the railroad right of way. When those acts were passed, Congress was desirous, above all things, to have a telegraph line constructed across the plains that would be able to render cheap, prompt, and efficient service both to the government and the public. This purpose is manifest throughout all of the legislation of Congress, which antedates the contract of 1881, and for that reason we cannot hold the provisions of the contract now in question to be unlawful merely because they gave the telegraph company better opportunities for successful competition. We think it obvious that they enabled both the railway company and the telegraph company to operate their lines more economically, and to render the public better service, without impairing the franchise of either.

Much stress, however, is laid on the fact that under the operation of the contract the great bulk of the commercial telegraph business over the lines in question is done by the Western Union Company. Attention is also directed to the circumstance that the wires devoted to the use of the railway company are about sufficient to do its ordinary railroad business, and are wholly insufficient to do a considerable portion of the commercial business. With reference to the last of these suggestions it is sufficient to say that the record does not disclose that the railway company has ever failed or refused to transmit over its own wires a single governmental or commercial message which was tendered it to be so sent. The wires which it operates seem to be adequate for its patronage, and under no possible construction of its charter can it be held bound to furnish more wires than are needed to meet the demands made upon it for telegraphic service. But it is said that its loss of patronage is due to the contract with the telegraph company, and that what has actually occurred under the operation of that contract is persuasive evidence of what was intended to happen, and that it should control in determining the purpose of the parties thereto and the true interpretation of the agreement. We entertain no doubt that the bulk of the commercial business, as claimed, is in the hands of the Western Union Telegraph Company; that fact is abundantly shown by the record, and is practically admitted by the appellants. But we are unable to concede that the fact last mentioned is mainly due to the operation of the contract of 1881, or that it should be accepted as a safe test by which to determine the legal effect of that agreement. It is not a necessary inference that the failure of the railway company to secure a fair share of the commercial

telegraph business is due to the existence of the contract; much less does it follow that, because the Western Union Telegraph Company now transacts the great bulk of the commercial telegraph business, the railway company has therefore parted with its telegraphic franchise, and disabled itself from fulfilling its public duties. The telegraph company is engaged exclusively in operating lines of telegraph for commercial and other purposes. Its wires ramify throughout the United States, and reach every important city and hamlet, while the railway company is limited to the lines erected on its right of way, and must depend upon connecting lines for the transmission of all dispatches that are not purely local. In view of this fact it becomes highly probable that, under the operation of natural laws of trade, the same disparity in the business of the two companies would in any event exist, because of the superior facilities of the telegraph company for reaching distant points, and forwarding messages intrusted to it with promptness and accuracy. At all events, we cannot regard the existing disparity in the amount of commercial business done by the respective companies as of much importance in deciding whether the contract was beyond the power of the railway company. That issue must be determined by ascertaining what power to transact a commercial telegraph business the railway company still retains, and what functions it has abdicated; in other words, the question must be decided with reference to the provisions of the contract, rather than with reference to a business condition that now exists, which may be, and probably is, due to natural causes. *Midland R. Co. v. Great Western R. Co.* 8 Ch. 841, 854.

The result of our deliberations on this branch of the case has been that we are unable to declare the contract of 1881 to be beyond the power of the railway company because it divests the company of its telegraphic franchise, or because it renders it powerless to discharge its public duties. In our judgment, the Union Pacific Railway Company has now the same absolute power to operate a telegraph line for commercial and other purposes that it ever had. Under the contract in question it secured at once the absolute control of several lines of wire, with authority to use them for all purposes, and the right to string any number of additional wires, and to use them as it saw fit. By the provisions of the agreement it also avoided a litigation of vast proportions and great intricacy in which it was then involved, touching its right to the lines of telegraph on its right of way, and at the same time it was relieved of its liability to account for large sums of money which it had received from the Atlantic & Pacific Telegraph Company under the invalid lease of September 1, 1869. From the standpoint of the railway company it was confessedly a beneficial business arrangement, by means of which it has realized great advantages in which the government has participated; and the record before this court fails to disclose that the general public have been prejudiced by the manner in which the lines of telegraph in question have been

maintained and operated under the provisions of the agreement. We would not be understood as intimating that the considerations last mentioned should have any weight if the contract was in fact contrary to law; but they furnish an adequate reason why it should not be set aside and canceled, unless it appears that it was clearly beyond the power of the railway company to enter into such an arrangement.

The other objection to the contract of 1881, which has been heretofore mentioned, is based on those provisions of the agreement whereby the Western Union Telegraph Company attempted to obtain certain exclusive rights and privileges from the Union Pacific Railway Company, and to prevent other telegraph companies from coming upon the railroad right of way. These stipulations are said to have rendered the contract voidable on grounds of public policy. When the contract was executed, the railway company appears to have entertained doubts of its power "to assure to the telegraph company the exclusive right of way along and upon its line of road;" hence it agreed to grant such exclusive right only to the extent that it might legally do so. The further provision in the contract relative to withholding facilities for the construction of competing lines of telegraph was also accompanied with the reservation that it should only be required to refuse to afford such assistance and facilities as it might lawfully withhold. It may be admitted that these provisions of the contract would have been unlawful, as the law is now understood, if the railway company had bound itself absolutely to exclude other telegraph companies from its right of way, or to withhold all facilities for the construction of competing lines. *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781. But, as these stipulations were actually drawn, they neither bound the railway company to do anything that was unlawful or contrary to its duty. The most that can be alleged against them is that they placed the railway company in a position in which it might be compelled to determine, at its peril, whether, by extending certain facilities and assistance to competing lines, it would thereby violate its contract with the telegraph company; but this is an attitude in which the parties to contracts are frequently placed. The only exclusive privileges that the telegraph company acquired by this contract, so far as we are able to see, was the right to connect its wires with the railway company's station-houses and to maintain offices therein; also, the right to have the wires thus connected with such stations operated by employees of the railway company, and the right, under the ninth clause, to have poles and telegraph materials transported and distributed free of charge along the Union Pacific Railway. For all of these privileges the railway company undoubtedly received what it deemed an adequate consideration in the way of advantages derived from other provisions of the contract, and the privileges in question do not appear to us to be of such nature that the railway company was bound, either under then existing acts of Congress or on general

principles of law, to confer them equally upon all other telegraph companies. *Memphis & L. R. R. Co. v. Southern Exp. Co.* 117 U. S. 1, 29 L. ed. 791; *Pullman Palace Car Co. v. Missouri Pac. R. Co.* 115 U. S. 587, 29 L. ed. 499. Under the second section of the Act of Congress of August 7, 1888, enjoining upon the railway company the duty of affording equal facilities to all without discrimination, the privileges aforesaid may most likely be claimed by all telegraph companies who comply with the provisions of the last mentioned Act, and they can no longer be regarded as exclusive; but we think it must be conceded that, when the contract was executed, the railway company had some power to enter into arrangements with other telegraph companies with a view of making a profitable use of its telegraphic franchise, and that within this power was the right to select some telegraph company, and to confer upon its special privileges, like those above mentioned, in exchange for benefits and advantages which it could by such means secure. We will not impute to Congress the folly of having granted to the railway company a telegraphic franchise, and of having so limited the power to exercise it or deal with it as to render it a burden rather than a benefit. In the nature of things, some power must be conceded to the railway company to enter into arrangements with other telegraph companies to assure the economical maintenance and profitable working of its lines, and we think that the grant of the exclusive privileges above referred to was not an unreasonable nor an unlawful exercise of that power.

Passing, now, to the contract of October 1, 1866, between the Kansas Pacific Railway Company and the Western Union Telegraph Company, it should be observed, that the necessity of noticing that contract, which has been superseded, for the time being, by the contract of 1881, grows out of the fact that it was annulled by the decree of the circuit court, whereas the appellants claim that it was lawfully entered into under the fourth section of the Act of July 2, 1864, and operated to relieve the railway company of its obligation to maintain a telegraph line along the railroad right of way between Kansas City and Denver. Hence, it becomes an important inquiry whether that contract was rightfully annulled. The Act of July 2, 1864, last referred to, is entitled "An Act for Increased Facilities of Telegraphic Communication Between the Atlantic and Pacific States and the Territory of Idaho." 13 Stat. at L. 373. Its first section declared "that the United States Telegraph Company and their associates, are hereby authorized to erect a line or lines of magnetic telegraph between the Missouri river and the city of San Francisco, . . . on such route as they may select, to connect with the lines of the said United States Telegraph Company now constructed and being constructed through the states of the Union." By the same section the company was given the right to use unoccupied land of the United States for right of way, materials, station houses, etc. The second section granted said company the right to

erect a line of telegraph from Ft. Hall to Portland, Or., via San Francisco, and from Ft. Hall to Bannock and Virginia City. The third section granted to the company the right to send dispatches over any line then or thereafter built by authority of Congress, to connect with any lines erected by the Russian or English governments. The fourth and last section was as follows:

"Sec. 4. The several railroad companies authorized by Act of Congress, July one, eighteen hundred and sixty-two, are authorized to enter into arrangements with the United States Telegraph Company so that the line of telegraph between the Missouri river and San Francisco may be made upon and along the line of said railroad and branches as fast as said roads and branches are built, and if said arrangements be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of the Act referred to, be held and considered a fulfillment on the part of said railroad companies of the provision of the Act in regard to the construction of a telegraph line; and, in case of disagreement, said telegraph company are authorized to remove their line of telegraph along and upon the line of railroad therein contemplated, without prejudice to the rights of said railroad companies."

Now, the contract of October 1, 1866, provided, in substance, for the erection of a line of telegraph on the railroad right of way from Lawrence, Kan., to Denver, Colo., at the joint expense of the telegraph company and the railway company, and for their joint use, but the railway company was denied the right to transact a commercial telegraph business over that line. Before this contract was entered into, a small portion of the line between Lawrence and Denver had been wholly or partially constructed by the United States Telegraph Company, under an arrangement with the railway company for its joint use, and it seems evident that the agreement of October 1, 1866, was entered into with the Western Union Telegraph Company because, by consolidation proceedings, it had then become the successor of the United States Telegraph Company. It seems most probable, we think, that the contract of October 1, 1866, was intended to give expression, in a more detailed form, to an oral understanding or agreement which had previously existed between the Kansas Pacific Railway Company and the United States Telegraph Company, and it admits of no doubt that, in accordance with the terms of that contract, a line of telegraph was completed through to Denver. After a very full consideration of the question it was held by *Mr. Justice Miller*, as far back as 1880, in the case of *Western U. Tele. Co. v. Union Pac. R. Co.* 3 Fed. Rep. 721, 727, 728, that the contract of October 1, 1866, embodies such an "arrangement" as was contemplated and authorized by the fourth section of the Act of July 2, 1864, above quoted, and such an "arrangement" as, if carried out, would absolve the railway company with which it was made from the obligation to construct and operate an independent line of tele-

graph. The court said in that case that "it was manifestly the design of the Act of 1864 to enable the United States Telegraph Company to become substituted, by a proper arrangement with the Pacific Railroad Company and its branches, to the right to build a telegraph line along the . . . right of way of those railroad companies, and thereby to relieve those companies from the obligation to build and operate such a line." It furthermore said, in substance, that the contract of 1866 satisfied all the requirements of the Act of July 2, 1864, notwithstanding the fact that it prohibited the railway company from transmitting commercial messages. In that case, however, the evidence then before the court did not disclose whether the Western Union Telegraph Company was in fact the legal successor of the United States Telegraph Company, and that point was left undetermined, with the statement, however, that the contract of 1866 was clearly valid if such successorship was thereafter established.

On the trial of the present case *Mr. Justice Brewer*, held, in effect that the testimony showed that the United States Telegraph Company and the Western Union Telegraph Company had become lawfully consolidated under the laws of New York, prior to October 1, 1866, and that the latter company was the legal successor of the former. He was of the opinion, however, that the privilege conferred upon the United States Telegraph Company by the fourth section of the Act of July 2, 1864, *supra*, was so strictly personal that it was lost by the consolidation proceedings, and did not pass to the consolidated company. In all other respects the circuit court appears to have fully concurred in the points ruled by *Mr. Justice Miller*, and in similar rulings made by *Judge McCrary* in the same case. *vide* 3 Fed. Rep. 423, 425. The question that we have to decide, therefore, with respect to the contract of 1866 (and in view of former decisions, the only question that we deem it necessary to consider) is whether the privilege granted to the United States Telegraph Company by the act of July 2, 1864, was purely personal, and was lost by its merger with the Western Union Telegraph Company. With reference to that question it may be conceded to be a well settled rule, resting upon sound reasons, that, when a franchise has been granted to a quasi public corporation in consideration of public benefits that may result from its exercise, such franchise cannot be bodily assigned by the grantee company unless the power of assignment is conferred in express terms or by fair implication. Such franchises are properly said to be personal in their nature, and not assignable. But when a corporation is endowed with a privilege or power like the one now in question, and the corporation is one which, under the law of its creation, has the right to consolidate with other corporations engaged in a like business, it may well be doubted whether the rule above conceded has any application. In such cases it must be presumed that the privilege was conferred with full knowledge of all the charter powers of the grantee, and it is a reasonable inference, unless some restrictive words are

employed, that the legislature intended that the privilege conferred should pass to, and become vested in, the consolidated company, if one was subsequently formed. In the present case, however, it is not necessary for the Western Union Telegraph Company to rest its right to enter into the aforesaid arrangement with the Kansas Pacific Railway Company upon the ground last stated, however tenable that ground may appear to be, for the Act of July 2, 1864, bears upon its face indubitable evidence that Congress did not intend that the right to enter into such an arrangement should be exercised solely by the United States Telegraph Company. The first section of that Act granted the right to construct a line of telegraph between the Missouri river and San Francisco to "the United States Telegraph Company and their associates." That was the important franchise which the Act conferred, and other privileges mentioned in succeeding sections were incidental and supplementary; in other words, they were conferred to furnish an inducement to the telegraph company and its associates, and to enable them, to accomplish the work authorized by the first section, which the government was desirous of fostering. In view of the language employed in the first paragraph of the Act, which clearly authorized and encouraged other corporations to become associated with the United States Telegraph Company, and to embark their means in what was then considered a great and hazardous enterprise, it cannot be consistently maintained that Congress intended that the privilege of entering into the arrangement mentioned in the fourth section of the Act should be confined solely to the United States Telegraph Company, and that it should not inure to the benefit of its associates. We think it is far more reasonable to suppose that Congress intended that the privilege in question should be shared by any corporation which became lawfully associated with the United States Telegraph Company in the work of constructing a transcontinental line, and more especially that the privilege should inhere in a corporation with which the United States Telegraph Company became lawfully united by the process of consolidation.

In opposition to the views last expressed, it is urged by the government that when the Act of July 2, 1864, was passed, Congress knew that a line of telegraph had already been constructed across the plains, by other telegraph companies, about on the proposed route of the main line of the Union Pacific Railroad; that by the last named Act it intended to aid in the construction of an independent and competing line of telegraph; and that this purpose will be defeated unless it is held that the privilege granted by the United States Telegraph Company to enter into an arrangement with the Kansas Pacific Railway Company was strictly a personal privilege accorded to the former company. It is to be observed, however, that the Act now under consideration says nothing about competing lines of telegraph, but is entitled "An Act for Increased Facilities of Telegraphic Communication Between the Atlantic

and Pacific States. . . .” Such additional facilities would be obtained by the construction of a new line on a new route, and Congress undoubtedly contemplated that such a line would be built, and such a line was in fact constructed. We fail to see, therefore, how the purpose which Congress saw fit to express in the title of the Act will be defeated by conceding that the privilege mentioned in the fourth section of the Act was not strictly personal, but was a grant to the United States Telegraph Company “and its associates.” It might happen, of course, that by a process of consolidation the two companies would fall under one management; but even in that event the two lines of telegraph, if erected, would afford increased facilities for communication. Moreover, if the idea of exciting competition by the construction of a second line of telegraph across the continent was at that time entertained by Congress (which we very much doubt) it was evidently well known to Congress that a practical identity of interest and control could be effectually secured by other means than by a consolidation of property and franchises, and it took no precautions to prevent such a merger. We must conclude, therefore, that the considerations last mentioned are entitled to little weight in determining whether the privilege in question became vested in the Western Union Telegraph Company. An attempt is also made, in behalf of the government, to deduce evidence, from certain reports made by the Kansas Pacific Railway Company to the United States, that the line of telegraph along that railway, from the Missouri river to Denver, was in fact built by the railway company at its own expense, in fulfillment of its charter obligations; but an obvious answer to this suggestion is that no statement made by the officers of the railway company can prejudice the rights of the telegraph company. For other reasons, however, the suggestion is without merit. We have no doubt, under the testimony, that the line of telegraph along the Kansas Pacific Railway was built substantially in accordance with the arrangement embodied in the contract of October 1, 1866. To enable the railway company to obtain its subsidy it was no doubt required to prove, to the satisfaction of the officers of the government, that a telegraph line, as well as a railroad, had been constructed. The United States was entitled to insist upon such proof because the obligation of the railway company to construct a telegraph would not be fulfilled merely by entering into an “arrangement” with some telegraph company to construct such a line. It was bound to see that the arrangement was carried out, and that a line was erected along its right of way, either by the telegraph company alone, or by itself and the telegraph company, under some satisfactory agreement as to dividing the expense, which telegraph line would be fairly adequate for governmental and commercial purposes; but it certainly was not necessary for the railway company to set forth in its reports to the government the precise terms of its arrangement with the telegraph company, or the precise sum which it had itself contributed

towards the construction of the line. For these reasons we cannot attach much importance to such reports,—certainly not enough to decide that the line was not built under an arrangement with the telegraph company. The result is that with respect to this feature of the case we feel constrained to concur in the view entertained by *Mr. Justice Miller*,—that the contract of October 1, 1866, was a valid agreement, and that it was within the purview of the Act of July 2, 1864.

This opinion has necessarily been extended to such length in the discussion of the foregoing questions that we have felt compelled to dispose of the remaining questions as briefly as possible, although we have considered them attentively, and with a due appreciation of their importance. The fourth section of the Act of August 7, 1888, under which this bill purports to have been filed, provides, in effect, “that in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines . . . constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this Act [being those mentioned in the Pacific Railroad acts] and to have the same possessed, used and operated, in conformity with the provisions of this Act and of the several acts to which this Act is supplementary—it is . . . made the duty of the Attorney General . . . by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States . . . to have legally ascertained and . . . adjudicated all alleged rights of all persons and corporations . . . claiming . . . any control or interest . . . in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, . . . and to have all contracts and provisions of contracts set aside, . . . which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies. . . .” We must presume in this case, as in all others, that, when Congress authorizes the Attorney General to take any legal proceedings to enforce the rights of the United States, it is intended, unless the contrary idea is clearly expressed, that rights of a purely legal nature, for the enforcement of which there is an adequate legal remedy, shall be so enforced by a proceeding at law rather than by a suit in equity. We cannot assume, therefore, there being no clear expression of such a purpose, that Congress intended by the fourth section of the Act of August 7, 1888, to authorize matters of legal and equitable cognizance to be mingled indiscriminately in the same complaint, and that all the rights and duties mentioned in said Act, of whatsoever nature, should be enforced in a single suit, to be instituted by the Attorney General in the name of the United States. Even if Congress has power to so direct, we should not feel authorized to say that it has done so, without a positive declaration of such purpose, which we do not find in the statute now in question. Some of the duties imposed by the Act of August 7, 1888, which the government apparently

seeks to enforce in this suit, are evidently of such a nature that they may be adequately enforced at law. Among these may be mentioned the duty enjoined upon the Union Pacific Railway Company, by the first section of the Act, of operating "by itself alone, through its own corporate officers, its telegraph lines." We know of no reason why this precise duty may not, and should not, be enforced by mandamus, if it has in fact been violated. *United States v. Union Pac. R. Co.* 98 U. S. 569, 609, 25 L. ed. 148, 158; *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371. Acting in accordance with the views last stated, we have not considered it our duty in this case to inquire, and we do not determine, whether the railway company's present method of operating its line of telegraph is in violation of the first section of the Act of August 7, 1888. It is shown by the record that since the passage of that Act the parties to the contract of 1881 have by mutual consent rescinded the twelfth clause of the agreement, which provided for the employment of a joint superintendent of the telegraph line. Whether the existing method of operating the line should be altered in any other respect to keep within the requirements of the late statute in the respect last stated we leave to be determined in an appropriate proceeding brought for that purpose. In this connection we may also add that it is the opinion of this court that the duty enjoined by the second section of the Act of August 7, 1888, with reference to affording equal facilities to all connecting lines of telegraph, without discrimination against any, is a duty which should be enforced in the mode prescribed by the third section of the Act, rather than by a bill in equity. The second section imposed a duty upon the railway company which was in some respects new, and provided a special remedy for its enforcement. Under these circumstances, we think that the remedy thus provided should be regarded as exclusive. But, even if the latter view is erroneous, we still think it manifest that the record does not make out a case which would authorize us to enter any order or decree based on the "equal facilities" provision of the second section of the Act. The proof does not show, with any certainty, that since the passage of the Act any telegraph company has placed itself in a position to demand of the railway company the same facilities which it accords to the Western Union Telegraph Company, and that its demand has been refused. No telegraph company is complaining before us that, having accepted the provisions of title 65 of the Revised Statutes, and having extended its lines to a connection with the stations of the railway company, and having solicited the same facilities which the Western Union Telegraph Company now enjoys, it has been denied such privileges. Until such a case has been presented, both by complaint and by proof, we cannot presume that the railway company intends to disregard its duty, and it surely cannot be expected of us that we will attempt to give an additional sanction to the statute by merely repeating its mandate. In other respects, however, the

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case, as presented by the record, is one which entitles the complainant to a certain measure of equitable relief under the provisions of the Act on which the suit is based. The bill shows that the government has a lien upon the railroad and telegraph lines to which the litigation relates, and, as such lienholder, it is undoubtedly entitled to have its rights and equities in and to the telegraph property along the right of way of the Union Pacific Railway Company judicially ascertained, and to have the rights of other persons and corporations therein also ascertained and adjudicated. Incidental to that relief is the right to have all provisions of contracts set aside and annulled that are unlawful, and that in any manner impair the security of the United States, or cloud its title or prejudice its rights. It is the appropriate function of a court of equity to administer such relief, and the Act of August 7, 1888, directs the Attorney General to inaugurate such a proceeding. We are of the opinion, therefore, that it was the duty of the circuit court, under the evidence laid before it, to have treated the suit as a bill filed to obtain the relief which we have generally indicated in the last paragraph, and to have decreed accordingly. In point of fact it went much further than the Act of August 7, 1888, seems to us to have warranted in an equitable proceeding of this nature, and incorporated some provisions in its decree which we feel constrained to disapprove. We shall not stop, at this time, to enumerate all of the provisions of the decree of the circuit court that have thus met with our disapproval. It will suffice to say that the order canceling the contracts of July 1, 1881, and October 1, 1866, was the most important error. The government was in no position to ask that the contract of July 1, 1881, should be annulled *in toto*, merely because some of its provisions, though valid when made, had been rendered invalid by a subsequent statute. It was only entitled to have those provisions declared inoperative and no longer obligatory, so far as they were in conflict with the subsequent enactment. The case must accordingly be reversed, and the cause remanded, with directions to the circuit court to set aside its former decree, and, in lieu thereof, to make and enter a modified decree, consistent with this opinion, the provisions whereof we will now proceed to outline.

The decree to be entered by the circuit court pursuant to the mandate of this court should order, adjudge, and decree:

First. That the agreement named in the bill of complaint, entered into on the 1st day of October, 1866, by and between the Union Pacific Railway Company, Eastern Division, and the Western Union Telegraph Company, was lawfully entered into by the parties thereto, and constituted a valid and binding contract. Second. That said contract of October 1, 1866, continued in full force and effect until the 1st day of July, 1881, when, by agreement of the parties thereto, its provisions were superseded by the provisions of the contract of that date, entered into by and between the Union Pacific Railway Company and the Western Union Telegraph Com-

pany. Third. That the agreements entered into on the 1st day of September, 1869, and on the 14th day of December, 1871, by and between the Atlantic & Pacific Telegraph Company and the Union Pacific Railroad Company were entered into by the Union Pacific Railroad Company unlawfully and beyond its powers, and the said contract, and each of them, are hereby canceled, annulled, and held for naught. Fourth. That the equities arising out of the said contracts of September 1, 1869, and December 14, 1871, were adjusted and settled by all the parties interested therein in the making of the contract of July 1, 1881, by and between the Union Pacific Railway Company and the Western Union Telegraph Company. Fifth. That the contract of July 1, 1881, named in the bill of complaint, entered into by and between the Union Pacific Railway Company and the Western Union Telegraph Company, was lawfully entered into by the Union Pacific Railway Company and the Western Union Telegraph Company, and constituted, when made, a valid and binding contract by and between the parties thereto. Sixth. That the third and fourth paragraphs of the contract of July 1, 1881, in so far as they grant, or were intended to grant, exclusive rights or privileges of any character, are repugnant to the Act of Congress approved August 7, 1888, entitled "An Act Supplementary to the Act of July first, eighteen hundred and sixty-two, Entitled 'An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes,' and also of the Act of July second, eighteen hundred and sixty-four, and other acts amendatory of said first named Act:" and said paragraphs of said contract are hereby adjudged and declared to be null and void, and are hereafter to have no force or effect, to the extent, and only to the extent, that they secure or grant to the Western Union Telegraph Company, or were intended to secure to it, any exclusive rights, privileges, or advantages whatsoever. Said third and fourth paragraphs are as follows, to wit:

Seventh. That there is a single line of poles between Council Bluffs and Ogden, on the right of way of the defendant railway company, which poles were erected in accordance with the provisions of the contract of July 1, 1881, at the joint and equal expense of the defendant railway company and the defendant telegraph company, and is the property of said companies jointly; that upon said poles, between Council Bluffs and Ogden, there are two distinct lines of telegraph, the wires of one of which said lines are owned solely by the said railway company, and the wires of the other of which are owned solely by the said telegraph company; that the line of telegraph poles on the Kansas Pacific Railway, from Kansas City to Denver, was originally erected as provided in the contract of October 1, 1866; that said line of poles between Kansas City and Denver, since the 1st day of July, 1881, has been reconstructed under and in accordance with the provisions of said last named contract, and said line of poles thus reconstructed bears two distinct lines of telegraph, one of which is the sole property of the defendant railway company, and the other of which is the sole property of the defendant telegraph company; that there are two distinct lines of telegraph on the line of poles between Denver and Cheyenne, one of which is the sole property of the defendant railway company, and the other of which is the sole property of the defendant telegraph company. Eighth. That all of the foregoing lines of telegraph of the defendants herein are, in accordance with the provisions of the contract of July 1, 1881, worked by batteries furnished by the defendant telegraph company, and operated by instruments the property of the defendant telegraph company. Ninth. It is further ordered, adjudged, and decreed that the defendants hereto are allowed the period of 60 days after the entry of this decree to make such arrangements, adjustments, and changes as are rendered necessary by the annulling of the aforesaid provisions of the contract of July 1, 1881, and to carry out the provisions of this decree.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

OREGON SHORT LINE & UTAH NORTHERN R. CO., *Appl.*,

v.

NORTHERN PACIFIC R. CO.

(See S. C. 61 Fed. Rep. 158.)

1. A railroad company cannot appropriate the grievance of a traffic or locality under the Interstate Commerce Act, § 3, prohibiting preference by a carrier to persons, firms, or corporations, and to localities and traffic, and complain on account of it.
2. The refusal by a railroad company to transport freight on foreign cars originating east of a certain meridian, when its own cars are not in use but are free to be employed in the transportation desired, or where a transfer of freight will not be injurious to it, is not an unreasonable discrimination against another railroad company.
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or a denial to it of reasonable and proper facilities under the Interstate Commerce Act, although it accepts in such cars freight originating west of such meridian.

3. The refusal of a railroad company to honor tickets or coupons for passage issued by another company over its line does not constitute a discrimination within the Interstate Commerce Act as, in the absence of arrangement between the companies, there is no obligation on the part of either to honor tickets issued by the other.
4. The provision of the Act incorporating the Northern Pacific Railroad Company that it shall

be its duty to permit any other railroad to form running connections with it on fair and equitable terms, does not require it to permit the use of

its road by the cars of other companies, or to honor tickets of such other companies.

Decided April 12, 1894.

A PPEAL by complainant from a decree of the Circuit Court of the United States for the District of Oregon, dismissing a bill filed to enjoin defendant from continuing to make alleged unlawful discrimination against complainant in receiving and forwarding freight tendered by complainant and in refusing to recognize through passenger tickets issued by it. *Affirmed.*

The facts are stated in the opinion.

Argued before McKenna, *Circuit Judge*, and Knowles and Hawley, *District Judges*.

Messrs. W. W. Cotton, John M. Thurston, and Zera Snow for appellant.

Messrs. Dolph, Bellinger, Mallory & Simon for appellee.

McKenna, *Circuit Judge*, delivered the opinion of the court:

As is said by appellant's counsel, "the controversy between the parties in this suit is mainly one of law, and not of fact;" and, succinctly stating the relations of the parties, also said: "The appellee owns and operates a line of railroad extending from St. Paul, Minnesota, to Portland, Oregon, passing through Tacoma and other points in the state of Washington, on Puget sound. The appellant owns and operates a line of railway connecting with the lines of the appellee at Portland, and extending from Portland to Granger, Wyoming, where a connection is made with the lines of the Union Pacific Railway, extending thence to various points on the Missouri river. The appellee and appellant are therefore competing lines in the transportation of traffic from Missouri river points to places upon the Pacific coast. The only rail connection which the lines of the appellant have from Portland to Puget sound is by means of the lines of the appellee." The connection, however, is not direct, but through the lines of the Northern Pacific Terminal Company. The latter, however, are leased to appellee. We shall consider the case as if the connection was direct.

The bill is very long. In substance, it charges appellee with discriminating against traffic, passengers and freight, starting east of a given meridian, and destined for Puget sound points *via* Portland, Or., and also discriminating against localities situate east of a given meridian. There is also a charge that facilities are given to the Southern Pacific Company which are denied to appellant. This charge is not sustained by the evidence, and may be dismissed from consideration. The discrimination against traffic and localities consists in receiving goods at Portland which start west from the meridian in cars other than those of appellee without requiring payment to the owners of the cars of the usual mileage, and without exacting prepayment of freight, while goods which start east of the meridian are denied these facilities; and in receiving through tickets issued by appellant to passengers starting west of the meridian, and refusing such tickets issued to passengers starting east of the merid-

ian; the condition and other circumstances of the freight and passengers being the same. The action, appellant contends, is contrary to the custom and practice of railroads which have the force of law, and infringes section 3 of the Interstate Commerce Act, so called. This section is as follows:

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith and shall not discriminate in their rates and charges between such connecting lines. But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The first part of this section prohibits preference to persons, firms, or corporations, and to localities and traffics, and prohibits the subjecting of either to prejudice or disadvantage. The evidence shows that there was no preference given any person, firm, or corporation in the sense of this section, and no traffic or locality is complaining, unless the complaint of appellant is such. But we do not think it is competent for a railroad company to appropriate the grievance of a traffic or locality under section 3, and complain on account of it.

In *Memphis & L. R. R. Co. v. Southern Exp. Co.* 117 U. S. 1, 29 L. ed. 791, certain railroad companies made contracts with certain express companies granting them facilities on their trains, refusing contracts and facilities to other express companies. The

Supreme Court sustained the railroad companies, reversing the judgment of the circuit court. The court said:

"The question is not, whether these railroad cars must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines."

And again, on page 28, 117 U. S., and page 808, 29 L. ed., the court says:

"If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or allow it to be carried by others, different questions would be presented."

And the court further said:

"So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them."

This language is applicable to the case at bar. Whether appellant shall unload its cars at Portland as an alternative to paying car mileage, however it may involve expense or inconvenience to appellant, is not necessarily the concern of the freight or its shippers or the locality of its shipment. When it becomes such, a complaint will no doubt be made. None now is made, nor does it appear that either the traffics or localities discriminated against are even competitors. In *Hozier v. Caledonian R. Co.* 1 Ry. & Canal Traffic Cas. 30, of the traffic act, it was said:

"It provides for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain."

In *Swindon, M. & A. R. Co. v. Great Western R. Co.* 4 Ry. & Canal Traffic Cas. 349, it is implied that to make undue preference, traffic must go between same places. And in 1 Railway & Canal Traffic Cases, page 32, the same rule is asserted as to passengers. To construe the section so as to authorize a railroad to complain for a traffic or locality would seem to confound the distinctions made by it, and make the second part of it superfluous. The regulation of the roads was undoubtedly in the interest of their customers, but it left them powers and privileges, between themselves, which might affect their customers; indeed, left powers and privileges in them as regards their customers, because all favor and all discrimination is not forbidden, even between them.

This view takes out of consideration the rights of the traffic originating and the rights of localities situate east of a given meridian, and confines the inquiry to the rights and obligations of the railroads between themselves under the second paragraph of the section.

As an aid to the interpretation of this paragraph, a number of cases which arose under the English act are cited by appellant. They are not of much assistance. The English act is different from ours. It is fuller and more precise. There is little or no ambiguity about it. At any rate, our act is different, and the difference has been construed as substantial. *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 2 Inters.

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Com. Rep. 763, 41 Fed. Rep. 559, and *Kentucky & I. Bridge Co. v. Louisville & N. E. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289. See, also, the first decisions of the Interstate Commerce Commission. But in *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 2 Inters. Com. Rep. 454, the Commission holds that our Act was intended to effect similar results, but omitted the machinery to accomplish them. It would seem like better reasoning to assume that, if congress had intended the same results as the English act, having it and its history and construction before them, it would have adopted its language and machinery, and made the results certain.

We get little light, therefore, from the English act or decisions, and not much from the debates in Congress. There was little or no comment on section 3. Section 4 (the long and short haul provisions) appeared to have engaged almost exclusive attention. Senator Cullom, who had charge of the bill in the senate, said:

"The third section is broader and more general in its terms, and should perhaps have been made the second section, as it contains a general prohibition of every variety of unjust discrimination. The section covers all subjects. The first paragraph prohibits the giving of any undue or unreasonable preference to any particular person or locality, or to any particular description of traffic in any respect whatever. . . . The language adopted in this paragraph is substantially that of the English statute on the subject, which has been repeatedly construed by the English courts, so that its meaning has been practically established. The second part of the section is modeled in part upon the English and in part upon similar statutes in several of the states. Its purpose is to require railroads to furnish connecting roads all reasonable and proper facilities for the interchange of traffic that may be necessary for the convenience of the public, and to prevent one road, or a combination of roads, from 'freezing out' connecting lines by refusing to accept from it, or deliver traffic to it, upon any terms, as has been done." Senator Cullom's Speech Explaining the Bill, section 1, p. 3577, Cong. Rec. 49th Cong., April 15, 1886.

This is not very explicit. The first part of section 3, he says, is adopted from the English statute, and that its meaning has been practically established. So far, so good. But the second part is selected from the English and certain states' statutes, and, besides, very important language is omitted which is in the English statute. And, as *Justice Field* states:

"Whenever an intention has been manifested, in the creation of railway charters, that a connecting company shall have the power to run its cars over the lines of another, or to require one company to haul over its lines the cars of another, such intention has been expressed in unequivocal terms, such as is found in the constitutions or statutes of several of the states respecting railway companies, which is substantially in these terms: 'And they shall receive and

transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination."

Senator Cullom stated the evil which was to be remedied. Railroads had refused to accept or deliver traffic on any terms and thereby froze out connecting lines. This the Act was intended to correct and did correct. But confining it to this, appellant contends, makes no advance on the common law; and that, under the latter, the appellee was bound to carry freight in its own cars, and that, therefore, Congress intended to impose a duty beyond that. This is begging the question somewhat, and does not consider the distinction between rights and remedies; but whether the common law required a railroad company to carry freight delivered to it by another we need not consider. The fact was, as said by Senator Cullom, it was not done, and the Act was deemed necessary to compel it. Whether common law rights were enlarged thereby or only affirmed we need not decide. If we assume the former, as appellant has, we cannot also assume that the independence of the roads between themselves was entirely destroyed. Not all preference is prohibited,—only undue and unreasonable preference; and the facilities which are required to be granted have two limitations: They do not include tracks and terminal facilities, and they must be reasonable and proper. How must the latter be determined? Surely not only of themselves, but in the circumstances, and these must include the proper interests of the road from which the facilities are required. Any other construction would be too abstract, and we concur in the opinion of the learned justice who rendered the judgment of the circuit court "that the refusal to transport freight on foreign cars, where the freight originated east of the ninety-seventh meridian, when its own cars were not in use, but were free to be employed in the transportation desired, or was made where a transfer of freight would not have been injurious to it, can in no respect be deemed an unreasonable discrimination against complainant, or a denial to it of reasonable and proper facilities."

Of course, if appellant's construction of section 8 be correct, and it can compel appellee to receive one car, by the same right it may compel the receipt of many, and what more would be necessary to take the use of tracks? We think nothing. The attachment of the locomotive would only affect the degree of use. The same conclusion was reached after a careful consideration of all the cases by the circuit court of the eight circuit in *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 4 Inters. Com. Rep. 542, 59 Fed. Rep. 408. A construction which permits the use of tracks we are forbidden to entertain.

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Of the complain of appellant that appellee denies it facilities for passenger traffic in refusing to honor tickets or coupons for passage over appellee's lines north of Portland issued by it, the lower court said:

"It is sufficient to say there is no evidence to support it. The practice of railway companies operating connecting lines to honor tickets or coupons for passage over their respective lines issued by a connecting company, which is very general, is founded entirely upon arrangements between the connecting companies. In the absence of such arrangements, there is no obligation on the part of either company to honor tickets issued by the other. All the witnesses examined on this point concur in their statements in this respect."

We concur in this statement and the conclusion of the court.

Appellant further urges that the facilities which it asks of appellee are required to be given by the fifth section of the Act incorporating the Northern Pacific Railroad Company, which contains the following provision:

"It shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States or by the legislature of any territory or state in which the same may be situated to form running connections with it on fair and equitable terms."

In answering this contention we can do no better than to adopt the language of *Justice Field*:

"The running connection," he said, "which must be permitted by the defendant is not, as contended by complainant's counsel, a running over its line, but only in connection with it, a provision intended to secure the transportation and exchange of freight between connecting lines, and not the use of each other's roads by the cars of such company. . . . We are of opinion that a running connection of one road with another, within the meaning of the defendant's charter, only includes such arrangements as to the time of arrival and departure of trains, and as to stations, platforms, and other facilities, as will enable companies desiring to connect to do so without detriment or serious inconvenience."

The effect of a custom among railroads to grant the facilities contended for we have not considered, because the existence of such a custom is not established by the evidence. The finding of *Justice Field* on the facts seems to be concurred in by *Judge Deady*. His dissent is based entirely on a different interpretation of section 8 of the Interstate Commerce Act, and of section 5 of the Act incorporating the Northern Pacific Railroad Company. *Judgment is therefore affirmed.*

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF MICHIGAN.

INTERSTATE COMMERCE COMMISSION

v.

DETROIT, GRAND HAVEN & MILWAUKEE R. CO.

1. That persons complaining before the Interstate Commerce Commission of the violation by a certain railroad company of the provisions of the Interstate Commerce Act had no real grievance, but were instigated to their prosecution by a rival of the company, will not cause the dismissal of a suit brought by the Commission to enforce an order which it has made in the cause.
2. A carrier's furnishing free cartage between its station and the warehouse of shippers and consignees at one point which is refused at a point nearer the place of shipment but which has been lawfully grouped with the former for a common charge from the place of shipment, is an undue discrimination against the latter, violative of the Interstate Commerce Act, and is not justified by

the facts that the business at the former point is much greater than at the latter, and at the former the stations of rival carriers are much nearer than its station to the business portion of the town, since the advantage of free cartage is more than enough to equalize conditions.

3. The custom of railroads to furnish switch tracks for the use of certain of its customers upon which freight is delivered free of charge, does not justify free delivery by carts to all parts of one city and a refusal of like service for other cities under substantially similar conditions; nor does a prohibition of the delivery by carts require a prohibition of the tracks.

(Severens, District Judge, *dissents*.)

(October 6, 1893.)

PETITION to enforce an order made by the Interstate Commerce Commission requiring defendant to desist from furnishing free cartage at one of the stations upon its line which was denied at other stations similarly situated. *Granted.*

Statement by Taft, C. J.:

This was a bill in equity exhibited by the Interstate Commerce Commission averring that the Detroit, Grand Haven & Milwaukee Railway Company, a common carrier corporation subject to the provisions of the Interstate Commerce law, had been duly impleaded in a controversy before the Interstate Commerce Commission upon the petition of Mary O. Stone and Thomas Carten, residing at the city of Ionia, Michigan, wherein it was made to appear to the satisfaction of the Commission that the said defendant had violated the provisions of the Interstate Commerce law as alleged; that the Commission had formulated an order and notice in relation to the matters charged in the petition based upon findings and determinations of the Commission with respect thereto, which order was still in force but which the defendant refused to obey. Wherefore the Commission prayed for an injunction, mandatory or otherwise, to restrain the defendant, its officers, servants and attorneys, from further continuing in their violations of and disobedience to the order of the Commission.

The facts found by the Commission were as follows:

1. The complainants are copartners doing business under the firm name of Stone & Carten and are engaged in the sale at retail of goods, wares and merchandise in the city of Ionia, county of Ionia and state of Michigan, purchasing said goods, wares and merchandise at Philadelphia, Pa., New York, N. Y., Boston, Mass., and points east of Detroit, Michigan.

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2. That the respondent railway company is a corporation existing under and pursuant to the laws of the state of Michigan, and is a common carrier of passengers and property for hire between the city of Detroit and the city of Grand Haven, both of said places and its entire line of railway being in the state of Michigan; but it does not own and control a line of steamboats plying across Lake Michigan, between Grand Haven and Milwaukee, Wisconsin, but there is a line of steamboats engaged in the transportation of persons and property across Lake Michigan, between Grand Haven and Milwaukee, from which the respondent received traffic consigned over its road from Milwaukee, and to which it delivers traffic from its road destined to Milwaukee; that all of said boats are under the direction and control of an independent corporation, organized under the laws of the state of Michigan, by the name of the Grand Haven & Milwaukee Transportation Company; that the management of the business of the last named company is under the management and control of the same officers as those which manage and control the road and business of the respondent.

3. The respondent, for its service, as a common carrier for continuous shipment, under a common arrangement, of property from Detroit to its stations on its line of transportation, established and published a schedule of rates and charges, a tariff of freights which makes on all freights, from Philadelphia, New York and Boston and all other points east of Detroit, consigned over the respondent's road, the same rates and charges for the complainants which

is made and charged for the same class of freights to the merchants doing business at the city of Grand Rapids, a copy of which schedule or tariff is hereto annexed and deemed a part hereof.

4. The shipments of freight from Philadelphia, New York and Boston and points east of Detroit, which are delivered to complainant's road at said city of Detroit and transported by it over its line of railway, pass through the city of Ionia before reaching the city of Grand Rapids; that it is a shorter distance from Detroit to Ionia than from Detroit to Grand Rapids, and over the same line, in the same direction, the shorter being included in the longer distance.

5. That the respondent provides, at its own expense, drays, carts and trucks at the city of Grand Rapids for the service of transporting merchandise and freights generally, as well as merchandise and freight consigned from Philadelphia, New York, Boston and points east of Detroit, between its station at Grand Rapids and the places of business of merchants, traders and other patrons of its road at that place, which service it performs without additional charge to the owner or shipper of property on account thereof; that this service is not furnished to complainants or other merchants, traders and patrons of its road at the city of Ionia; that this service at Grand Rapids has been openly and notoriously rendered for a long period of time, to wit, for twenty-five years and upwards; that its station at the said city of Grand Rapids is within the corporate limits thereof, and is on an average one and a quarter miles from the business sections of said city where the traffic of the places tributary to respondent's road originates and terminates, while respondent's station for receiving and discharging freight and property at the city of Ionia is not to exceed an eighth of a mile from the business center of said city; that at the city of Grand Rapids there are two other railroads, the Michigan Central Railroad and the Grand Rapids, Lansing & Detroit Railroad, both of which are immediately and directly in competition with respondent's road for the business of Grand Rapids; that the stations of both of said roads for receiving and discharging freight and property at Grand Rapids are near the business center of said city, requiring only short haul to and from their stations, on an average about one quarter of a mile; that the respondent did the carting of freight to and from its station at Grand Rapids substantially in the same manner as at present, long prior to the time when either said Michigan Central or Grand Rapids, Lansing & Detroit Railroads were constructed to that place.

6. That the actual cost of carting or draying freight from the respondent's warehouse in the city of Ionia to the several places in said city of Ionia to and from which traffic has to be hauled is two cents per hundred weight; that the cost of carting or draying freight transported over respondent's line to and from the places of business of the merchants, traders and other patrons of its road at Grand Rapids, is two cents per hundred weight.

7. That there is but slight competition en-

countered by the complainants and other persons, firms and corporations engaged in business at the city of Ionia, interested in shipping over respondent's road, with similar business at the city of Grand Rapids.

9. The complainants have not brought any suit for the recovery of money or damages for which the respondent is alleged to be liable under the provisions of the Act to Regulate Commerce, but have elected to adopt this procedure as the sole means of obtaining relief.

10. The city of Grand Rapids has a population of about 70,000. The city of Ionia has a population of about 6000. The freight traffic to and from Grand Rapids by all roads in 1887 amounted to 983,685 tons. The freight traffic to and from Ionia by all roads for the same time amounted to about 55,000 tons.

11. Cartage by railway companies in a similar manner to that at Grand Rapids is conducted by other railway companies at exceptional stations in the state of Michigan, and more or less extensively practiced by companies in other states at exceptional stations.

On this statement of facts, a majority of the Commission, the chairman, *Judge Cooley*, and *Commissioners Morrison* and *Schoonmaker* held that the cartage at Grand Rapids was a violation of the long and short haul clause of the 4th section of the Act to Regulate Commerce, because its result was that the merchants at Grand Rapids obtained transportation of freight from Boston, New York and Philadelphia at two cents a hundred less than the merchants of Ionia, the free cartage at Grand Rapids being in effect a payment in money's worth to the merchants at Grand Rapids of two cents a hundred. *Commissioners Morrison* and *Schoonmaker* also held that the free cartage was unlawful on the further ground that it was in effect a device for receiving less than the established tariff rate from and to that point, that it was a rebate in violation of the 2nd section of the Act.

The answer of the defendant to the bill herein admitted the averment of the findings of fact embodied in the opinion of the Interstate Commerce Commission and averred that it had been the practice of railway companies engaged in interstate commerce to do free cartage as a means of obtaining traffic at exceptional stations on the lines of the railroads where the business was of sufficient magnitude to warrant the carrier in incurring the expense, and that such expense was deemed to be legitimate as a means of securing traffic for the railroad and of affording increased facilities and dispatch for doing its business; that on every railroad in Michigan and in the United States there were tracks constructed by the railway company, at its own expense, at exceptional stations on the line of road, leading from the main track of the road to private business establishments, which were used solely for delivering and receiving freight in the business between such private business establishments and the railway and without any charge being made by the railway company therefor; though there were private business establishments at the same station of the railroad not furnished with these advantages in connection with such traffic; that such practice did not infringe any

provision of the Interstate Commerce law and yet it involved quite as clear an element of discrimination as the cartage system at Grand Rapids; that the practice of freight cartage was originally adopted because it was less expensive than would be a change of its line so as to bring it into nearer proximity to the business center of the city or the construction and operation of spur tracks from the main line of road into the business center where the main line tracks of its competitors, the Michigan Central and the Detroit, Lansing & Northern Railroad companies, were held in said city; that the free cartage had the additional advantage of enabling the carrier to promptly clear the freight buildings of traffic and prevent its burdensome and expensive accumulation and that it secured a method and order in the delivery of its traffic from its buildings; and that it also saved the expense of sending notice to the consignees of the arrival of freight; that the free cartage at Grand Rapids was an absolute condition of the respondent's procuring for its road any considerable part of the freight traffic of the city; that the two cents a hundred pounds paid for cartage at the city of Grand Rapids by respondent, was not paid alone for the cartage but included the services of the cartage agents, acting in behalf of respondent, in soliciting freight traffic for its road and collecting bills for freight charges; that the value of these services aside from the mere matter of carting the freight, was not less than one third the sum which respondent paid.

Wherefore the defendant submitted that in view of all these considerations, the free cartage was not an undue or unreasonable preference or advantage to said city of Grand Rapids as against the city of Ionia, and was not in conflict with the long and short haul clause of the law.

Mr. Ashley Pond with *Messrs. L. G. Palmer, Dist. Atty., and J. B. McMahon* for complainant.

Mr. Otto Kirchner with *Mr. E. W. Meddaugh* for defendant.

Taft, C. J., delivered the following opinion: The first objection made by defendant to granting the relief asked is that the complainants before the Commission, Stone and Carter, had no real grievance but were instigated to their prosecution by a competitor of the defendant, the Michigan Central Railway, which is paying the expenses of the litigation. This objection is not founded on any finding of the Commission but on an admission of counsel for the complainant below, before the Commission, and is referred to in the dissenting opinion of *Mr. Commissioner Bragg*. Were this a mere private action by private litigants the objection, if founded on anything in the record (as this does not seem to be) might have weight, but under the provisions of the Interstate Commerce law we are not permitted to entertain it. The Act by section 13 provides for the lodging by any person of complaints with the Commission, of a common carrier's violations of the law, and expressly enjoins upon the Commission "that no complaint shall at any time be dismissed, because of the absence of direct damage to the complainant."

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Moreover the same section provides that, "said Commission . . . may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." By section 15 of the Act, the Commission is required, in any case, where investigation has been made by it, if the law has been violated, to notify the common carrier to cease from further violation, and by section 16, in case of the refusal of the common carrier to obey, it becomes the duty of the Commission to apply by petition to a circuit court in equity to enforce its order and restrain the further violation of law by the carrier. It is obvious from these provisions that when the case reaches the circuit court on petition of the Commission, it is the complaint of the Commission which gives the court jurisdiction and that the *bona fides* of the complaint cannot be attacked by impeaching the good faith of those who, in the first instance, induced the Commission to take action.

Although the question was made in the original answer before the Commission, it is not seriously disputed here that the defendant is a common carrier subject to the provisions of the Interstate Commerce law.

The question at issue is whether the practice of free cartage at Grand Rapids is, with reference to the shippers at Ionia, a violation of the following sections of the Interstate Commerce law:

"Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or a like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance: but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance."

Provided, however, that, upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property: that the Commission may from time to time prescribe the extent to which designated common carrier may be relieved from the operation of this section of this Act."

It is conceded that the contract of carriage of a railway common carrier as usually understood is the transportation of the goods from the warehouse of the railway at the point of shipment to the railway warehouse at the point of destination. Generally the cartage from the railway warehouse to the storehouse of the consignee is paid by him. If the railway company pays it, the expense of transporting the goods to the place where he can use them is lessened by the cost of cartage. This is generally exactly equivalent to the railway company's reducing the freight by as much as the cartage would cost the consignee. Now it is admitted that this latter would be a violation of the long and short haul clause if the reduction were made at Grand Rapids and not at Ionia. Why should not its exact equivalent, the furnishing of free cartage be also a violation? It is said that it is not, because the transportation to Ionia and that to Grand Rapids are not under substantially similar circumstances and conditions. In accordance with a practice which has been approved by the Interstate Commerce Commission (*Imperial Coal Co. v. Pittsburg & L. E. R. Co.*, 2 Inters. Com. Rep. 436, 2 I. C. C. Rep. 618) Ionia and Grand Rapids are grouped together by the defendant company as stations to which the freight rates from the far east, Boston, New York and Philadelphia, may properly be made the same. This is a conclusive admission by the defendant that so far as a transportation from the east to the warehouses of the company at the two places is concerned, it is under substantially similar circumstances and conditions. The question remains whether the conditions existing with reference to the delivery of goods from the warehouses to the storehouses of the consignees, are such as to warrant a full charge for the same at Ionia, and no charge at all at Grand Rapids. If not, then the free cartage at Grand Rapids is, in fact, a reduction in the cost of transportation to Grand Rapids and illegal. We do not see how this result can be escaped. The reasoning is said to be mathematical, but that is a term not ordinarily used to describe defective reasoning. Any benefit in relation to the shipment of goods, having a definite money value conferred gratis by the shipper upon one shipper which is not conferred upon another when the service to each is admittedly under substantially similar circumstances and conditions, is an undue reduction in the price of carriage to the former and is illegal. If this were not true, then the provision against undue discrimination, of which the long and short haul inhibition is only one instance, would be a dead letter.

It may be admitted that the terminal facilities may be varied at different stations without causing undue discrimination, provided such a

variation is not such a departure from the usual facilities as to make it an obvious reduction in the cost of transportation to the shipper. It is very clear that free cartage is exceptional and that it is a departure from the usual terminal facilities furnished either at large or small cities, and towns. Of course it would not be a discrimination that could be complained of, that one company puts its station at one town nearer the business center than another, and if free cartage could be said to properly make up for the greater distance of defendant's station from the business center of Grand Rapids and in this respect to put Grand Rapids merchants on the same footing as Ionia merchants with their proximity to the station, then it would seem to be unobjectionable because justified by the dissimilar circumstances. But can this be said? We think not. If at Grand Rapids the defendant's station were moved into the business center, the shippers would still have to pay for the cartage. It may be that it would be for a less price but still they have to pay. The equalizing of the conditions between the two places in this respect would be complete by a charge for cartage by the railway company at the lower rate which would be charged for cartage were the station in the city. Free cartage from defendant's station at Grand Rapids confers on the shippers a benefit of a definite money value over and above that usually included in a transportation tariff, equal to the cost of cartage from a station to the center of the city.

What has been said with reference to difference between the distance of the station at Grand Rapids from the business center and that of the station at Ionia, has equal application to the contention of the defendant that the free cartage is justified by the fact that the competitors of the defendant have their stations at Grand Rapids in the business center, and that this places defendant at a disadvantage, which creates a dissimilar condition. Even if competition under such circumstances can produce dissimilarity of conditions, the extent of the discrimination founded thereon must be commensurate with and limited to the dissimilarity. It will fully equalize the conditions if the defendant furnishes cartage for a mile and a quarter at a price equal to that at which cartage for a quarter of a mile could be furnished without loss. To do more is to bid for competition by reducing the cost of transportation and this cannot be done except by proportionately reducing the rates at Ionia also.

But it is said that Grand Rapids is a much larger place than Ionia and therefore a carrier may confer favors on a shipper at the former place. In so far as the greater amount of business enables the railway company to do carting at a cheaper rate at Grand Rapids than at Ionia, by so much may the carrier reduce the cartage cost to the shipper at the former place, because this is a legitimate and actual dissimilarity in conditions between the two places, but cartage at Grand Rapids must cost something and free cartage, therefore, confers on the shipper a benefit which dissimilarity of conditions does not justify.

The chief argument for the defendant is based on the custom among railroads to furnish those of their customers whose store-

houses are convenient to the railway track with switch tracks, so that upon these tracks consignments in carloads are delivered at the door of the consignee. If free cartage is to be prohibited, it is said that the same principle must prevent the use of switch tracks for such a purpose, because this is a benefit to certain customers of a similar character not enjoyed by others. We do not think the cases are parallel. The providing of a switch track depends on two things: First, the proximity of the consignee's storehouse, and second, business of a character to require or permit consignments in carload lots. The first of these conditions, and perhaps the second, entitles the customer to a lawful discrimination in his favor. The favorable location of his storehouse with respect to the track is an advantage which he may rightly improve, and it may be that the wholesale character of his business is another element which may justify a discrimination in his favor over smaller shippers. *Interstate Commerce Com. v. Baltimore & O. R. Co.* 4 Inters. Com. Rep. 92, 145 U. S. 263, 36 L. ed. 699. If a case were presented where a merchant at Ionia with his storehouse convenient to the track of the defendant, had been refused a switch track and delivery thereon of merchandise in carload lots, when such a benefit was conferred on merchants at Grand Rapids not differently situated, a question might then arise similar to that at the bar, but it is not presented by a discrimination between merchants with storehouses far from the railroad track or who receive consignments of small bulk, and those who are near the track and receive carload lots. It would be a legitimate argument against a particular construction of the Interstate Commerce Law, if its logical result were the prohibition of a practice so general as that of private switch tracks, and which has always been considered lawful. But, as we have seen, the prohibition of free cartage does not involve any such result.

In order that a railway may reach many customers, it sometimes builds a belt railroad. This is a mere extension of its track and if the business to be obtained thereby will justify, there is no more objection to it as undue discrimination than there would be to the building of a branch road or the delivery of goods from several warehouses. It is part of the railroad business and the means of delivery is by railroad. Cartage is not usual railroad business, but is something not usually undertaken by them. It is as foreign to ordinary freight business as it would be for the company to do the packing for shippers free of cost.

For the reasons given, the prayer of the petition must be granted and a decree entered accordingly.

Severens, D. J., dissenting:

The finding of facts by the Commission is adopted for the purpose of this opinion, together with some further facts not inconsistent therewith, proven by the testimony or of which judicial notice is taken.

It is a legitimate rule in the construction of language employed in statutes that attention should be given to results which will follow from a proposed interpretation, and if those

results are contrary to the general purpose and object of the Act and are plainly seen to be such as were not intended, it should be rejected, unless the terms employed are too rigid to bear some other interpretation in harmony with the general policy of the law. The object sought to be attained is the guiding light always, and in the construction of this statute, couched as it is in broad and general language, it should be kept constantly in sight. For reasons presently to be stated, it appears to me that the conclusions of the Commission and the order founded thereon are productive of results quite different from those intended.

The general purpose of the Interstate Commerce Act was to prevent the practice of extortion by common carriers in the transportation of freight and passengers between the states by the imposition of unjust and unreasonable rates.

This is well known as matter of history and the courts take judicial notice of it. The law was passed for the protection of the public and not for the benefit or to redress any grievance of common carriers. They were known to be able to take care of themselves. And the closing paragraph of the first section sounds the key-note to the whole Act when it says that "every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

And this suggests a question somewhat preliminary in its nature, concerning the purpose of the proceeding and the province and duty of the court in dealing with it, which appears to me to deserve consideration.

The Act provides by the 18th section that any person, corporation or association, or any body politic may make complaint to the Commission for any violation by a common carrier of its provisions. Notice is thereupon required to be given by the Commission to the carrier of the charges preferred and it is called upon to satisfy the complaint or give its reason for refusal. If the carrier makes reparation for the injury complained of it is relieved from all liability to the complainant for the particular violation complained of. If this is not done, or if there shall be reasonable ground for investigating the subject of complaint, it is the duty of the Commission to investigate it. The Commission may also institute an inquiry upon its own motion in the same manner and to the same effect as though complaint had been made. In the latter case, it is clearly implied, as well from the language of the Act as from the nature of the proceeding, that any order it may make as the result of its inquiry must be upon notice of the particular violation which is charged against the carrier. However the proceeding may be commenced, the Commission is required by the 14th section, if it makes investigation, to make report of the facts found by it and its conclusions thereon and its recommendation in respect to the reparation which should be made to any injured party if there be such.

By the 15th section, if the Commission finds the charges to have been sustained, it is required to give a copy of its report to the carrier, together with a notice that it desist from the violation charged and make the reparation it has recommended to be made to any injured

party. If the carrier complies with this notice it is thereupon relieved from any further liability or penalty for such particular violation of law.

Then by the 16th section provision is made for an appeal to the courts in case of noncompliance with the notice of its duty enjoined in respect of the matters charged against the carrier by the Commission. If that refusal is in respect to a matter not triable by jury, the Commission or any party interested in the order or requirement it has made may apply to the circuit court in equity upon petition for such order or process, mandatory or otherwise, as shall be necessary and appropriate to compel obedience to the order of the Commission. And if, upon due hearing, the court shall find that the carrier has been guilty of the matter charged and the order or requirement of the Commission was such as the law required in such case, it will enforce obedience accordingly.

It is to be observed that the whole scope of the duty thus imposed upon the court is the trial of the questions of fact and law involved in the inquiry as to whether the respondent was by the particular order of the Commission required to execute a duty enjoined upon common carriers by the statute in the circumstances as they are found by the court to have existed; and if that inquiry results in such a finding, then also in awarding the proper process for compulsion. The court is not authorized to make any general order or decree upon the matters at large as they shall appear before it, but is given power simply to award its process if it judicially approves the order of the Commission. If it does not find it to have been warranted by law, its power and duty are at an end.

In this case the record indicates that the complaint was made by parties residing at Ionia. After setting forth the facts upon which it was based, it summarizes the grounds thereof by alleging that the respondent was by its practice violating the 2d, 3d and 4th sections of the Act and prayed that the respondent should be ordered to discontinue free cartage of freight for the merchants of Grand Rapids, or to render like service to the merchants of Ionia, or for other appropriate relief. The Commission after finding the facts and giving its reasons for its conclusion, held that it followed therefrom that the defendant was guilty of violating the long and short haul clause of the 4th section and that consignees at Ionia were overcharged to the extent indicated. The complaint was sustained on that ground and the Commission declared its purpose to order accordingly, without passing on the other points.

The inhibition of the long and short haul clause is against the charging "any greater compensation in the aggregate for the transportation of passengers or the like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance," etc.

The offense is made to consist in charging the greater compensation for the short distance and this is what the Commission concluded the respondent had done. It would seem that the due order for the correction of such offending

would be to require the carrier to desist from charging the merchants of Ionia the greater compensation and to fix a rate to correspond with its Grand Rapids rate, or accord some equivalent advantage to them, such as free cartage. Such correction would result in advancing the interests of the public at Ionia and in leaving the public at Grand Rapids in the enjoyment of the facilities which had been afforded them by a practice which the Commission rightly declares was perfectly lawful in itself.

The effect of such an order might be somewhat disadvantageous to the competing railroad there, which is also one of its competitors at Grand Rapids, but it would furnish no lawful ground of complaint to such competitor.

Instead of doing this the Commission made an order which raises the compensation which the public of Grand Rapids must pay for the service they have enjoyed, and the benefit of their loss does not come to any other portion of the general public but falls into the hands of the competing railroads, by crowding their rival out. It seems to me the Commission could not have sufficiently considered the results of their order. If they did, I am at a loss to understand how they could reconcile it with the spirit and policy of the law.

If, as is claimed (and I think it must be conceded, properly) we cannot look back of the proceedings of the Commission to inquire into the motive of the parties who set them in motion, we are yet bound to recognize the obvious consequences and give their consideration due weight in determining whether as matter of law the order we are asked to enforce was such as was warranted by the assumed facts. I cannot but think that the express language of the long and short haul clause, the well known general purpose of the Act, and the argument drawn from results incongruous with that purpose, all concur to repel the approval of the order of the Commission upon the ground assumed by it in its opinion. However, if the facts as they are here found to exist are such as to have warranted the order, probably the conclusions of the Commission as to matters of law are not material.

But I am also of the opinion that there was nothing in the facts which justified the conclusion that any provision of the statute had been violated.

Having in the closing paragraph of the first section indicated the general purpose, the Act proceeds in sections 2, 3, 4, and 5 to lay down certain rules by which that object is to be attained.

By the 2nd section it prohibits all kinds of discrimination in the imposition of charges upon different persons for the like service rendered under similar conditions.

By the 3rd it prohibits all undue preference by the carrier to any person or locality or kind of traffic, or the subjecting of any person or locality to any undue or unreasonable disadvantage, and then proceeds to require the carrier to afford reasonable and equal facilities to connecting lines for the interchange of traffic, without discrimination of rates between such connecting lines.

The 4th section prohibits the charging a greater rate for transportation, under similar

conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.

The 5th prohibits the pooling of freights between competing carriers.

Subsequent sections contain subordinate regulations designed to facilitate the operation of the provisions of the sections above enumerated, especially the 2nd, 3rd and 4th.

What is there in these provisions which justly interpreted renders the respondents' course of business, otherwise lawful, obnoxious to the prohibitory order of the Commission? Surely there is nothing in it which contravenes their general purpose. But it is attempted by argument to show that this course of business is in conflict with some of the provisions which are designed to accomplish that purpose. The argument appears to me to rest upon substantial grounds which have been swept away by the rulings of the Commission itself upon constructions of the law which have been acquiesced in as just and reasonable. When it was held that it was consistent with the spirit of the law for the common carrier to group stations which were seventy-five or one hundred miles apart and charge a common rate to each, the strict construction of the Act was abandoned for what was thought to be a more rational one. And when it was further conceded that, for reasons founded on public necessity or convenience, the carrier might carry freight beyond its terminal station and deliver it to its patrons along spur tracks and belt lines another broad construction was adopted in the genuine spirit of the law. The differing conditions and circumstances in large cities and small villages are rightly held to justify it. The facts in the present case illustrate this. The average distance from the station at Ionia to the merchants there is short, the place being small. The distance at Grand Rapids is five times as great and the business ten times as large. These differing circumstances and conditions are of a local character and do not pertain to the transportation by the carrier. If they are not in terms those mentioned in the statute, they are at least relied upon in construction as elements to be taken into account in determining what is a reasonable discrimination. With these concessions in view it is difficult to be very seriously impressed by the suggestion that one object of the law was to prevent the blighting effect upon smaller towns by the discrimination which had been given to larger ones, if by discrimination is meant the giving the facilities above mentioned. If that was an abuse the law has passed it by. But it was not an abuse. It is absurd to say that a common carrier is bound to supply to every little hamlet the same advantages for the transmission and reception of freight that it does to large cities. The similar circumstances and conditions to which the statute refers are those which are found in the different localities to be served as well as those which pertain to the transportation. Whether the dissimilarity arises from one cause or the other, if it affects the service it is within the language and the reason of the statute.

It is found by the Commission that similar cartage is practiced by other common carriers

at exceptional stations in Michigan and is more or less extensively practiced by companies in other states at exceptional stations. By exceptional, it is presumed to be understood that the conditions are similar to those at Grand Rapids, or otherwise the fact is irrelevant. Thus it happens that at one place where the public necessity or convenience requires it, it is met by the projection of branches and belt lines beyond the terminal station of transportation at that locality and from them delivering freight to their customers, and at another by rendering substantially the same service by cartage, at another by lighterage, a "business in which railroads are not usually employed." The only difference is in the means employed by the carrier to accomplish the same end. But of what real significance is that? It is the service, the actual benefit given, which makes such discrimination as there is, and not the particular instrumentality by which it is effected. It is transportation and that by a common carrier in the one case as much as the other. So far as the public are concerned the particular way in which the thing is done is matter of indifference, and no possible reason is perceived why that may not be left to be determined by the economy of the carrier. To say that it must be done on rails and by steam, instead of on wagons and by horse power, is purely arbitrary. The law is leveled at the carrier as such, and only at the railroad company in its character of a carrier. Conceding it to be permissible to build belt lines and spur tracks to reach many customers and thereby obtain more business, it is yet said that this is so because it is a part of railroad business and the means of delivery is by railroad: That cartage is not usual railroad business; that it is as foreign to ordinary freight business as it would be to do the packing for shippers free of cost. This does not appear to me to state the situation correctly. Packing for the shippers is not only never done, but it is not transportation, or delivery or reception of goods. The cartage of goods, though not usual, is sometimes resorted to as a substitute for delivery on rails, and is generally resorted to when it is the most convenient method in the circumstances. And the suggestion also appears to me to be at fault in assuming that the statute makes any distinction between carrying wholly by rail and partly by rail and partly by other means with any purpose to make the latter when equivalent to the former, unlawful. I cannot think that any language in the Act, or any postulate of reason, can be invoked upon which to say to the common carrier that the transportation which it may fairly do by the usual methods it employs, it shall not do by any method not usually adopted, even though it is a perfectly lawful method for a common carrier, and is more economical for it in the special circumstances and equally convenient to the public. The rate schedules of the carrier, ordinarily and probably almost universally, and the bills of lading issued thereon in terms contemplate the station of the carrier as the locality to which the freight is consigned as the terminus of transportation and the place of delivery. If we are to regard a service beyond that at one locality as *per se* a discrimination against a locality which does

not receive it, it must be upon some principle, and if there be such a principle, it must be equally efficacious to defeat the discrimination, however produced. Calculation is made to show that it costs two cents per hundred to render the delivery service at Grand Rapids. How much it costs carriers to deliver freight by side-tracks does not appear, but it must cost something, even if the track is laid for them, and of that the customer gets the benefit. It can make no difference in the principle how many get that benefit. Whether one or all, it is the same discrimination as to the public at Ionia.

It would be allowable, it is said, for the respondent to extend branches through the city, and accommodate the public by delivery to them on those lines. If the situation were so fortunate that all or the great majority could be thus accommodated, it would not make the practice more objectionable.

It is charged that the schedule rates are violated. What do those rates mean? In strictness, as already pointed out, they mean transportation from and to the stations named. In fact they mean that, together with the terminal facilities which are afforded by the carrier. The contract of transportation is entered into with those in view. These incidental facilities furnished at the locality of the station, in one form or another, are enjoyed by the consignees of a very large proportion of the freight traffic of the country. There is no violation of the schedule of rates in this practice, for the schedule is not in the general business of the public construed in so strict a way as the suggestion implies.

It is said that the defraying the expense of cartage delivery is generally exactly equivalent to the railway company's reducing the freight by as much as the cartage would cost the consignee, and that this latter would be a violation of the long and short haul clause if the reduction were made at Grand Rapids and not at Ionia. This argument proves too much and cannot be sound. It would overturn much wholesome doctrine which is already well settled. By the same reasoning any advantage of any value given by the terminal facilities of the carrier to customers at one place is exactly equivalent to a reduction to the same extent as that value, from the freight charge to that place and is an unlawful discrimination against others in that group. The fault in the argument is, I think, in assuming the false premise that a carrier may not do more at one place than he does at another for the same price—a proposition that is refuted in every-day transactions in the cartage of freight. In this case it is shown that freight is carried by Ionia 34 miles to Grand Rapids and nothing is charged for the cartage for that distance. It costs the carrier something to do this. It would cost the Grand Rapids merchant some money to bring the goods from the place where the Ionia merchant takes his. Is it permissible to say that by the amount of that cost, either to the carrier or the Grand Rapids merchant, the rate common to both places is lessened to the Grand Rapids merchant and the Ionia merchant is discriminated against?

It is also said that because the respondent

has grouped Grand Rapids and Ionia together, it conclusively admits that, so far as transportation from the east to the warehouse of the company at the two places is concerned, it is under substantially similar circumstances and conditions. I do not understand the admission to be as stated. The warehouse at Grand Rapids is not in fact the terminus of transportation which the respondent had in mind when it made the grouping; nor does the fact that places are grouped make it necessary to assume that they shall all have the same accommodations. It might as well be said that, having regard to the long and short haul clause, such grouping is a conclusive admission that the distance from the east to Grand Rapids is not greater than that to Ionia, whereas nobody supposes that to be admitted. So far as there is any admission, it is only that the distances are nearly the same, practically the same in the large view of the subject. It seems to me that we are not to allow our vision to be suddenly and capriciously narrowed, but should continue to see the subject on the same wide field in all its relations.

Tied to this erroneous assumption is another proposition, which standing by itself may be quite true, namely, that any benefit in relation to the shipment of goods, having a definite money value, conferred gratis by the carrier upon one shipper which is not conferred upon another where the service is admittedly under similar conditions, is an undue reduction in the price of carriage to the former, and therefore illegal. But this proposition and the conclusion, as applied to such facts as we have in the present case, depend upon the assumption that there is any money value conferred gratis. If the incidents of delivery at the terminus, whether by the usage there it be by one means or another, are included in the contract and price for carriage, the cost of those incidents cannot be scaled off, and carried back upon the whole price in order to reduce the price of the mere carriage between station houses. Nor do the similar conditions exist if one place is out of all proportion with another, and the station at the small place is located close to the local business, and at the large one it is a long distance off. The exact dissimilarity is not overcome until this disadvantage at the larger place is measurably reduced. It is impossible to make the adjustment nicely. If it be said that free cartage, as it is erroneously called, more than makes up for the inequality of conditions, and that to the extent of the excess it is a gratuity, one answer is that the excess thus afforded is not greater than the deficit or disadvantage which would exist without it. It is the mere oscillation of the pendulum swinging within lawful limits.

Pertinent to this is the suggestion that it would, of course, not be a discrimination that could be complained of that the company puts its station at one town nearer the business center than at another, and if free cartage could be said to properly make up for the longer distance of respondent's station from the business center of Grand Rapids, and in this respect to put the Grand Rapids merchants on the same footing as Ionia merchants with their proximity to the station, then it would

seem to be unobjectionable because justified by the dissimilar circumstances. But, it is asked, can this be said? And the argument in support of a negative answer is that if the defendant's station at Grand Rapids were moved into the business center, the shippers would still have to pay for the cartage. It may be that it would be a less price, but still they would have to pay. The equalizing of the conditions between the two places in this respect would be complete by a charge for cartage by the railway company at the lower rate which would be charged for cartage were the station in the city. The proposition admits that the practice would be unobjectionable, because justified by the dissimilar circumstances, if only the disadvantage were overcome, but the gravamen of the mischief consists, it is urged, in the remedy being overdone. But as the overdoing is not greater than the mischief overcome, and the result is not injurious to the public but beneficial rather, I can see no reason for condemning the practice as a whole.

And even if the argument above quoted were sound, it would not justify the order made by the Commission, which not only forbids the alleged mischief, but the remedy to the public for an acknowledged disadvantage. Upon the theory suggested the real unlawfulness of the practice is in the excess referred to, and the order should have been appropriate to its correction and stopped there, instead of utterly depriving the public of a remedy "justified by the dissimilar circumstances." But as already said the court can make no new order. The order of the Commission stands or falls as made. The theory last mentioned and the argument in its support proceed upon too nice distinctions. Such close balancing is impracticable, and is not attempted in the administration of the statute generally.

In answer to the claim that on account of its greatly larger size and business Grand Rapids is entitled to greater facilities than a small place, it is said that in so far as the greater amount of business enables the railway company to do carting at a cheaper rate at Grand Rapids than at Ionia, by so much may the carrier reduce the cartage cost to the shipper at the former place, because this is a legitimate and actual dissimilarity in conditions between the two places.

The dissimilarity of conditions which is thus admitted to be legitimate ground for different rates of cartage prices at the two places, consists primarily in the greater amount of busi-

ness at Grand Rapids, and consequently in the fact that therefore it can be more cheaply done. But the cartage is parcel only of the whole transportation. It is done to augment the bulk of that business. And no reason is perceived why the discrimination which would justify a larger cartage for the same money would not justify a larger service in the whole transportation, the business being so much larger as to make it an object on ordinary business principles, for the carrier to render that service in order to gain the profits accruing from its greater volume. The public at Grand Rapids are entitled to enjoy the corresponding advantage which results from the aggregation of their business, and if that aggregation justifies their superior accommodation on business principles, there is nothing in the Interstate Commerce Law, fairly interpreted, which prevents their enjoyment of it.

The breeding of artificial distinctions in this law is, in my opinion, very objectionable and very likely to impair its utility to the public, who are parties most likely to suffer on every occasion when losing sight of the main object, the Commission or the courts listen to the ingenious weaving of unsubstantial fabrics among the branches of the statute by interested parties.

In this opinion the result is reached, upon considerations which do not depend upon any supposed right of the respondent to be protected in the privilege of putting itself upon a footing of equality in competition for the business at Grand Rapids. The Commission has, in many instances, recognized such a right and incidentally, at least, sought to protect it. The circuit courts in the fifth and ninth circuits have held that the competition of other roads might produce such dissimilarity in conditions as the statute recognizes in permitting the rendition of greater service for the same compensation. To what extent this may be carried it has not been deemed necessary here to say.

For the reasons given and with great respect to the Commission, I cannot bring myself to the conclusion that their order is right, and I feel bound to withhold my assent from it. My conviction is that it would establish a precedent, the principle of which, carried to its logical conclusion would reach far into existing usages and be extremely injurious to the interests of the public in many localities, without any corresponding advantages to the public anywhere else.

FLORIDA SUPREME COURT.

F. R. OSBORNE, *Plff. in Err.*,

v.

STATE of Florida.

- *1. A state cannot tax or regulate interstate commerce, or make the payment of a tax or the taking out of a license a condition precedent to carrying interstate commerce. A state statute which does so, either expressly or in effect, is offensive to the commerce clause of the Constitution of the United States, and void at least to that extent. The same is true as to foreign commerce.
2. A state statute which imposes a tax, in general terms, on the doing of specified kinds of business, or the pursuit of designated occupations, in the state, and requires that a license shall be taken out before any such business or avocation shall be done or engaged in, should not be construed to apply to any business of the kind that may constitute interstate commerce, but only to business that is domestic or state commerce and to persons engaged or intending to engage in such domestic or state business.
3. Although interstate commerce cannot be taxed or regulated by state legislation, and the commerce clause of the Federal Constitution exempts all such commerce from regulation or taxation by state authority, yet the doing of business that constitutes interstate commerce by a person who is also at the same time engaged in business, of the same kind, that constitutes state or local commerce, cannot be made a bar or exemption of the local or state commerce business from taxation or regulation by state authority.
4. The ninth section of the General Revenue Law of 1886 (chapter 4115, approved June 2, 1886) provides that no person shall engage in or manage the business, profession, or avocation mentioned therein without first taking out a state license as provided therein and paying the occupational tax and license fee prescribed thereby; and it authorizes counties and incorporated cities and towns to impose further taxes. As to express companies its special provisions, substituting figures for words, are as follows: "All express companies doing business in this state shall pay in cities of 15,000 inhabitants or more, a license tax of \$200; in cities of 10,000 to 15,000 inhabitants, \$100; in cities of 5000 to 10,000 inhabitants, \$75; in cities of 3000 to 5000 inhabitants, \$50; in cities of 1000 to 3000 inhabitants, \$25; in towns and villages of less than 1,000 and more than fifty inhabitants, \$10." Any express company violating these provisions, or any person that knowingly acts as

agent for any express company before it has paid the tax payable by such company is guilty of a misdemeanor and punishable as therein provided. *Held,*

(a) The act does not tax or regulate or apply to interstate commerce, as distinguished from state or local commerce carried on by an express company, but applies only to express business that is local or state commerce.

(b) That so long as an express company confines its operations to express business that constitutes interstate or foreign commerce it is exempt from the above legislation, but if it engages in business that is state or local, as distinguished from interstate or foreign commerce, it becomes subject to the statute, notwithstanding it may at the same time engage in interstate or foreign commerce.

(c) The effect of the section, in so far as it imposes license taxes on express companies, is that each company doing any business that constitutes local or state commerce, as contradistinguished from interstate or foreign commerce, shall pay a state license tax and take out a state license when it proposes to do business in any city or town or village having more than fifty inhabitants, the amount of such tax being as above indicated according to the population. When there are in one county several cities or towns or villages belonging to one or more of the stated classes, the company must take out a separate state license for each city, town, or village it may intend to do business in, and pay the tax and the fee for the same. Any county may require each company doing business within its limits to pay for doing business in any city, town, or village in the county and within the provisions of the act, a license tax not exceeding fifty per cent of the amount paid the state for doing business in such city, town, or village. And any incorporated city or town may impose a tax of as much as fifty per cent of the state tax on any company doing business therein.

(d) That the amount of the tax is not shown to be prohibitory or destructive of the business of express companies, even if it be that any judicial action could be based on such a showing.

(e) The act is of uniform operation throughout the state as to all persons standing in the situation made the test of such taxation.

(f) The ascertainment of population involved in the act is not one that the courts are incapable of dealing with successfully.

*Headnotes by RANEY, Ch. J.

(Decided January 16, 1894.)

ERROR to the Circuit Court for Duval County to review a judgment denying plaintiff's application for a writ of habeas corpus to obtain his release from custody, to which he had been committed for acting as agent of an express company without a license. *Affirmed.*

NOTE.—As to the validity of state taxes or licenses which affect interstate commerce, see authorities collected in *Rothermel v. Meyerle* (Pa.) 9 L. R. A. 386, and note; and see also the case next following this one.

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As to how far shipments within a state are part of interstate or foreign commerce, see note to *Missouri Pac. R. Co. v. Sherwood* (Tex.) 17 L. R. A. 648.

Statement by **Raney, Ch. J.:**

Section 9 of chapter 4115, Laws approved June 2, 1893, provides that: "No person shall engage in or manage the business, profession, or occupation mentioned in this section, unless a state license shall have been procured from the tax collector, which license shall be issued to each person on receipt of the amount hereinafter provided, together with the county judge's fee of twenty-five cents for each license, and shall be signed by the tax collector and the county judge, and have the county judge's seal upon it. Counties and incorporated cities and towns may impose such further taxes of the same kind upon the same subjects as they may deem proper, when the business, profession, or occupation shall be engaged in within such county, city, or town. The tax imposed by such city, town, or county shall not exceed fifty per cent of the state tax. But such city, town, or county may impose taxes on any business, profession, or occupation not mentioned in this section, when engaged in or managed within such city, town, or county. No license shall be issued for more than one year, and all licenses shall expire on the first day of October of each year, but fractional licenses, except as hereinafter provided, may be issued to expire on that day at a proportionate rate, estimating from the first day of the month in which the license is so issued, and all licenses may be transferred, with the approval of the comptroller, with the business for which they were taken out, when there is a bona fide sale and transfer of the property used and employed in the business as stock in trade; but such transferred license shall not be held good for any longer time, or for any other place, than that for which it was originally issued."

The same section, in various subdivisions, then enumerates divers business occupations and professions that are required to procure licenses, and prescribes the amount of tax that each shall annually pay therefor, until we reach the 12th subdivision of the section, that provides, among other things, that "all express companies doing business in this state, shall pay in cities of 15,000 inhabitants or more, a license tax of \$200; in cities of 10,000 to 15,000 inhabitants, \$100; in cities of 5000 to 10,000 inhabitants, \$75; in cities of 3000 to 5000 inhabitants, \$50; in cities of 1000 to 3000 inhabitants, \$25; in towns and villages of less than 1,000 and more than 50 inhabitants, \$10. Any express company violating this provision, and any person that knowingly acts as agent for any express company before it has paid the above tax, payable by such company, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$50, or confined in the county jail not less than six months." Besides the criminal penalty above, section 10 of the same act provides that "the payment of all license taxes may be enforced by the seizure and sale of the property by the collector." For an alleged violation of this statute, in knowingly acting as agent at Jacksonville, in Duval county, Florida, for the Southern Express Company, a corporation created under the laws of the state of Georgia, but doing business in Florida, without having paid such license,

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F. R. Osborne, the plaintiff in error, was arrested upon affidavit and warrant, and required to give bond for his appearance before the criminal court of record for Duval county to answer said charge. Upon his refusal to give such bond he was committed to the common jail of the county, there to await trial. Whereupon he applied to the judge of the circuit court for the writ of habeas corpus to test the legality of his arrest and detention. Upon the hearing on habeas corpus the arrest and detention of the plaintiff in error on the charge alleged against him under this statute was adjudged to be legal, and he was remanded to the custody of the sheriff, and this order he brings here for review by writ of error.

The cause was submitted to the court below upon the following agreed statement of facts: "That the said F. R. Osborne is the agent of the Southern Express Company, and that said company is a corporation created, existing, and being under the laws of the state of Georgia. That said Southern Express Company is doing a business in the state of Florida ordinarily done by express companies in the United States, of carrying goods and freight for hire from points within the state of Florida to points in said state, and also of carrying goods and freights for hire from points within the state of Florida to points without the state of Florida in other states in divers parts of the United States, and in carrying goods and freights for hire from points in other states of the United States to points within the state of Florida, and that it has been engaged in such business for more than twenty years, and was so engaged on the 3d day of October, 1893. That of the business done by the Southern Express Company 95 per cent thereof consists of traffic carrying of goods and freights from the state of Florida into other states and bringing and carrying from other states of the United States to points within the state of Florida, and 5 per cent thereof consists of carrying goods and freights between points wholly within the state of Florida. That F. R. Osborne did knowingly act as the agent of said express company on the 3d day of October, 1893, in the city of Jacksonville, Duval county, Florida, a city having more than 15,000 inhabitants, the said Southern Express Company having then and there failed and refused to pay the license tax as required by article 12, section 9, of an Act entitled 'An Act for the Assessment and Collection of Revenue,' of the Laws of Florida, approved June 2d, 1893. That the Southern Express Company does business in and has agents in more than one town in nearly every county in the state, and that said towns differ in population, and that it has an office and agent and does business in Polk county, Florida, in the following incorporated towns with a population as follows: Bartow, 1500 inhabitants, Ft. Meade, 600 inhabitants, Columbia, 600 inhabitants, Lakeland, 800 inhabitants, and Winter Haven, 200 inhabitants; in Orange county, Apopka, 500 inhabitants, Orlando, 10,000 inhabitants, Sanford, 5000 inhabitants, Umatilla, 3000 inhabitants, Winter Park, 600 inhabitants, and Zellwood, 300 inhabitants; in Alachua county, Campville, 400 inhabitants, Archer, 150 inhabitants, Grove Park, 110 inhabitants, Gaines-

village, 5000 inhabitants, Hawthorne, 300 inhabitants, High Springs, 500 inhabitants, and Island Grove, 200 inhabitants; in Duval county, Jacksonville, with a population of over 15,000, Baldwin, 125 inhabitants."

Mr. John E. Hartridge, for plaintiff in error:

The word "commerce" has been so extended as to scarcely have any boundary. "Commerce is a term of comprehensive import. It includes intercourse for the purposes of trade in any and all forms. The effort to regulate, says the Supreme Court of the United States, embraces all the instruments by which such commerce may be conducted."

Rorer, *Interstate Law*, p. 405.

The Constitution of the United States places commerce between the several states exclusively within the control and regulation of congress.

Id. p. 406.

No state may in any manner fetter or obstruct interstate commerce.

Id. p. 408, and authorities there cited.

To require a license tax before one can act as an agent of an express company is to fetter or obstruct interstate commerce, where that company is engaged in such business.

Until congress exercises its authority upon the subject interstate commerce is free.

Rorer, *Interstate Law*, p. 409; *Leisy v. Hardin*, 135 U. S. 109, 34 L. ed. 132, 3 Inters. Com. Rep. 36.

It cannot be said in any seriousness that the act of the legislature of the state of Florida under discussion is a police regulation, as it does not protect property, health, or the safety of a person.

No matter whether the state law is or is not a police regulation, if it is in conflict with the Constitution of the United States, either as expressed in terms or by its silence, it is not valid.

Patterson v. Kentucky, 97 U. S. 504, 24 L. ed. 1116; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306; *Re Rahrer*, 140 U. S. 554, 35 L. ed. 574; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185.

The following state taxes directly regulating the subjects of commerce have been declared unconstitutional:

A tax on every ton of freight carried by the railroads of the state, as far as it applied to interstate freight.

State Freight Tax Case, 82 U. S. 15 Wall. 232, 21 L. ed. 146.

On all messages of a telegraph company, as far as it applied to messages sent to or received from points in other states.

Western U. Teleg. Co. v. Texas, 101 U. S. 460, 26 L. ed. 1067.

In the form of a license to sell the products of other states.

Ward v. Maryland, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565.

On all persons soliciting orders, as far as it

applied to those soliciting for persons outside the state.

Asher v. Texas, 128 U. S. 129, 32 L. ed. 868, 2 Inters. Com. Rep. 241.

On all nonresidents who sold liquor.

Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691.

On common carriers for each person carried out of the state.

Crandall v. Nevada, 73 U. S. 6 Wall. 35, 18 L. ed. 745.

On a steamship company for every alien passenger landed at the ports of the state.

New York v. Compagnie Generale Transatlantique, 107 U. S. 59, 27 L. ed. 888.

A tax in the form of a bond from the captains of all vessels to insure that the alien passengers shall not become a charge on the state.

Henderson v. Wickham, 92 U. S. 259, 23 L. ed. 548.

In the form of a license for all drummers, as far as applied to those selling the products of other states.

Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45.

Or in the form of a license to sell such products not the product or manufacture of the vendor.

Corson v. Maryland, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50.

The following state taxes, regulating indirectly the subjects of commerce, though the means of commercial intercourse, have been declared unconstitutional:

A tax in the form of a license for the officers of all foreign corporations, as far as it falls on those engaged in interstate commerce.

McCall v. California, 136 U. S. 104, 34 L. ed. 892, 3 Inters. Com. Rep. 181.

In the form of a license for all occupations as far as it falls on the business of running tug boats to the Gulf of Mexico.

Moran v. New Orleans, 112 U. S. 69, 28 L. ed. 653.

On the gross receipts of common carriers, as far as applied to the receipts from interstate business.

Fargo v. Stevens, 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51; *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308.

On the gross receipts of a telegraph company, as far as it applied to receipts from messages sent to or received from points outside the state.

Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59.

A tax in the form of a license for ferry boats owned in other states, touching at the wharves of the state.

St. Louis v. Wiggins Ferry Co. 78 U. S. 11 Wall. 423, 20 L. ed. 192.

On the capital stock of all companies, so far as it applied to ferry companies chartered in another state whose boats touch at the wharves of the state.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 882.

On all vessels touching at the wharves of the state, as applied to those engaged in interstate business.

Inman SS. Co. v. Tinker, 94 U. S. 288, 24 L. ed. 118.

On all cars used on the roads in the state, not owned by the common carrier resident in the state, as far as it applied to cars engaged in interstate traffic.

Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785.

In the form of a license for a telegraph company established by Congress.

Leloup v. Port of Mobile, 127 U. S. 640, 32 L. ed. 811, 2 Inters. Com. Rep. 184.

On the franchise of a railroad which franchise had been granted by Congress.

California v. Central Pac. R. Co. 127 U. S. 1, 32 L. ed. 152, 2 Inters. Com. Rep. 153.

On the tonnage of vessels, though to support quarantine inspection.

Peete v. Morgan, 86 U. S. 19 Wall. 581, 22 L. ed. 201.

A state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it.

Norfolk & W. R. Co. v. Pennsylvania, 186 U. S. 114, 118, 84 L. ed. 394, 396, 3 Inters. Com. Rep. 178; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24.

Mr. William B. Lamar, Atty. Gen., for the state.

Raney, Ch. J., delivered the opinion of the court:

In the case of *Osborne v. Mobile*, 83 U. S. 16 Wall. 479, 21 L. ed. 470, decided in 1872, the ordinance then in question provided that every express or railroad company doing a business in the city of Mobile, Alabama, and having a business extending beyond the limits of that state, should pay an annual license of a stated amount, and every such company doing a business within the limits of the state, and every such company doing business within the city, should take out a license, paying therefor other amounts. Osborne was there, as here, the agent of the Southern Express Company, a Georgia corporation, which transacted a general express business within and extending beyond the state of Alabama. The company fell under the first clause of the ordinance, and notwithstanding its terms that clause was held unobjectionable to the commerce clause of the Federal Constitution. The decision is founded expressly on the rule laid down in the case of *State Freight Tax*, 82 U. S. 15 Wall. 252, 21 L. ed. 146, where it was said that it is not everything which affects commerce that amount to a regulation of it within the meaning of the Constitution, and was also admitted that the ultimate effect of the tax on such receipts might be to increase the cost of transportation, but was held that the right to tax the receipts, though derived in part from interstate transportation, was within the general authority of the state to tax persons, property, business, or occupations within their limits. In *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, the decision in the case of *State Freight Tax*, 4 INTER S.

was considered and questioned, it being held by a unanimous court that a state tax upon the gross receipts of a steamship company incorporated under its laws, such receipts being derived from the transportation of persons and property by sea between different states, and to and from foreign countries was a regulation of interstate and foreign commerce, and in conflict with the exclusive powers of Congress. That the *Osborne Case* has been overruled by that of *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 811, 2 Inters. Com. Rep. 134, decided in 1888, cannot be denied, and it is clear that the first clause of the ordinance did in terms and effect impose a tax on that class of express companies which might be engaged in interstate commerce, as a distinct class from the other classes engaged, one in business not extending beyond the state, and the other in that not extending outside of the corporate limits.

In the *Leloup Case*, *supra*, an ordinance, adopted in 1883, imposed an annual license tax of \$225 "on telegraph companies." Leloup was the agent of the Western Union Telegraph Company at Mobile, and the license tax not having been paid, a civil action was brought in the circuit court against Leloup to recover a pecuniary penalty which had been adjudged in another tribunal under the ordinance for its violation, the complaint in the circuit court alleging that the company was a New York corporation, having a place of business at Mobile, and had been engaged there in the business of transmitting telegrams from and to points within Alabama, and between private individuals of that state, as well as between citizens thereof and of other states. The plea alleged, in substance, Leloup's agency and that the company's charter authorized it to construct and operate lines of telegraph in and between the various states of the Union, including Alabama; and further, that on June 5, 1867, the company accepted the restrictions and obligations of the Act of Congress of July 24, 1866, and that in accordance with its charter the Act of Congress and agreements with the railroad companies, it constructed, and was at the time of the alleged breach of the ordinance, maintaining and operating, its lines of telegraph on various specified public railroads leading into Mobile, and through Alabama and several other named states, and into others, and over all the principal railroads, post-roads, and military roads in the United States, said roads being public highways, and the daily mails being regularly carried thereon under authority of law and the direction of the postmaster general; and under and across navigable streams in said states, but without interruption to navigation of the streams, or travel on such military and post-roads. That before and during the year 1883, it had been and still was engaged in the business of sending and receiving telegrams over such lines for the public between its office in Mobile and other places in other states and territories of the United States, and to and from foreign countries, also in sending telegraphic communications between the several departments of the government of the United

States and their officers and agents, giving priority to said official telegraphic communications over all other business, such official communications being sent at rates fixed by the Postmaster General annually since June 5, 1867. To this plea there was a demurrer which was sustained by the circuit court and judgment was given for the plaintiff, and this judgment affirmed by the supreme court of Alabama. The Supreme Court of the United States reversed the judgment, and decided: (1) That the license tax imposed by the ordinance was purely a tax on the privilege of doing the business in which the telegraph company was engaged, the company being also required to pay taxes on its property as other corporations and individuals, and also a tax on its gross receipts within the state; (2) Stating that the question was squarely presented, whether a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one state to another, and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the Act of Congress of July 24, 1866, and other acts incorporated in title LXV. of the Revised Statutes. Proceeding to answer this question, it held that a state cannot tax a business occupation when it cannot tax the business itself; and that a tax on the occupation of doing a business is a tax on the business. That communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different states it is commerce among the several states and directly within the power of regulation conferred upon congress, and free from the control of state regulations except such as are strictly of a police character. In reply to the argument that a portion of the company's business was internal to the state and therefore taxable by the state, it is said that such fact does not remove the difficulty; that the tax affects the whole business without discrimination, and that there are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation without the imposition of a tax which covers the entire operation of the company. The cases of *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708, and *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067, are also referred to approvingly, and the conclusion reached in *Leloup's Case* is declared to be plainly within the principles of the decisions in *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 695, 1 Inters. Com. Rep. 45, and *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, and the case is held to be parallel with that of *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678, and the court declares that the fairest and most just construction of the Constitution in all its parts "leads to the conclusion that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transpor-

tation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

It will be well to notice here the cases of *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, and of the same company v. *Texas*, referred to *supra*. The former case is one in which it was held that the above Act of Congress in so far as it declares that the erection of telegraph lines shall, as against state interference, be free to all who accept its terms and conditions, and that a telegraph company shall not after accepting them, be excluded by another state from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the states, and appropriate legislation to execute the powers of congress over the postal service; and is not limited in its operation to such military and post-roads as are upon the public domain. This act, it will be found, gives to all telegraph companies organized under the laws of any of the states the right to construct telegraph lines through and over any portion of the public domain of the United States, and over and along any of the military and post-roads of the United States, and over and across the navigable streams and waters of the United States, with certain conditions as to construction; and grants the right to occupy land and use materials; and enacts that telegraphic communications between the several departments of the general government and their officers and agents shall in their transmission over the lines of such companies have priority over all other business, and be sent at rates to be annually fixed by the Postmaster General; and also enacting that before any company shall exercise the powers and privileges conferred thereby it shall file its written acceptance with the Postmaster General of the restrictions and obligations required by this act. And in *Western U. Teleg. Co. v. Texas*, where a Texas statute required every chartered telegraph company doing business in that state to pay a tax of one cent on every full-rate message, and one half cent for every message less than full rate, the state sued to recover the tax for messages of which a large number were sent to places outside of the state and by officers of the general government on public business. There was judgment for the state, no deductions being allowed by the state courts for messages sent out of the state or by government officers on government business. The Supreme Court of the United States, in reversing the judgment, says: "The . . . company having accepted the restrictions and obligations of this provision by congress, occupies in Texas the position of an instrument of foreign and interstate commerce and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise ques-

tion now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the state, or sent by public officers on the business of the United States. . . . As such, so far as it operates on private messages sent out of the state, it is a regulation of foreign and interstate commerce and beyond the power of the state. That is fully established by the cases already cited. As to the government messages, it is a tax by the state on the means employed by the government of the United States to execute its constitutional powers, and therefore void." The conclusion was that the judgment in so far as it included taxes for government messages or those sent out of the state, was erroneous, it being observed that any tax which the state might put on messages sent by private parties, and not by the agents of the general government, from one place to another exclusively within the jurisdiction of the state, will not be repugnant to the Federal Constitution, and that whether the state law of Texas, in its present form, could be used to enforce the collection of such a tax, was a question entirely within the jurisdiction of the courts of the state, and as to which the supreme court had no power to review. Still another case involving the effect of the Act of Congress referred to above and tending also to elucidate the question before us independent of such legislation, is *Western U. Teleg. Co. v. Atty. Gen. of Massachusetts*, 125 U. S. 530, 31 L. ed. 790. The valuation of the entire capital stock of the company was obtained from the company, and from this there were made certain deductions allowable in determining the assessable value of such entire stock, and the value of the property of the company in the state was ascertained upon the basis of the proportion of the length of the lines within the state to the length of its lines throughout the country, and this value was assessed at the uniform rate of \$14.14 on each \$1000 of valuation. The company contended that, in view of the Act of Congress, which it had accepted, no tax could be claimed for that part of its line,—2334.55 out of 2838.05 miles—that was over, under, or across post-roads. The Massachusetts law had a provision to the effect that upon a failure to pay the taxes required to be paid to the treasurer, he might commence an action for the recovery of the same, and further, that all penalties denominated by the act might be collected by informations, and that upon such information the court might issue an injunction restraining the further prosecution of business by the corporation, company, copartnership, or association until all such taxes due, or penalties incurred, should be paid, with interest and costs. The tax was held by the supreme court to be essentially an excise on the capital of the corporation, imposed in an attempt by the commonwealth to ascertain the just amount which any corporation engaged in business within its limits should pay as a contribution to the support of its government on the amount and value of the capital employed by the company therein; or as elsewhere said the tax though nominally upon

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the shares of the capital stock is in effect a tax upon that organization on account of property owned and used by it in the state, and the proportion of the length of its lines in the state to their entire length throughout the whole country, is made the basis for ascertaining the value of that property. While, says the opinion, the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights, is liable to be taxed upon its real and personal property as any other person would be; and that it never could have been intended by Congress in conferring upon a corporation of one state the authority to enter the territory of another and erect its poles and lines therein to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support. The tax was held to be valid, but that part of the state legislation which authorized an injunction was decided to be void, the court observing that the effect of the injunction was to utterly suspend the business of the company and defeat its operations within the state; that if Congress had authority to say that the company might construct and operate its telegraph over these lines, the state can have no authority to say it cannot be done; but that in holding this portion of the act to be void, it was not meant to deprive the state of the power to assess and collect the tax.

In *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, a statute of Kentucky made it unlawful for any agent of any express company, not incorporated by the laws of that state, to carry on the business of transportation in that state without first obtaining a license therefor from the auditor, and before the auditor could issue such license to any agent of any company incorporated by any state of the United States, there had to be filed with such officer a copy of the company's charter and a sworn statement showing the assets and liabilities of the company, amount of capital stock, how paid, and of what the assets of the company consist, and, in short, the financial condition of the company, and that it was possessed of \$150,000 either in cash or safe investments inclusive of stock notes; such statement to be renewed annually. A fee of \$5 to be paid by the company or agent was allowed to the auditor for issuing the license, and a like fee for filing copy of charter, and of ten dollars for filing original and annual statements. Crutcher was indicted for doing business as the agent of the United States Express Company, an express company not incorporated by the laws of Kentucky, but trading and doing business as a common carrier by express of goods and other things of value in and through the county of Franklin and state of Kentucky without having any license so to do, either for himself or for such company, and on a plea of not guilty, was found guilty and sentenced

to pay a fine. There was an agreed statement of facts, including in its admissions the agency, the incorporation and absence of license, and the doing of business ordinarily done by express companies in this country, of carrying goods and freight for hire not only between points in the state, but also from points in the state to points out of it, and *vice versa*. The statement also showed the total amount of business done at the Frankfort office in November, 1888, and that not quite one fourth of it was local to the state, and the balance was between places in the state and places outside of it. The court of appeals of Kentucky affirmed the judgment of conviction; but the Supreme Court of the United States reversed it, and in doing so said of the statute that it required from the agent of every express company a license before he can carry on any business for the company in the state, and that this of course embraced interstate business as well as business confined wholly within the state, and was a prohibition against the carrying on of interstate business without a compliance with the state law. The requirement of the statement as to \$150,000 investment is also held to be a regulation of such commerce in its application to corporations or associations engaged in that business and a subject belonging to the jurisdiction of the national, and not the state legislature. "If," says the opinion, "a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise, or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right unless Congress should see fit to interpose some contrary regulation on the subject." In citing *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, and other cases, observes the opinion, the court has frequently decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. Again, the court, addressing itself to the fact that the statement shows some business of a purely domestic character to have been done, says: "This is probably quite as much for the accommodation of the people of that state as for the advantage of the company. But whether or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce which was manifestly the principal object of its organization. These regulations are clearly a burden and restriction on that commerce. Whether intended as such or not they operate as such. But taxes or license

fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection." The opinion also distinguishes the case from those of foreign corporations seeking to do a business which does not belong to the regulating power of Congress, as insurance business, and manufacturing, and all other corporations whose business is of a local and domestic nature, as to all of which the state has full power to prescribe the conditions of their doing such business in its limits. *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 586, 19 L. ed. 1029; *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1187; *Philadelphia Fire Asso. v. New York*, 119 U. S. 110, 30 L. ed. 342. The act was held null and void as applied to the case of Crutcher.

The case of *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, cited by the attorney general, holds, as the same is summarized in the syllabus, that a statute which requires every corporation, person or association, operating a railroad within the state, to pay an annual tax for the privilege of exercising its franchises therein, to be determined by the amount of its gross transportation receipts, and further provides that when applied to a railroad lying partly within and partly without the state, or to one operated as a part of a line or system extending beyond the state, the tax shall be equal to the proportion of the gross receipts in the state, to be ascertained in the manner provided by the statute, does not conflict with the Constitution of the United States, and the tax thereby imposed upon a foreign corporation operating a line of railway partly within and partly without the state is one within the power of the state to levy. By the terms of the statute passed in 1881 it was provided that "every corporation, person, or association, operating any railroad in this state, shall pay to the state treasurer for the use of the state an annual excise tax for the privilege of exercising its franchise in this state."

The named railway company was a Canadian corporation having its place of business at Montreal. Its railroad in Maine had been constructed by a Maine corporation, whose charter authorized it to construct and operate a railroad from Portland to the boundary of the state; and with the permission of New Hampshire and Vermont it constructed a railroad from that city to a point in Vermont. In 1858 the Maine company leased its rights and privileges to the Canadian company which, since then, had operated the road and used its franchises. The manner of ascertaining the amount of the tax was as follows: The amount of gross transportation receipts for the year ending September 30 preceding the levying of the tax was to be divided by the number of miles of railroad operated, to ascertain the gross receipts per mile, and the tax was to be fixed on a scale of percentage varying according to the average receipts per mile, not to exceed in any event a stated per centum; and when a road lay partly within

and partly without the state, or is operated as a part of a system extending beyond the state, the gross transportation receipts of the railroad line or system over its whole extent within and without the state were to be divided by the total number of miles operated to obtain the gross receipts per mile, and the gross receipts in the state were to be taken to be the average gross receipts per mile multiplied by the number of miles operated within the state. The supreme court held the tax to be an excise tax upon the corporation for the privilege of exercising its franchise within the state of Maine, and it is said in the opinion that the privilege of exercising the franchise of a corporation within a state is generally one of value, and often of great value and the subject of earnest contention, and that as the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state in its judgment may deem most conducive to its interest and policy; and it may require the payment into its treasury each year of a specific sum, or may apportion the amount exacted according to the value of the business permitted as disclosed by its gains or receipts of present or of past years. And further, that the erroneous ruling of the lower court to the effect that the tax in question was a regulation of interstate and foreign commerce, was founded upon the assumption that a reference by the statute to the transportation receipts and adopting a certain percentage of the same for determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce; whereas the resort to the stated methods was not an interference with transportation, domestic or foreign, over the road of the railroad company or any regulation of commerce consisting in such transportation; and there being no levy by the statute on the receipts themselves, either in form or fact, they constituting merely the means of ascertaining the value of the privilege conferred. The case is assimilated by the court to that of *Home Ins. Co. of New York v. New York*, 134 U. S. 594, 33 L. ed. 1025, where a portion of the capital stock of the company was invested in bonds of the United States, and by an act of the legislature of New York it was declared that certain classes of companies with certain exceptions, incorporated under the laws of that state or of any other state or country and doing business in New York, should be subject to a tax on its corporate franchise or business to be computed at a varying percentage on its capital stock according as its dividends thereon should be more or less, or there should be no dividend, as stated in the act. The company resisted the payment of the tax, asserting that it was one upon the capital stock of the company, and that consequently there should be deducted from the amount of the tax a sum bearing the same ratio thereto that the amount invested in government bonds, which were exempt from taxation, bore to its capital stock,

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and that the law requiring a tax, without such reduction, was unconstitutional and void. It was held, however, that the tax was not on the capital stock nor upon any bonds of the United States composing a part thereof, but upon the corporate franchise or business of the company, and that reference was only made to the stock and dividends for the purpose of determining the amount of the tax to be enacted each year.

In 1879 the legislature of Pennsylvania enacted a statute to the effect, as far as it need be stated, that no foreign corporation, except insurance companies, that did not invest and use its capital in that commonwealth, should have an office or offices therein for the use of its officers, stockholders, agents, or employes, unless it should have first obtained from the auditor general an annual license so to do, and for such license pay into the state treasury annually one fourth of a mill on each dollar of capital stock that it was authorized to have, such payment to be made before the license could issue. This statute has been before the Supreme Court of the United States in the case of *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, and in *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178. In the former case it appeared merely that the appellant company, a corporation organized under the laws of Colorado, for the purpose of carrying on a general mining and milling business in that state, with its principal office there, had an office in the city of Philadelphia, Pennsylvania, for the use of its officers, stockholders, agents and employes, and not having complied with the law, an action was brought to recover of it the tax and penalty authorized by the statute. The tax was sustained by the Supreme Court of the United States as not in conflict with the commerce clause of the Constitution; and Judge Field speaking for the court said of the statute that it imposed no prohibition upon the transportation into Pennsylvania of the products of the corporation or upon their sale in the commonwealth, but exacted only a license tax from the corporation when it has an office in the commonwealth for the use of its officers, stockholders, agents or employes; and it is also observed by him, that the only limitation upon the power of a state to exclude a foreign corporation from doing business within its limits, or hiring officers for that purpose or to exact conditions for allowing it to do business or have offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce interstate or foreign; that the control of such commerce being in the Federal government, is not to be restricted by state authority. In the second case there was a different state of facts. The road of the railroad company, a corporation existing under the laws of Virginia and West Virginia, though entirely within the two states named, was a link in a through line of railroad by which passengers and freight were carried into Pennsylvania from other states, and from that state to other

states; and it kept its office in Philadelphia for its stockholders, officers, agents, and employes for the "furtherance of its business interests in the matter of its commercial relations," and did not "exercise or seek to exercise any privilege or franchise not immediately connected with interstate commerce, and required for the purpose thereof." The Pennsylvania courts held that the company was subject to the tax imposed by the statute, but the Supreme Court of the United States decided that the office was maintained because of the necessities of the interstate business of the company, and for no other purpose, and that a tax upon the company was therefore a tax upon one of the means or instrumentalities of the company's interstate commerce, and as such was in violation of the commerce clause of the Constitution.

In *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, the appellant was an agent in the city and county of San Francisco for the New York, Lake Erie & Western Railroad Company, a railroad corporation having its principal place of business in Chicago, and operating a continuous line of road between Chicago and New York; and as such agent his duties consisted in soliciting passenger traffic in that city and county over such road. He did not sell tickets to passengers over that or any other road, but took the passengers to the Central Pacific Railroad Company where tickets were sold them. The only duty he was required to perform for such company was to induce people who contemplated taking a trip east to be booked over the line he represented, he neither receiving nor paying out any money or other valuable consideration on account thereof. An ordinance of San Francisco prescribed certain rates of license, and, among others, "for every railroad agency, twenty-five dollars per quarter," and made any violation of the ordinance a misdemeanor. McCall was convicted by the state court upon the above state of facts and the further circumstance that he had not complied with the ordinance. The tax was exacted of him as a condition precedent to carrying on the business. "It is admitted," says the opinion of the Supreme Court of the United States, reversing the state court, that "the travel which it was his business to solicit was not from one place to another within the state of California. His business therefore as a railroad agent had no connection direct or indirect with any domestic commerce between two or more places within the state. His employment was limited exclusively to inducing persons in the state of California to travel from that state into and through other states to the city of New York." The conclusion was, the business of the agent was interstate commerce, and that the tax was forbidden by the federal organic law.

In *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, the decision was that a state statute imposing a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the state, under which a corporation of another state engaged in running railroad cars into, through, and out of the state, and having at all times

a large number of such cars within the state, is taxed by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in that and other states over which its cars are run, does not, as applied to such a corporation, violate the interstate commerce provision of the Federal Constitution. In the opinion of the court, by Judge Gray, it is said, citing *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785; *Robbins v. Shelby County Taring Dist.* and *Leloup v. Port of Mobile*, *supra*, that much reliance was placed by the plaintiff in error upon the cases in which it has been decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits, and is then observed that in each of those cases the tax was not on the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden on the commerce itself.

In *Robbins v. Shelby County Taring Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, a Tennessee statute enacted that "all drummers and all persons not having a regular licensed house of business in the taxing district offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of \$10 per week or \$25 per month for such privilege, and no license shall be issued for a longer period than three months." Robbins, according to the agreed statement of facts, was a citizen and resident of Cincinnati, Ohio, and was engaged in the taxing district of Shelby county, Tennessee, in the business of drumming—soliciting trade by the use of samples—for the firm of Rose, Robbins & Co., doing business at Cincinnati, all the members thereof being citizens and residents of Cincinnati, for which firm he worked as a drummer, the firm being engaged in the selling of paper and other articles used in the book stores of the stated taxing district. Robbins was arrested for drumming in the district without a license. There was judgment against Robbins, and on appeal it was affirmed by the supreme court of Tennessee, from which court the case was carried to the Supreme Court of the United States, where the judgment was reversed on the ground that the legislation, in so far as it applied to cases like that then under consideration, was a regulation of commerce among the states, and unconstitutional. In *Ficklen v. Shelby County Taring Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, Ficklen and Cooper & Co. were respectively commercial agents or brokers having an office in the district, and in 1887 took out licenses for their said business under a statute of Tennessee which provided that "every person or firm dealing in cotton or any other article whatever, whether as factor, broker, buyer or seller, on commission or otherwise, \$50 per annum, and in addition every such person or firm shall be taxed *ad valorem* ten

cents on every hundred dollars of amount of capital invested or used in such business.

And provided further that if the person or persons taxed in this subsection have no capital invested they shall pay two and one half per cent on their gross year commissions, charges, or compensation for said business, and at the time of taking out said license they shall give bond to return said gross commissions, charges, or compensation to the trustee at the end of the year, and at the end of the year they shall make return to said trustee accordingly and pay him the said two and one half per cent." During the year for which they took out license all the sales negotiated by Ficklen were made on behalf of principals residing in other states, and the goods so sold were at the time of the sale in other states to be shipped to Tennessee as sales should be effected. During the same time at least nine tenths of the commissions of Cooper & Co. were derived from similar sales. They had no capital invested in their business. At the expiration of the stated year they applied for a renewal of their license for 1888, tendering each the tax and fee therefor, but as they had made no return of their commissions and no payment of the percentage on their commissions, the application was denied. Thereupon they filed a bill to restrain the collection of the percentage tax for the past year, and also to restrain any interference with their current business, claiming that the tax was a tax on interstate commerce. The Supreme Court of the United States held that if the tax could be said to affect interstate commerce in any way, it did so incidentally and so remotely as not to amount to a regulation of it; and that under the circumstances the complainants could not resort to the court simply on the ground that the authorities had refused to issue a new license without the payment of the stipulated tax. Speaking here for all the court, except Harlan, J., who dissented, there being, however, one vacancy, *Chief Justice* Fuller said of the Robbins case, *supra*, that the question involved there was, in the language of *Judge* Bradley, who wrote the opinion of the court: "Whether it is competent for a state to levy a tax or impose any other restrictions upon the citizens or inhabitants of any other state for selling or seeking to sell their goods in said state before they are introduced therein," and that it was decided that it was not; yet that it was conceded that commerce among the states might be legitimately incidentally affected by state laws when they, among other things, provided "for the imposition of taxes upon persons residing within the state or belonging to its population and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States." That in Robbins case the tax was held in effect not to be a tax on him, but on his principals, while in the Ficklen case it was clearly levied upon the parties in respect of the general commission business they conducted, and their property engaged therein or their

profits realized therefrom. "No doubt," he further says, "can be entertained of a right of a state legislature to tax trades, professions, and occupations in the absence of inhibition in the state constitution, and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist for the time being wholly or partially in negotiating sales between resident and nonresident merchants of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the constitution." Referring to what was said in *Lyng v. Michigan*, 135 U. S. 161, 166, 34 L. ed. 150, 153, 3 Inters. Com. Rep. 143, he observes, but here the tax is not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business, and that the complainants voluntarily subjected themselves thereto in order to do a general business. And as to *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, where an annual license fee was imposed on a ferry company by the city of East St. Louis, Illinois, the company having been chartered by that state and being domiciled in the city, but its boats plying between there and St. Louis, Missouri, he quotes from the opinion therein as follows: "The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a state expressly grants to an incorporated city as in this case the power to 'license, tax and regulate ferries,' the latter may impose a license tax on the keepers of ferries, although their boats ply between lands lying in two different states, and the act by which this section is authorized will not be held to be a regulation of commerce;" and of *McCall v. California*, *supra*, he says that the decision was because the business of the agency was carried on with the purpose to assist in increasing the amount of passenger traffic over the road, and was therefore a part of the commerce of the road, and hence of interstate commerce; and of *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, he remarks that the specific gross receipts were taxed as such, taxed "not only because they are money or its value, but because they were received for transportation." Referring to *Maine v. Grand Trunk R. Co.* *supra*, he says, since a railroad company engaged in interstate commerce is liable to pay an excise tax according to the value of the business done in the state, ascertained as it was there, it is difficult to see why a citizen doing a general business at the place of his domicile should escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits. "This tax is not on the goods, or on nonresident merchants, and if it can be said to affect in any way it is incidentally and so remotely as not to amount to a regulation of such commerce." What position they would have occupied if they had not undertaken to do a general commission business, and had taken out no license therefor, but has simply transacted business for

nonresident principals, is an entirely different question which does not arise on this record."

The present case is also clearly distinguishable from *Pickard v. Pullman Southern Car. Co.* 117 U. S. 34, 29 L. ed. 785, where a Tennessee statute imposing a privilege tax of \$80 per annum on every sleeping car or coach used or run over a railroad in that state, and not owned by the railroad on which it should be run or used, was held void in so far as it applied to interstate transportation of passengers carried over railroads in Tennessee into or out of or across that state in sleeping cars owned by a corporation of another state and leased by it for transportation purposes to Tennessee railroad corporations, the latter receiving the transit fare and the former the compensation for the sleeping accommodations. In the opinion it is said: "The car was equally a vehicle of transit as if it had been a car owned by the railroad company and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, the car, so far as it was engaged in interstate commerce, was not taxable by the state of Tennessee; because the plaintiff had no domicile in Tennessee, and was not subject to its jurisdiction for purposes of taxation; and the cars had no situs within the state for purposes of taxation; and the plaintiff carried on no business within the state, in the sense in which the carrying on of business in a state is taxable by way of license or privilege." Here the express company has, as is well known, its local offices and local agents throughout the state, and is doing business as personally here, and enjoying the protection of our government and laws over that business as much as any person in the state.

The statute now before us is clearly distinguishable from those involved in many of the preceding decisions. It does not impose any tax upon the value of the property of the company within the state, assessed either upon the principle adopted by the legislatures of Massachusetts and Pennsylvania, in the cases of *Western U. Teleg. Co. v. Atty. Gen. of Massachusetts*, and *Pullman Palace Car Co. v. Pennsylvania*, or otherwise; nor does it impose a tax on the mere right to exercise within the state a corporate franchise, estimating the value of such use as in *Maine v. Grand Trunk R. Co.*; again, it is not a tax on a corporation for merely having an office in the state for the use of its officers, stockholders, agents, or employes, as in *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, in all of which cases the statutes were sustained; nor one where the state has given exclusive right to a domestic corporation, and the question of the validity of that grant to the exclusion of another company which the Act of Congress gave the right to enter the same territory, and constituted a Federal agency, as in *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, where the efficiency of the state grant to exclude the latter company was denied. Our statute is clearly one in which the tax is imposed on the person and for doing the business of an express company.

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It is an occupational tax, and is not imposed on any corporation because it is a corporation or for exercising its corporate franchise within the state, but it is imposed as are most of the occupational taxes to be found in the act, on any and every person, whether natural or artificial who may do the express business, and simply because of doing such business. It is moreover entirely clear that the statute does not anywhere show any intent to tax interstate or foreign commerce as such, or to tax any one because of doing business that constitutes interstate or foreign commerce, as contradistinguished from local business. That a state cannot tax interstate commerce either directly or otherwise, or that it cannot make the payment of a tax or the taking out of a license a condition precedent to carrying on interstate commerce, we do not deny; nor do we wish to be understood as meaning that a state tax which in effect burdens such commerce wherever it may be carried on, although not laid directly or expressly on interstate commerce, is not offensive to the commerce clause of the constitution, still we do believe that a state tax imposed on any avocation generally, such as those usually imposed on merchants, druggists, dealers in tobacco and others, for doing business in the state, is not itself, nor is the statute imposing it, unconstitutional. That the commerce clause of the constitution exempts from the burden of state taxation those who confine themselves to interstate commerce is a truth of which, at this day, knowledge must be imputed to the law making power of the states, and in the absence of language that clearly connects such an intent with that power, it should not be held that there was a purpose to ignore such truth or violate its principles; but that the doing of express or other business which constitutes interstate commerce along with and as a part of a general business which is also made up in part of business of the same nature that is local to the state, exempts those engaged in such general business from the tax which the law imposes upon it, we do not admit. Of course where such statutes make the payment of the tax, or the taking out of a license, a condition precedent to such general business they are never a bar to any one at any time entering upon or doing interstate commerce business, and as long as any one does only such business he is exempted by the commerce clause from the effect of the statute, and is in our judgment placed beyond the intent of the more general language usually adopted in imposing occupational taxes, but when he does not confine himself to such business, but engages indiscriminately in local and interstate business, he cannot by making the former a feature of that business relieve himself from the taxes, conditions, or regulations to which the latter subjects him. Engaging in the former business does not necessitate his engaging in the latter, and if he does not engage in the latter the former is in nowise burdened or even affected by the tax or the statute, but, on the contrary, he is as free to carry on interstate commerce unaffected by the provisions of this Act, as if it was not on the statute book. He may, if he chooses, keep

his local and interstate business entirely distinct, or carry them on each as a separate business, and if he does so the former will be subject to state taxation and regulation but the latter will be exempt from any legislation regulating or burdening the former. In our judgment it was never the purpose of the commerce clause to interfere with state taxation or state regulation of taxation so long as any regulation of interstate or foreign commerce, or commerce with the Indian tribes, is not interfered with.

It is obvious from several of the decisions cited above that there is a clear distinction between the unconstitutionality of a statute as such or of a specific provision thereof, tested by the commerce clause, and the application of a general provision, like that before us, of a statute to interstate commerce business which, but for the commerce clause, would be within the operation of such general provision. This is illustrated by the case of the Pembina Consolidated Silver Mining and Milling Company, and that of the Norfolk & Western Railroad Company, involving the Pennsylvania statute as to foreign corporations having offices in the state for the use of officers and others. In the former of these cases, where the imposition of the tax was sustained, it was said, and is evident, that the statute proposed no prohibition upon the transportation of the products of the corporation or upon their sale in the state, nor is there in the statute anything that shows an intent to affect interstate commerce in any way, but when it was attempted to subject to that statute a company which was using its offices solely for interstate commerce purposes, and the state court had decided both that the statute applied to offices so used, and that the tax as thus applied was not contrary to the commerce clause, the supreme court reversed the decision, and held that as so applied the tax was unconstitutional. Again in the *McCall* case where it is made prominent that the business of the agent was exclusively interstate in its character, it is entirely plain that it was not the meaning of the court that the statute or ordinance involved in these cases did not stand in full force and effect as to everything except interstate or other commerce falling within the terms of the commercial clause. And in the case of *Western U. Teleg. Co. v. Texas*, where telegrams sent between persons in Texas and those in other states and those sent to government officers were held to be exempted from the general provision of the act, taxing all messages, the former because they were interstate commerce, and the latter because of the character of the company as a governmental agency, it is apparent that telegrams themselves were the subject of taxation by the terms of the act, and those which were held to be exempt were purely interstate or governmental in their character. Again it is shown in the Shelby County Taxing District cases. In one of them (*Robbins' case*) the facts showed nothing but interstate commerce business, pure and simple; there being not a fact in it that makes the decision authority beyond the inability to tax such commerce as such. Of course no one would pretend to

saying that it committed the court to the view that in the doing of a general business of a particular character composed of both interstate and local commerce, the former component would relieve the entire business from a state tax or regulation to which it would be subject if there was no such component, or that the act was not entirely effectual except as to business covered by the commerce clause. In the *Ficklen* case, however, the tax was, as it was imposed by the statute, as general as it was in the *Robbins' case*, and yet because the parties had submitted themselves to the statute as persons intending to do a general business, or, in other words, one indiscriminate as to local or interstate commerce, it was held that they could not either because in the one case only interstate business was done, and in the other mostly such business, and only one tenth of local business, evade the provisions of the statute. We do not understand any case to hold that the protection of the commerce clause is confined to citizens of other states than that whose legislation is complained of. It is as much a shield to the Floridian who in Florida is doing such business with those in other states as it is the Georgian residing in Georgia who may be engaging in business with residents of Florida; the protection is to all interstate commerce.

We are not unmindful of the seeming conflict to those views to be found in the expressions embodied in the *Leloup*, and the *Crutcher* cases, but our judgment is that these expressions are to be viewed with reference to the circumstances under which the Supreme Court of the United States was then speaking. The state courts which it was reviewing had each declared in effect that these statutes were binding upon and effectual as to companies as doers of interstate business, or, in other words, were a bar to their doing interstate business without having complied with their requirements. *Mobile v. Leloup*, 76 Ala. 401; *Crutcher v. Com.* 89 Ky. 7. This construction has become, in so far as the Federal tribunals were concerned, binding upon the Federal court as to the effect of each statute within the state enacting it, as much as if it had been expressly stated in the act. *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 21, 35 L. ed. 613, 614, 3 Inters. Com. Rep. 595. This being so, the doing of local business could not affect the question. It gave to the statute the same effect on interstate commerce as if it had had a special clause as to such commerce, like the first clause of the Alabama statute in the case of *Osborne v. Mobile*, *supra*, which decision we regard, in view of that clause, as entirely overthrown by the subsequent decisions of the same tribunal. It cannot be where the state statute does not interfere with interstate commerce, but it can be carried on protected by the state courts against regulation or interference by state authority, that the mere fact that state commerce, if carried on, is regulated or burdened, operates as a regulation of or burden on interstate commerce.

It is not to be doubted that, under our statute, any citizen of the state, or of any other

state, or any body corporate of either, that should enter upon the express business in this state proposing to confine itself to local or state business, or actually doing so, would be subject to all the provisions of this statute; and we cannot see how it can be that an engagement by any such person, natural or artificial, in local business, can be relieved from the provisions of the statute by an engagement at the same time in interstate commerce business, or how his engagement in the latter business can make the statute inapplicable to the other. Is it true that the merchant who may be doing a large local business can exempt himself from the statute by the fact that he may also do a regular business with customers in other states to whom he sells and ships goods? We do not think that anything but interstate and foreign business, or business with the Indian tribes, is protected by the clause in question, or that that clause is the basis either for interfering with a state's dominion over its own commerce, or for prescribing the mere form of its legislation as to its affairs.

Our state statute can have no effect as to any interstate or foreign commerce business which may be carried on by the Southern Express Company, the principal of the plaintiff in error, or by him as its agent, or in fact by any one. So long as he and the company confine their operations to express business constituting interstate or foreign commerce, they are exempt from any interference with them under state legislation. Such commerce is the subject of Federal regulation, and is beyond the jurisdiction of state authority. That the Southern Express Company is engaged in such commerce, is admitted; and that it is engaged in domestic or state commerce, is also admitted, and nothing is clearer than that the right to engage in interstate or foreign commerce freed from any regulation or burden of the same by the states, gives no immunity from state regulation or state taxation of state commerce. The exclusion of state interference in the one case is no more perfect, nor any more essential, than the exclusion of federal interference in the other. In our judgment the Florida statute now under consideration is, in so far as its terms can be construed to apply to interstate or foreign commerce, of no effect, and besides this there is in the Act, in so far as it applies to express companies, nothing that necessarily regulates, or that burdens or interferes with anything that is strictly interstate or foreign commerce, or that, in view of the commerce clause of the Federal Constitution, should or can properly be construed to apply to interstate or foreign commerce. Any person or persons, or body corporate, wishing to engage in the express business, and confine that business to interstate or foreign commerce, can do so, and any effort to apply to or enforce against him the provisions of the statute as to license, license tax, or license fee, must prove futile. The commerce clause of the Constitution of the United States protects him against any such interference. But because such person, or persons, or body corporate, may have this right, he or they have not as an incident to it the right to engage

in state commerce, and the statute as a regulation of state commerce is entirely valid. It is a legal regulation of state commerce, and there is nothing in the Federal Constitution that exempts any person or persons, natural or artificial, from its provisions.

If the person engaging, or proposing to engage, in interstate commerce express business, finds that to engage in express business which is state commerce will or may take some of his interstate commerce express earnings to pay the license taxes and fees of the state commerce business, he has only to refrain from the latter business to avoid incurring such exaction from such earnings. It is undeniable that taxes on property employed in interstate commerce business do not constitute a regulation of such commerce (*Maine v. Grand Trunk R. Co.* and *Western U. Tel. Co. v. Atty. Gen. of Massachusetts*, *supra*, and *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595) and this must be true notwithstanding that the payment of such taxes cannot be met from the earnings of state or local commerce. It is not sufficient to constitute a regulation of such commerce that the thing complained of affects it indirectly, incidentally and remotely. *Sherlock v. Alling*, 98 U. S. 99, 102, 23 L. ed. 819, 820; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804; *Union Pac. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5, 30, 31, 21 L. ed. 787, 791.

II. We fail to discover any uncertainty or obscurity in the statute as to the sums required by it to be paid by express companies as a state license tax, or, we may add, as a county or a city or town license tax. The obvious meaning of the Act, in so far as its provisions relate to these companies, is that each company shall pay a state license tax and take out a state license, when it proposes to do business in any city or town or village having more than fifty inhabitants; the amount of such state license tax being \$200 for cities of fifteen thousand, or more, inhabitants, and \$100 for cities of from ten to fifteen thousand inhabitants, \$75 for cities of from five to ten thousand, \$50 for those of from three to five thousand, \$25 for those of from one to three thousand, and \$10 for towns and villages of more than fifty inhabitants. Where there are in one county several cities, or towns or villages belonging to one or more of these classes, the company must take out a separate state license for each one of them that it may intend to do business in, and pay the tax and fee for the same as stated. It of course takes out no license for any city, town or village that it does not do business in. Any county may impose on a company doing business within its limits a license tax of not more than fifty per cent of the state tax, and thus require the company to pay it not more than fifty per cent of the amount such company has to pay to the state as a license tax for doing business at any city, town or village, within the provisions of the Act. If one company is doing business in, say, three places, one of which belongs to one class, another to another class, and the third to still another, the county may impose a tax

on the company for each of the three places, not exceeding fifty per cent of the amount of the state tax for that place. Likewise any incorporated city or town may impose on any such company doing business within its limits a municipal license tax not exceeding fifty per cent of the state license tax imposed upon it for that place by the statute. Whether or not this construction of the statute will result in rendering it impossible for express companies to carry on within our borders business that is local to the state, is a consideration for the lawmaking power, but it cannot be invoked properly to influence a construction that is contrary to the plain meaning of the statute, made more palpable still by a comparison of it with former legislation as to the same matter. Acts 1872, p. 37; 1881, p. 26; 1891, p. 8. By the legislation cited, the tax was imposed first on the agents, and afterwards changed to the companies, the tax on the companies being confined to simply a state tax payable to the state treasurer, without any license from collectors of revenue, or any county or municipal taxation under the general provisions of the license tax section of the statutes; while now the state tax is payable to the collectors of revenue, and the license is signed and delivered according to the general provisions of the ninth section of the Revenue Law of 1893, just as in the cases of many other if not all the occupations made subject to license by that section; its county and municipal taxation features being likewise applicable to these companies just as they are to merchants, keepers of hotels, liquor dealers and banks, and others too numerous to designate. Upon most deliberate consideration we are satisfied beyond doubt that any other construction of the Act on this point would be strained and inconsistent and contrary to its meaning and the manifest purpose exhibited by the statute. The amount of the tax, if not a matter solely of legislative discretion, is still not shown by this record to be prohibitory or destructive of business; and if there be one or more counties in the state

in which there is not even a village of fifty inhabitants, the fact does not bring the Act in conflict with any provision of our constitution, nor does it impair the uniform operation of the Act throughout the state as to all persons standing in the situation which the act makes the test of taxation. The question of the population of any city, town, or village has, as the petition shows, presented no insuperable difficulty to petitioner or his counsel, nor, as is shown by the stipulation between counsel, any to the state authorities; and, when it shall be made an issue it will be one of fact, and not beyond the power of the courts to deal with successfully; and it is entirely clear, from the case before us, that the law affords a hearing as to the enforcement of the criminal features of the statute, and it would be improper to intimate any opinion as to its provisions that give resort to levy and sale of property, when no such levy has been made.

It cannot be said that the detention of the plaintiff in error is without jurisdiction, and therefore he could or should have been discharged on habeas corpus from the custody in which he was when the writ issued. *Ex parte Prince*, 27 Fla. 196. The plaintiff in error was properly remanded by the circuit judge for a hearing before the criminal court of records of Duval county, upon the charge. That hearing must be conducted on principles consistent with the conclusions we have reached, and particularly with an eye to the fact that our legislation has and can have no effect upon interstate commerce, but is applicable alone to state or local business. The Southern Express Company may carry on any and all business that constitutes interstate or foreign commerce, free from regulation by or under our laws; but business strictly of a state or local character cannot be exempted from our laws or put beyond our authority by its engaging at the same time in interstate or foreign commerce.

The judgment will be affirmed and the cause remanded for proceedings not inconsistent with this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS.

P. M. ARTHUR *et al.*, Intervenor, *Appts.*, v. Thomas F. OAKES *et al.*

1. Equity will not enjoin employes of a receiver of a railroad from quitting his service, although the

NOTE.—The importance of this decision and the popular interest which was manifested by that of *Judge Jenkins* in the lower court make a full representation of both opinions desirable, so the circuit court case is given herewith in full as a footnote.

UNITED STATES CIRCUIT COURT EASTERN DISTRICT OF WISCONSIN.

FARMERS' LOAN & TRUST CO.,

v.

NORTHERN PACIFIC R. CO. *et al.*

(60 Fed. Rep. 803.)

1. An injunction is the appropriate remedy to prevent an unlawful combination and conspiracy
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effect of such action will be to cripple the property, or prevent or hinder the operation of the road.

to interfere with the operation of a railway and paralyze its business, since the injury would be irreparable and compensation could be obtained only through a multiplicity of suits.

2. Punishment for contempt is not such a remedy for a conspiracy to obstruct the business of a railroad in the hands of a receiver as to prevent the remedy of injunction.
3. A combination and conspiracy of the employes of a receiver of a railroad company to quit the service with the object and intent of crippling the property and preventing or hindering the operation of the road is illegal, since it involves the intimidation and oppression of others and the injury to property in their keeping tending to the prejudice of the public.
4. A combination or conspiracy having for its purpose the inauguration of a strike upon the lines of

2. Employees of the receiver of a railroad may lawfully confer together upon the subject of a proposed reduction of wages, and if not restrained by their contract, may withdraw in a body from the receiver's service because of such reduction, although they expect that such action will inconvenience the receiver and the public.
3. Equity will enjoin any combination or conspiracy among the employees of the receiver of a railroad which has for its object and intent the physical injury of the property in the receiver's possession, or actual interference with the regular continuous operation by him of the railroad.
4. Employees of a receiver of a railroad may be enjoined from disabling rolling stock or other property in the receiver's possession, from interfering with its possession or obstructing its management, and from using force, intimidation, threats, or other wrongful methods against the receiver, his agents, or employees, or persons seeking employment.
5. Illegal combinations are not sanctioned in any

degree by the Act of Congress of June 20, 1880, legalizing the incorporation of national trades unions.

6. Trade unions are not prohibited an injunction against illegal combinations of working men.
7. Employees of the receiver of a railroad may be enjoined from combining and conspiring to quit his service with the object and intent of crippling the property in his custody, or embarrassing the operation of the railroad.
8. A strike is not unlawful if it is merely a combination among employees having for its object their orderly withdrawal in large numbers or in a body from their employer's service, to accomplish some lawful purpose.
9. Injunction is a proper remedy to restrain threatened acts of employees of a railroad receiver which would inflict irreparable loss upon the property, and seriously prejudice the interests of the public involved in the regular continuous operation of the road.

Decided October 1, 1894.

APPEAL by intervening petitioners from a decree of the Circuit Court of the United States for the Eastern District of Wisconsin,

denying their motion to strike out certain portions of an injunction restraining employees of the receiver of the Northern Pacific Railway

a railway operated by receivers is unlawful and may be prevented by injunction.

(April 6, 1894.)

MOTION by intervening petitioners to strike out certain portions of the injunction which had been granted to receivers in possession of the Northern Pacific Railroad to restrain a strike which was threatened by the employees of the road. *Motion denied except as to one clause of the injunction.*

The facts sufficiently appear in the opinion.

Jenkins, Circuit Judge, delivered the following opinion:

On the 19th day of December, 1893, the receivers of the defendant company presented to the court their verified petition representing that on the 17th day of August, 1893, and within two days after their appointment, and in view of the insolvent condition of the railroad company, they ordered a reduction varying from 10 to 20 per cent in the salaries of all employees (including the general manager and other general officers of the company) amounting to \$1200 per annum or more, which reduction was acquiesced in by the employees to whom the same applied. On the 25th of August, 1893, in view of the increasing depression in the transportation business, the consequent falling off of earnings, and the necessity of greater retrenchment in operating expenses, the receivers ordered a further reduction in salaries and wages of employees, amounting to 5 per cent on all salaries aggregating \$50 a month and under \$75, and to 10 per cent on all salaries aggregating from \$75 to \$100 per month. This latter order was to take effect immediately, but upon consideration its operation was suspended by the receivers until the entire subject of salaries and wages could be more fully considered, especially with reference to certain schedules covering the pay and employment of certain classes of employees. The receivers informed the court that some of these schedules, which had been in existence for many years, were not justified by conditions now existing; that they had been amended from time to time, and extended so that they had become voluminous, and in some respects obscure, and had produced in operation inequalities and results unjust to the property, and unjust to many employees; that they thereupon revised and rearranged the schedules, and, instead of putting into operation the reduction contemplated by the order of August 25, they determined and ordered on the 28th of October, 1893 (giving general notice thereof

to the employees of the road) that all existing schedules covering the rates of pay of employees should, on the 1st of January then next ensuing, be abrogated, and that certain new schedules prepared by them should take effect on that day; and the general manager was instructed on and after that day to reduce all salaries and wages aggregating \$50 per month and less than \$75 per month 5 per cent, and all salaries and wages aggregating \$75 per month 10 per cent. The revised schedules corrected supposed inequalities between the different classes of employees, and did away with certain obnoxious regulations which were supposed to militate against the proper management of the property. The receivers further represented to the court that the reduction made in salaries and wages was justified in view of the large shrinkage of business, growing out of the financial revulsion throughout the country; that the rates of compensation provided for were fair and just to the employees to whom they related, in view of the then present conditions. It was made to appear to the court that the gross earnings of the property during the year 1893 were continuing to greatly decrease; that the decrease for the month of September, 1893, as compared with the month of September, 1892, amounted to \$758,000; that the decrease for the month of December, 1893, as compared with the month of December, 1892, would amount to \$790,000; decreasing by more than one half the entire estimated gross earnings for the month. That by the revised schedules the average reduction in the rates of compensation to the various classes of employees was about as follows: Engineers, 8 per cent; firemen, 7 per cent; trainmen and freight conductors, 8 per cent; passenger conductors, 10 per cent; telegraphers, 5 per cent. The receivers further advised the court that many of their employees claimed that the schedules and rates in force when the receivers took possession constituted contracts between the several employees and the receivers, terminable only by the consent of the employees, in which view the receivers could not concur; and that discontent and opposition to the enforcement of the schedule were rife among the employees, based upon the assumption that no power existed in the receivers to change the schedule. The receivers further advised the court that some of the employees threatened that, in the event that the revised schedules should be put into operation, they would suddenly quit the service of the receivers, and would compel by threats and force and violence other employees to quit the service; that they would prevent, by an organized effort, and by force and intimidation, others from taking service under the receivers in the place of

Company from interfering with the property in his hands. *Reversed in part.*

The case sufficiently appears in the opinion.

Argued before Harlan, *Circuit Justice*; Woods, *Circuit Judge*, and Bunn, *District Judge*.

Messrs. Charles Quarles, T. W. Spence, and T. W. Harper, for appellants:

An injunction is an extraordinary remedy, to be resorted to only when the end sought can be reached by no other legal process.

The writs of injunction in this case, in so far as they enjoin acts forbidden by law, are superfluous, and unnecessary, and they have no functions to perform, in so far as the writs forbid acts which the law does not forbid the order awarding the writs is erroneous.

The order appointing the receivers and directing them to take possession of the road, and authorizing them to operate it, is an equitable execution.

Davis v. Gray, 83 U. S. 16 Wall. 217, 21 L. ed. 452.

Any interference with the possession of the receivers, or with the operation of the road, is an obstruction to the execution of the mandate of the court.

Secor v. Toledo, P. & W. R. Co. 7 Biss. 521; *King v. Ohio & M. R. Co.* 7 Biss. 532.

The employes of receivers of railroad companies are *pro hac vice* servants of the court, and consequently they are at all times before the court for punishment, by summary process, upon mere citation for contempt.

Re Doolittle, 23 Fed. Rep. 544; *United States v. Kane*, 23 Fed. Rep. 748; *Gluck & B. Corporate Receivers*, § 83.

This is true as to the world at large.

Gluck & B. Corporate Receivers, § 83, and cases.

The remedy for interference is a simple citation to show cause, which would bring the guilty persons before the court.

Re Doolittle and United States v. Kane, *supra*; *Re Higgins*, 27 Fed. Rep. 443.

If two equal rights conflict, it does not and cannot rest with any court to declare which of these shall give way.

No court can subordinate the right of the laborer to the right of the employer, nor can any court declare that capital shall abate any of its rights because of collision with the rights of the laborer.

The assertion of a right cannot be called the "exercise of unbridled will" and liberty cannot be opprobriously stamped as license, merely because the exercise of his right by one man works damage to another man, or to another set of men, or to society.

The right of a man to his services is the same in kind and degree as the right of a man to his property.

Whatever may be the injury that casually results to an individual from the act of another while pursuing the reasonable exercise of an established right, it is his misfortune. The law pronounces it *damnum absque injuria*, and the individual from whose act it proceeds is liable neither at law nor in the form of conscience. And the principal right necessarily

those who might leave such service; and that they would thereby, as the means of forcing the receivers to abandon the proposed revised schedules, disable the receivers from operating the road, and from discharging their duty to the public as common carrier. The receivers further represented to the court that some of the employes threatened, if the revised schedules should be put in operation, to disable locomotives and cars so that the same could not be safely used at all without expensive repairs; that they would take possession of the cars, engines, shops, roadbed, and other property in possession of the receivers, and that they would destroy and prevent the use of the property, and would so conduct themselves with regard thereto as to hinder and embarrass the receivers in the management of the property, in the operation of the trains thereover, and would bring about incalculable loss to the trust property, and inflict great inconvenience and hardship upon the public. The receivers further represented to the court that, unless the parties were restrained by order of the court, they would carry out such threats, and the receivers would be prevented from operating the road, from carrying the mails of the United States thereover, from performing the duties of a common carrier thereon, and that great loss of property and jeopardy to life would ensue; that the parties referred to (whose names the receivers were unable to state) were contriving secretly to perpetrate the acts of violence and wrong described, and to interfere with the possession and operation by the court, through the receivers, of the property; that such combination included not only dissatisfied employes of the receivers, but others not in the service of the receivers, who from a spirit of sympathy or mischief, threaten to join the employes in perpetrating the wrongful acts and things stated; and that they would so do unless restrained by the court. The receivers thereupon asked, among other things, for an order authorizing them to put in operation and maintain on and after January 1, then proximo, the revised schedules in such petition described, and that a writ of injunction might issue as prayed for in the petition.

Upon consideration of the petition the court on that day entered its order authorizing the receivers

to adopt the revised schedules, and directing the issue of a writ of injunction as prayed for in the petition, and directing its delivery to the marshal for execution, ordering him to protect the receivers of the Northern Pacific Railroad in their possession of the property of the railroad, and in their operation thereof; and directing the receivers to file, in the courts wherein they had been appointed receivers of said property upon ancillary bills, petitions similar to that on which the order was based, to the end that the power of each court might be seasonably invoked for the protection of the receivers in the possession and management of the property within its territorial jurisdiction. The writ in question was directed to the officers, agents, and employes of the receivers, engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all other employes of the receivers, and to all persons, associations, and combinations, voluntary or otherwise, whether employes of said receivers or not, and to all persons generally. The restraining clause of the writ was as follows:

"Now, therefore, in consideration thereof, and of the matters in said petition set forth, you, the officers, agents, and employes of Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all other employes of said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and each and every one of you, and all persons, associations, and combinations, voluntary or otherwise, whether employes of said receivers or not, and all persons generally, and each and every one of you, in the penalty which may ensue, are hereby charged and commanded that you, and each and every one of you, do absolutely desist and refrain from disabling or rendering in any wise unfit for convenient and immediate use any engines, cars or other property of Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers for the Northern Pacific Railroad Company, and from interfering in any manner with the possession of locomotives, cars, or property of the said receivers, or in their custody.

carries with it also all the means essential to its exercise.

The Eleanor, 15 U. S. 2 Wheat. 345, 4 L. ed 257.

The question presented is this: Whether when the wages of men working under no contract are reduced by their employer on account of small profits, these men may, by concerted action, quit work in order to bring about a restoration of the old scale.

It is not logical to say that a railway is a public highway and owes a duty to the public, and that it must be kept a going concern although it prove unremunerative to the shareholders, and at the same time shift this duty, owed to the public, from the shoulders of the railroad company and its shareholders to the wage-earners, who in no event can have any interest in the profits.

The workmen are not the actors; the receivers are the aggressors; the sole reason for the change is lack of profits to the bondholders.

The judgment of the circuit court is, not that the men must not breach a contract, but that they are obligated to enter into a new contract.

A tort springs out of a contract when there is a breach of a duty which the law, contradistinguished from the contract, has imposed.

Bishop, Non-Cont. L. § 73.

Where contract relations exist, the parties assume towards each other no duties whatever besides those the contract implies.

Cooley, Torts, p. 91.

The class of tortious actions arising out of contract do not arise from a breach of express

provisions thereof; but from a breach of an implied duty arising out of and incident to the contract "and the liability arises out of a duty incident to and created by the contract" of employment, but only dependent upon the contract to the extent necessary to raise the duty. The tort consists in the breach of the duty.

Wood's Addition, Torts, § 27, note.

The terms of the contract, therefore, do not define the duty and cannot be resorted to for that purpose.

The duty spoken of is not to perform the contract, but to do or refrain from doing something which the law says shall or shall not be done by a man who has entered into a certain contract relation.

The question for the court in this case is where this duty of a railroad employé begins and ends.

One of these implied conditions on their behalf was that they would not leave its service or refuse to perform their duties under circumstances, when such neglect on their part would imperil lives committed to its care, or the destruction of property involving irreparable loss and injury, or visit upon it severe penalties.

Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. 19 L. R. A. 395, 54 Fed. Rep. 746.

It is idle to say that a man has a right to quit, and yet that the law prohibits him from quitting so as to interfere with the convenience of his employer.

In the absence of restrictive contract, workmen have a right, by concerted action, to cease

and from interfering in any manner, by force, threats, or otherwise, with men who desire to continue in the service of the said receivers, and from interfering in any manner, by force, threat, or otherwise, with men employed by the said receivers to take the place of those who quit the service of said receivers, or from interfering with or obstructing in any wise the operation of the railroad, or any portion thereof, or the running of engines and trains thereon and thereover, as usual, and from any interference with the telegraph lines of said receivers or along the lines of railways operated by said receivers, or the operation thereof, and from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad, and from so quitting the service of the said receivers, with or without notice, as to cripple the property, or to prevent or hinder the operation of said railroad, and generally from interfering with the officers and agents of said receivers, or their employes, in any manner, by actual violence, or by intimidation, threats, or otherwise, in the full and complete possession and management of the said railroad, and of all the property thereunto pertaining, and from interfering with any and all property in the custody of the said receivers, whether belonging to the receivers or shippers or other owners, and from interfering, intimidating, or otherwise injuring or inconveniencing or delaying the passengers being transported or about to be transported over the railway of said receivers, or any portion thereof, by said receivers, or by interfering in any manner by actual violence or threat, and otherwise preventing or endeavoring to prevent the shipment of freight or the transportation of the mails of the United States over the road operated by said receivers, until the further order of this court."

On the 22d day of December, 1893, the receivers presented to the court their supplemental petition, setting forth that the employes affected by the new schedules referred to in the former petition, consisted of engineers, conductors, firemen, trainmen, switchmen, operators, and shopmen; that each of said classes of employes had appointed a committee to confer with the operating officers of the receivers, at St. Paul, with reference to the proposed

change in the schedules, and stating the names of the members of those several committees; that such committees had confederated and agreed to co-operate and report to the various classes of employes along the line whom such committee especially represented a joint recommendation,—that is to say, should said committees agree to report and recommend a strike along the line of the railroad, then the separate committees mentioned representing the different classes of employes along the line should report and recommend separately to the employes represented by such committee to strike. The petition further represented to the court that a subcommittee of thirty-two persons had been appointed by the joint committee to confer with the operating officers of the receivers, and to make report and recommendation to the joint committee; and that, should such subcommittee recommend a strike, the general and joint committee would report or recommend a strike, which the separate committees in turn would recommend or report to the different orders or classes of labor to which they belonged upon the lines of the railroad. The receivers further represented that the subcommittee of said general committee intended and was about to recommend and advise the general joint committee to recommend that the employes of the road should strike on or about January 1, 1894, and that the general joint committee and the said several separate committees were about to recommend to the several classes of labor in the employment of the receivers to strike on or about that day. And the receivers further informed the court that, if such committees should recommend a strike, the individual employes along the line of the road would the day recommended join in a general strike, unless the members of the committee were enjoined by the court from issuing any order or recommendation to strike; that the employes of the railroad held themselves bound to obey the order or recommendation of the committee; that almost all of the employes of the road belonged to one of the labor organizations of the engineers, conductors, firemen, trainmen, switchmen, operators, or shopmen, and also to national labor organizations comprising the employes in similar lines on almost all the other lines of railroad in the United States, namely, the Brotherhood of Locomotive Engineers, the Order

work to procure better terms of service, no compulsion being used except that incident to the cessation.

A conspiracy is generally defined, "the combination or agreement of two or more persons to do an act unlawful in itself, or to do a lawful act by unlawful means."

Anderson, Law Dict. title *Conspiracy*.

The case of *Com. v. Carlisle*, Brightly, 36, which was mainly relied upon by counsel for the receivers below, is pronounced by the United States Circuit Court of Appeals, 8th Circuit, to be "a case of questionable authority."

United States v. Trans-Missouri Freight Assn. 24 L. R. A. 73, 58 Fed. Rep. 58, and the cases holding contrary to its doctrine, viz: *Snow v. Wheeler*, 113 Mass. 179; *Bowen v. Matheson*, 14 Allen, 499; *Skravinka v. Scharringhausen*, 8 Mo. App. 522; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, are approved.

Where a confederacy having no lawful aim tends simply to oppression of individuals or to the prejudice of the public, it will be a conspiracy. But where the aim is lawful, and the means are lawful, the combination will not be a conspiracy, even though inconvenience, discomfort, or prejudice ensue to individuals or to the public.

State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 887, 54 Fed. Rep. 788.

Every definition of conspiracy includes and bases it upon a tort.

Adler v. Fenton, 65 U. S. 24 How. 407, 14 L. ed. 696.

Before this court can restrain an act the law must have condemned it.

Wheaton v. Peters, 33 U. S. 8 Pet. 591, 8 L. ed. 1055.

Under the common law, since the abrogation of, or departure from, the old English statutes, which made it a criminal offense for an individual to refuse to work, combinations of workmen for the purpose of improving their condition, increasing their earning power, and enforcing the payment of higher wages by combination, have been held innocent.

Curew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; *Snow v. Wheeler*, 113 Mass. 186; *State v. Stewart*, 59 Vt. 285, 59 Am. Rep. 710; *Com. v. Hunt*, 4 Met. 134.

The best American authorities to-day concur in placing labor and capital on the same plane.

State v. Glidden, 55 Conn. 74; *Curran v. Galen*, 2 Misc. 553; *Rogers v. Earls*, 17 N. Y. Supp. 264; *State v. Stewart*, 59 Vt. 289, 59 Am. Rep. 710.

The right of employes to quit work singly, and the right of employes to quit work in a body, has been and is to-day recognized and affirmed by the Federal courts.

Re Doolittle, 23 Fed. Rep. 547; *United States v. Kane*, Id. 748; *Oeur d'Alene Consol. & Min. Co. v. Miners' Union of Wardner*, 19 L. R. A. 382, 51 Fed. Rep. 263; *King v. Ohio & M. R. Co.* 7 Bliss. 533; *United States v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. Rep. 994.

The Wisconsin statute prohibits persons from combining, associating, agreeing, mutually undertaking, or concerting together for

of Railway Conductors, the Brotherhood of Locomotive Firemen, the Order of Railway Telegraphers, and the Brotherhood of Railway Trainmen. The petition then proceeds to give the names of the executive heads of those organizations, and asserts that the employes will not strike unless such strike is ordered by one or more of the executive heads of the national labor organizations named; and that without an order from the executive head, no assistance would be given to the employes by the national organizations to which they belonged if they should attempt to strike. The petition further alleged that the railway in question was engaged in interstate commerce, and that the strike along the line of the road would not only cause irreparable damage to the trust property, but to a large portion of the country traversed by the Northern Pacific Railroad, because not reached by any other line of road or telegraph line or express company. That there were many communities along the line of the railroad whose entire commercial facilities were furnished by the three departments of the railroad operated by the receivers—the railroad, the telegraph, and the express; and that all classes of business men in large portions of the country traversed by the railroad operated by the receivers were dependent to a very large extent, upon these three departments of service, and that large sections of country are dependent upon the railroad trains operated by the receivers for their necessary daily supply of fuel, provisions, etc. The petition asked for an order granting a writ of injunction restraining these committees and the heads of the national organizations mentioned from ordering or recommending or advising a strike.

Upon consideration of this petition an order was made directing a writ of injunction to issue as prayed in the original petition, and as prayed in the supplemental petition, with a similar direction with respect to the presentation of the order and writ to those courts in which ancillary bills had been filed for like orders from those courts. The writ of injunction issued upon this order was directed to the various persons named, and to their agents, sub-agents, representatives, and employes, and to the officers, agents, and employes of the receivers, and

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to the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen, and all other employes of the receivers, and to all persons, associations, and combinations, voluntary or otherwise, whether employes of said receivers or not, and to all persons generally. It embodied the provisions of the first writ, with the following additional clause:

"And from combining or conspiring together or with others, either jointly or severally, or as committees, or as officers of any so-called 'labor organization,' with the design or purpose of causing a strike upon the lines of railroad operated by said receivers, and from ordering, recommending, approving, or advising others to quit the service of the receivers of the Northern Pacific Railroad Company on January 1, 1894, or at any other time; and from ordering, recommending, advising, or approving by communication or instruction or otherwise, the employes of the said receivers, or any of them, or of said Northern Pacific Railroad Company, to join in a strike on said January 1, 1894, or at any other time, and from ordering, recommending, or advising any committee or committees, or class or classes of employes of said receivers to strike or join in a strike on January 1, 1894, or at any other time, until the further order of this court."

On the 15th day of February, 1894, P. M. Arthur, grand chief engineer and chief executive officer of the Brotherhood of Locomotive Engineers; E. E. Clark, grand chief conductor and chief executive officer of the Order of Railway Conductors; F. P. Sargent, grand chief fireman and chief executive officer of the Brotherhood of Locomotive Firemen; D. G. Hamesy, grand chief telegrapher and chief executive officer of the Order of Railway Telegraphers; S. E. Wilkinson, grand master and chief executive officer of the Brotherhood of Railway Trainmen; and John Wilson, grand master and chief executive officer of the Switchmen's Mutual Aid Association,—in behalf of themselves and of their respective organizations and associations, and the members thereof, and in behalf of such of the employes of the receivers as are members of the said associations and organizations, moved the court to modify the writs of injunction by expung-

the purpose of willfully or maliciously injuring another.

The word "willfully" is ordinarily used to express something like a wicked purpose or an evil or improper motive, or to characterize an act done wantonly.

State v. Preston, 34 Wis. 675; *United States v. 3 Railroad Cars*, 1 Abb. U. S. 196.

The word "maliciously" in the penal statutes is construed as meaning a wicked intent to injure.

Tuttle v. Bishop, 30 Conn. 80; *Com v. Walden*, 3 Cush. 558.

The United States statute prohibiting trusts does not touch the case.

United States v. Patterson, 55 Fed. Rep. 605-641; *United States v. Trans-Missouri Freight Assn.* 24 L. R. A. 78, 58 Fed. Rep. 58.

The phraseology of the injunctive writs is correct or erroneous, according to the idea which their words conveyed to the men addressed, the words being taken in the sense in which those men had the right to construe them.

Unless there be the most decisive reasons which lead us to conjecture the intent was otherwise, words are to be understood in their proper and most known signification, not the grammatical one, which regards the etymology and original of them, but that which is vulgar and most in use: for use is the judge, the law, and rule of speech. Lieber's *Hermeneutics*, Hammond's edition, 299.

All the lexicographers are in accord on the meaning of the word "strike," and therefore

the word "strike" in these injunctions means just what the people who coined the word have made it mean: "A combined effort of workmen to obtain higher wages or other concessions from their employers, by stopping work at a preconceived time."

If the definition given by the learned circuit judge of the word "strike" be correct, then the following sentence, found in McCarthy's "History of Our Own Times," is rank nonsense, or worse.

"Some eminent men, of whom Mr. Mill was the greatest, had long been endeavoring to get the world to recognize the fact that a strike is not a thing which can be called good or bad, until we know its object and its history: that the men who strike may be sometimes right and that they may have sometimes been successful."

And the writer in the *Encyclopedia Britannica*, on the subject "Trade Unions," made a slip when he wrote that a strike was a simultaneous cessation of work to secure a concession.

Memoirs. James McNaugh, John C. Spooner, and George P. Miller for appellees.

Harlan, J., delivered the opinion of the court:

The questions before us relate to the power of a court of equity—having custody by receivers of the railroad and other property of a corporation—to enjoin combinations, conspiracies or acts on the part of the receivers' em-

ing and striking from the writs the parts italicized. The motion was based upon the petition and supplemental petition, and upon the orders of the court directing the issuance of the writs; and at the hearing the constitutions, statutes, and rules of order of the various organizations referred to were presented and considered in argument.

In the discussion of the important and interesting questions presented by this motion it is not within the province of the court to assume part in the contest between capital and labor, which it is asserted is here involved. It may be that the aggregated power of combined capital is fraught with danger to the republic. It may be that the aggregated power of combined labor is perilous to the peace of society, and to the rights of property. It doubtless is true that in the contest the rights of both have been invaded, and that each has wrongs to be redressed. If danger to the state exists from the combination of either capital or labor, requiring additional restraint or modification of existing laws, it is within the peculiar province of the legislature to determine the necessary remedy, and to declare the general policy of the state touching the relations between capital and labor. With that the judicial power of the government is not concerned. But it is the duty of the courts to restrain those warring factions, so far as their action may infringe the declared law of the land, that society may not be disrupted, or its peace invaded, and that individual and corporate rights may not be infringed. It therefore becomes the duty of the court to inquire whether, in respect of the things complained of, there has been threatened violation of the law of the land, and to determine the appropriate remedy, taking care, however, to apply the remedy without usurpation of jurisdiction, or, as remarked by Lord Chancellor Bacon, "to contain jurisdiction within the ancient mere-stones without removing the mark;" and having also constantly in mind the maxim that the province of the court is "*dicere et non dare legem*." In this spirit, as I trust, I proceed to the consideration of the questions involved, taking occasion to express my obligation to counsel, whose able presentation of the law has much relieved the labor of the court, if it could not lighten its responsibility.

If the combination and conspiracy alleged, and the

acts threatened to be done in pursuance thereof, are unlawful, it cannot, I think, be successfully denied that restraint by injunction is the appropriate remedy. It may be true that a right of action at law would arise upon consummation of the threatened injury, but manifestly such remedy would be inadequate. The threatened interference with the operations of the railway, if carried into effect, would result in paralysis of its business, stopping the commerce ebbing and flowing through seven states of the Union, working incalculable injury to the property, and causing great public privation. Pecuniary compensation would be wholly inadequate. The injury would be irreparable. Compensation could be obtained only through a multiplicity of suits against 12,000 men, scattered along the line of this railway for a distance of 4400 miles. It is the peculiar function of equity in such case, where the injury would result not alone in severe private, but in great public, wrong, to restrain the commission of the threatened acts, and not to send a party to seek uncertain and inadequate remedy at law. That jurisdiction rests upon settled and unassailable ground. It is not longer open to controversy that a court of equity may restrain threatened trespass involving the immediate or ultimate destruction of property, working irreparable injury, and for which there would be no adequate compensation at law. It will, in extreme cases, where the peril is imminent, and the danger great, issue mandatory injunctions requiring a particular service to be performed, or a particular direction to be given, or a particular order to be revoked, in prevention of a threatened trespass upon property or upon public rights. I need not enlarge upon this subject. The jurisdiction is beyond question, is plenary and comprehensive. Some of the authorities are assembled by *Judge Taft* in the case of *Toledo, A. & N. M. R. Co. v. Pennsylvania Co.* 54 Fed. Rep. 730, 19 L. R. A. 305, a case in which the court restrained Mr. Arthur, chief of the Brotherhood of Locomotive Engineers, from giving the order and signal for a strike which was intended to result in injury to the complainant's rights. See also, *Blindell v. Hagan*, 54 Fed. Rep. 40, affirmed on appeal, 6 C. C. A. 88, 56 Fed. Rep. 606; *Coeur d'Alene Consol. & Min. Co. v. Miners' Union of Wardner*, 51 Fed. Rep. 200, 19 L.

ployés and their associates in labor organizations which, if not restrained, would do irreparable mischief to such property, and prevent the receivers from discharging the duties imposed by law upon the corporation.

The original bill was filed on behalf of stockholders and creditors of the Northern Pacific Railroad Company, a corporation created by an Act of Congress, and had for its general object the administration under the direction of the court of the entire railroad system, lands and assets of that corporation, and the enforcement of the respective rights, liens, and equities of its preferred and common stockholders, bondholders, and creditors.

The railroad company having filed its answer, receivers were appointed with authority to take immediate possession of its railroads and other property and to exercise its authority and franchises, conduct its business and occupation as a carrier of passengers and freight, discharge the public duties obligatory upon it or upon any of the corporations whose lines of road were in its possession, preserve the property in proper condition and repair so as to be safely and advantageously used, protect the title and possession of the same, and employ such persons and make such payments and disbursements as were needful. The receivers were also authorized to manage all other property of the company at their discretion and in such manner as in their judgment would produce the most satisfactory results consistent with the discharge of the public duties imposed on them, and to fix the compensation of officers, attorneys, managers, superintendents, agents,

and employés in their service. It was further ordered that an injunction issue against the defendant and all claiming to act by, through, or under it, and against all other persons, to restrain them from interfering with the receivers in taking possession of and managing the property.

Subsequently the Farmers' Loan & Trust Company, as trustee for the holders of bonds and collateral trust indentures, filed an original bill in the same court against the Northern Pacific Railroad Company, the individual plaintiffs in the first suit, and the receivers. The relief asked was that the plaintiff as trustee under the mortgages named in the bill be placed in possession of the mortgaged premises, or that receivers of the rights, franchises, and property of the railroad company be appointed with authority to operate its railroads and carry on its business under the protection of the court; that the liens created by the several mortgages be ascertained and declared; and that the mortgaged property, in certain contingencies, be sold and the proceeds applied according to the rights of parties.

The railroad company having appeared in that suit, an order was entered appointing the same persons receivers who were appointed in the first suit, and the two suits were consolidated, to proceed together under the title of the *Farmers Loan & Trust Co. v. Northern Pacific Railroad Company, etc.*

By a writ of injunction dated December 19, 1893, the officers, agents, and employés of the receivers, including engineers, firemen, trainmen, train dispatchers, telegraphers, conduc-

R. A. 382. It would be anomalous, indeed, if the court, holding this property in possession in trust, could not protect it from injury, and could not restrain interference which would render abortive all efforts to perform the public duties charged upon this railway.

It was suggested by counsel that, as improper interference with this property during its possession by the court is a contempt, punishment therefor would furnish ample remedy; and that, therefore, an injunction would not lie. This is clearly an erroneous view. Punishment for contempt is not compensation for injury. The pecuniary penalty for contumacy does not go to the owner of the property injured. Such contempt is deemed a public wrong, and the fine inures to the government. The injunction goes in prevention of wrong to property and injury to the public welfare; the fine, in punishment of contumacy. The authority to issue the writ is not impaired by the fact that, independently of the writ, punishment could be visited upon the wrongdoer for interference with property in the possession of the court. The writ reaches the inchoate conspiracy to injure, and prevents the contemplated wrong. The proceeding in contempt is *ex post facto*, punishing for a wrong effected.

Asserting then, as undoubted, the right of the court by its writ to restrain unlawful interference with the operation of this railway, I turn my attention to the objections urged to particular paragraphs of the writs. It is contended that the restraint imposed by that part of the original writ to which objection is made by this motion is in derogation of common right, and an unlawful restraint upon the individual to work for whomsoever he may choose, to determine the conditions upon which he will labor, and to abandon such employment whenever he may desire. In the determination of this question it is needful to look to the conditions which gave rise to the issuance of the writ. Here was a railway some 4400 miles in length, traversing some seven states of the Union, engaged in interstate commerce, carrying the mails of the United States. This vast property was within the custody of the court, through its receivers, in trust to operate it, to discharge the public duties imposed

upon it, to keep it a going concern until the time should come to hand it over to its rightful owners with all public duties discharged, and with its franchises, rights, and privileges unimpaired. The receivers employed in the operation of this property some 12,000 men. These men are *pro hac vice*, officers of the court, and responsible to the court for their conduct. *Re Higgins*, 27 Fed. Rep. 443. The petition represented to the court—and the facts are confessed by this motion—that some of the men threatened to suddenly quit the service of the receivers, and to compel, by threats and force and violence, other employés, who were willing to continue in the service, to quit their employment; that by organized effort, and by force and intimidation, they would prevent others from taking service under the receivers in place of those who might leave such service, and would thereby, as a means of forcing the receivers to submit to the terms demanded, disable the receivers from operating the road and discharging their duty to the public as a common carrier, and would so conduct themselves by disabling locomotives and cars, and taking possession of the property of the receivers, as to destroy and prevent its use, and hinder and embarrass the receivers in its management, thereby causing incalculable loss to the trust property, and inflicting great inconvenience and hardship upon the public. The restraining portion of the writ complained of, and now under consideration, prohibited these men from combining and conspiring to quit this service with the object and intent of crippling the property of the receivers and embarrassing the operation of the road, and from carrying that conspiracy into effect. The writ was in prevention of the mischief asserted. In no respect, as I conceive, does that portion of the writ interfere with individual liberty. None will dispute the general proposition of the right of every one to choose his employer, and to determine the times and conditions of service, or his right to abandon such service,—to use the expression of Judge Pardee in *Re Higgins*, *supra*.—"peaceably and decently." But it does not follow that one has the absolute right to abandon a service which he has undertaken, without regard to time and conditions. It is absurd to say that one may do as he will with-

tors, switchmen, and all persons, associations, and combinations, voluntary or otherwise, whether in the service of the receivers or not, were enjoined—

From disabling or rendering in any wise unfit for convenient and immediate use any engine, cars, or other property of the receivers;

From interfering in any manner with the possession of locomotives, cars or property of the receivers or in their custody;

From interfering in any manner, by force, threats, or otherwise, with men who desire to continue in the service of the receivers, or with men employed by them to take the place of those who quit;

From interfering with or obstructing in any wise the operation of the railroad or any portion thereof, or the running of engines or trains thereon as usual;

From any interference with the telegraph lines of the receivers along the lines of railways operated by them, or the operation thereof;

From combining and conspiring to quit, with or without notice, the service of said receivers with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad, and from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad; and, generally,

From interfering with the officers and agents of the receivers or their employés in any manner by actual violence or by intimidation, threats, or otherwise, in the full and complete possession and management of the railroad and

of all the property thereunto pertaining, and from interfering with any and all property in the custody of the receivers whether belonging to them or to shippers or other owners, and from interfering, intimidating, or otherwise injuring or inconveniencing or delaying the passengers being transported or about to be transported over the railway of the receivers or any portion thereof, or by interfering in any manner by actual violence or threat, and otherwise preventing or endeavoring to prevent the shipment of freight or the transportation of the mails of the United States over the road operated by the receivers, until the further order of this court.

This injunction was based on a petition of the receivers, urging in view of the general depression in the business of transportation the necessity of reducing expenses, and representing to the court that many employes were threatening that if their compensation was diminished as indicated in a revised schedule of wages which the receivers had adopted to take effect January 1st, 1894, they would prevent or obstruct the operation of the railroads in the hands of the receivers.

A second writ of injunction was issued December 22, 1893. It was based on a supplemental petition of the receivers, and was in all respects like the former one except that it contained, *in addition*, a clause by which the persons and associations to whom it was addressed were enjoined—

From combining or conspiring together, or with others, either jointly or severally, or as committees, or as officers of any so-called labor

out respect to the rights of others. It is not infringement upon individual liberty to compel recognition of the rights of others. Liberty and license must not be confounded. Liberty is not the exercise of unbridled will, but consists in freedom of action, having due regard to the rights of others. There would seem to exist in some minds a lamentable misapprehension of the terms "liberty" and "right." It would seem by some to be supposed that in this land one has the constitutional right to do as one may please, and that any restraint upon the will is an infringement upon freedom of action. Rights are not absolute, but are relative. Rights grow out of duty, and are limited by duty. One has not the right arbitrarily to quit service without regard to the necessities of that service. His right of abandonment is limited by the assumption of that service, and the conditions and exigencies attaching thereto. It would be monstrous if a surgeon, upon demand and refusal of larger compensation, could lawfully abandon an operation partially performed, leaving his knife in the bleeding body of his patient. It would be monstrous if a body of surgeons, in aid of such demand, could lawfully combine and conspire to withhold their services. It was stated at the argument that this was not a fair illustration of the proposition, because human life was involved. I cannot perceive that the aptness of the illustration is weakened because of that fact. Whether the effect be the destruction of life or the destruction of property, the principle is the same. It would be intolerable if counsel were permitted to demand larger compensation, and to enforce his demand by immediate abandonment of his duty in the midst of a trial. It would be monstrous if the bar of a court could combine and conspire in aid of such extortion by one of its members, and refuse their service. I take it that in such case, if the judge of the court had proper appreciation of the duties and functions of his office, that court, for a time, would be without a bar, and the jail would be filled with lawyers. It cannot be conceded that an individual has the legal right to abandon service whenever he may please. His right to leave is dependent upon duty, and his duty is dictated and measured by the exigency of the occasion. Ordinarily, the aban-

donment of service by an individual is accompanied with so little of inconvenience, and with such slight resulting loss, that it is a matter of but little moment when or how he may quit the service. But, for all that, the principle remains, recognized by every just mind, that the quitting must be timely and decent, in view of existing conditions; and this I take it, was Judge Pardee's meaning by the expression, "peaceably and decently." He had occasionally only to deal with the particular facts he was considering, but the principle asserted is universal in its application. If what I have stated be correct as to individual action, the principle applies with greater force to the case of a combination of a large number of employes to abandon service suddenly, and without reasonable notice, with the result of crippling the operation of the railway and injuring the public. The effect in this particular instance would have proven disastrous. These labor organizations are said to represent three fourths of all the employes upon the railways within the United States—an army of many hundred thousands of men. The skilled labor necessary to the safe operation of a railway could not be readily supplied along 4000 miles of railway. The difficulty of obtaining substitutes in the place of those who should leave the service would be intensified by the fact, asserted and conceded at the argument, that no member of these large organizations would dare to accept service in the place of those who should leave, because such acceptance would be followed by expulsion from their order, and by social ostracism by their fellows. If this conspiracy had proven effective by failure on the part of the court to issue its preventive writ, this vast property would have been paralyzed in its operation, the wheels of an active commerce would have ceased to revolve, many portions of seven states would have been shut off in the midst of winter from necessary supply of clothing, food, and fuel, the mails of the United States would have been stopped, and the general business of seven states, and the commerce of the whole country passing over this railway, would have been suspended for an indefinite time. All these hardships and inconveniences, it is said, must be submitted to, that certain of these men, discontented

organization, with the design or purpose of causing a strike upon the lines of railroad operated by said receivers, and from ordering, recommending, approving, and advising others to quit the service of the receivers of the Northern Pacific Railroad Company on January 1, 1894, or at any other time, and from ordering, recommending, advising, or approving, by communication or instruction, or otherwise, the employes of said receivers, or any of them, or of said Northern Pacific Railroad Company, to join in a strike on said January 1, 1894, or at any other time, and from ordering, recommending, or advising any committee or committees, or class or classes of employes of said receivers, to strike or join in a strike, on January 1, 1894, or at any other time until the further order of this court.

The appellants as chief executive officers respectively of the brotherhood of locomotive engineers, the order of railway conductors, the brotherhood of locomotive firemen, the order of railway telegraphers, the brotherhood of railway trainmen and the switchmen's mutual aid association, appeared in court on behalf of themselves and their respective organizations and associations, as well as on behalf of such employes of the receivers as were members of those associations and organizations or of some of them, and moved that the court modify the orders and injunctions of December 19, 1893, and December 22, 1893—

1. By striking from both writs of injunction these words: "And from combining and conspiring to quit with or without notice the service of said receivers, with the object and intent of crippling the property in their cus-

tody or embarrassing the operation of said railroad, and from so quitting the service of said receivers with or without notice, as to cripple the property or prevent or hinder the operation of said railroad."

2. By striking from the writ of injunction of December 22, 1893, the above clause or paragraph relating specially to "strikes" which was not in the writ issued December 19, 1893.

The motion was in writing and upon its face purported to be based on the petition and supplemental petitions filed by the receivers, on the orders of the court made December 19 and 22, 1893, respectively, and on the above writs of injunction. Beyond the facts set out in those petitions, the only evidence adduced at the hearing of the motion was documentary in its nature, to wit, the constitutions and by-laws of the associations whose principal officers had been permitted to intervene in the cause.

The court upon the hearing of the motion modified the writ of injunction of December 22, 1893, by striking therefrom the above words in italics: "*And from ordering, recommending, approving, or advising others to quit the service of the receivers of the Northern Pacific railroad on January 1, 1894, or at any other time.*"

The grounds upon which these words were stricken from the second writ of injunction are thus stated in the opinion of the court:

"In fairness this clause must be read in the light of the statements of the petition. It was therein asserted to the court that the men would not strike unless ordered so to do by the executive heads of the national labor organizations; and that the men would obey such orders

with the conditions of their service, may combine and conspire, with the object and intent of crippling the property, to suddenly cease the performance of their duties. It is said that to restrain them from so doing is abridgment of liberty and infringement of constitutional right. I do not so apprehend the law. I freely concede the right of the individual to abandon service at a proper time, and in a decent manner. I concede the right of all the employes of this road, acting in concert, to abandon their service at a proper time, and in a decent manner; but I do not concede their right to abandon such service suddenly, and without reasonable notice.

The railway is a great public highway. Its primary duty is to the public. In the interest of the public it must be kept a going concern, although it prove unremunerative to the shareholders. Bondholders and shareholders invest their money in view of the public nature of the enterprise. Their rights and interests are subordinated to the public duty charged upon the road. And so also, employes, in entering the service, assume obligations coextensive in kind with that of the corporation. They may, indeed, sever their relation in a proper and decent manner, but they may not legally resort to obstructive methods to compass their demands. Their rights—as the rights of bondholder and shareholder—are subordinate to the rights of the public, and must yield to the public welfare. This public consideration permeates and controls the whole subject. The reason is forcibly stated by Judge Ricks in the case of *Toledo, A. & N. M. R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 746, 752, 19 L. R. A. 305; holding that the duties of an employe of a public corporation are such that he cannot always choose his own time for quitting the service. In the following language: "Holding to that employer so engaged in this great public undertaking the relation they did, they owed to him and to the public a higher duty than though their service had been due to a private person. They entered its service with full knowledge of the exacting duties it owed to the public. They knew if it failed to comply with the law in any respect, severe penalties and losses would fol-

low for such neglect. An implied obligation was therefore assumed by the employes upon accepting service from it under such conditions that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable loss and injuries and excessive damages by any acts or omissions on their part. One of these implied conditions on their behalf was that they would not leave its service, or refuse to perform their duties, under circumstances when such neglect on their part would imperil lives committed to its care, or the destruction of property involving irreparable loss or injury, or visit upon it severe penalties. In ordinary conditions, as between employer and employe, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. The remedy for breach of contract may follow to the employer, but the employe has it in his power to arbitrarily terminate the relations, and abide the consequence. But these relative rights and powers may become quite different in the case of the employes of a great public corporation, charged by the law with certain great trusts and duties to the public. An engineer and fireman who start from Toledo with a train of cars filled with passengers destined for Cleveland, begin that journey under contract to drive their engine and draw the cars to the destination agreed upon. Will it be claimed that this engineer and fireman could quit their employment when the train is part way on its route, and abandon it at some point where the lives of the passengers would be imperiled, and the safety of the property jeopardized? The simple statement of the proposition carries its own condemnation with it. The very nature of their service, involving as it does the custody of human life and the safety of millions of property, imposes upon them obligations and duties commensurate with the character of the trusts committed to them."

In the case under consideration the receivers sought to change the terms and conditions of service. The employes had, of course, the right to decline service upon the terms proposed. Notwithstanding the public character of the service,

instead of following the direction of the court. The clause is specially directed to the chiefs of the several labor organizations. The use of the words 'order, recommend, approve, or advise' was to meet the various forms of expression under which by the constitution or by-laws of these organizations the command was cloaked, as, for instance, in the one organization the chief head 'advises' a strike; in another he 'approves' a strike; in another he 'recommends' the quitting of employment. Whatever terms may be employed the effect is the same. It is a command which may not be disregarded, under penalty of expulsion from the order and of social ostracism. This language was employed to fortify the restraints of the other portions of the writ, and to meet the various disguises under which the command is cloaked. It was so inserted out of abundant caution, that the meaning of the court might be clear; that there should be no unwarrantable interference with this property, no intimidation, no violence, no strike. It was perhaps unnecessary, being comprehended within the clause restraining the heads of these organizations from ordering, recommending, or advising a strike, or joinder in a strike.

"It is said, however, that the clause restrains an individual from friendly advice to the employés as a body, or individually, as to their or his best interest in respect of remaining in the service of the receivers. Read in the light of the petitions upon which the injunction was founded, I do not think that such construction can be indulged by any fair and impartial mind. It might be used as a text for a declamatory address to excite the passions and preju-

dices of men, but could not, I think, be susceptible of such strained construction by a judicial mind. The language of a writ of injunction should, however, be clear and explicit, and, if possible, above criticism as to its meaning. Since, therefore, the language of this particular phrase may be misconceived, and the restraint intended is, in my judgment, comprehended within the other provisions of the writ, the motion in that respect will be granted and the clause stricken from the writ."

Except in the particulars mentioned in the opinion of the circuit court, the motion to modify the injunctions was denied and the injunctions continued in force. Of this action of the court the intervenors complain.

In considering the important questions presented by the record we have assumed, as did the circuit court, the truth of all the material facts set out in the petition and supplemental petition of the receivers. This is the necessary result of the intervenors having based their motion on those petitions, and on the orders of the court directing writs of injunction to be issued. As those orders were based on the petitions of the receivers, it must be taken that the intervenors, although insisting that the injunction should have been modified to the full extent indicated by their motion, concede for the purposes of the motion the facts to be as alleged in those petitions.

It is consequently to be regarded as undisputed in this cause that, at the time the writ of December 19, 1893, was issued, some of the railroad employés were giving it out and threatening that if the revised schedules and rates in question were enforced they would

upon notification of their declination at a time prior to January 1, 1894, reasonable in view of the service in which they were engaged, they had the undoubted right to abandon their employment upon that day. That, however, is not the case presented to and dealt with by the court. Nor does the rectitude of the writ of injunction rest upon any mere right of the employés in good faith to abandon their employment. The restraint imposed was with reference to combining and conspiring to abandon the service with the object and intent of crippling the property. Its office was to restrain the carrying into effect of the conspiracy.

Was such a conspiracy unlawful? So long ago as 1821, Judge Gibson,—"that Judge "of great and enduring reputation,"—in the case of *Com. v. Cartledge*, Brightley, 38 (the case of a combination of employers to depress the wages of journeymen by artificial means, declared that "a combination is criminal when the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates." He clearly asserts the principle upon which combinations of men may become unlawful as follows: "It will therefore be perceived that the motive for combining, or what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

The doctrine thus declared is fully established. *State v. Buchanan*, 5 Harr. & J. 817, 9 Am. Dec. 534; *State v. De Witt*, 2 Hill. L. 282, 27 Am. Dec. 371; *State v. Norton*, 23 N. J. L. 38; *State v. Donaldson*, 33 N. J. L. 151, 90 Am. Dec. 649; *State v. Burnham*, 15 N. H. 193; *State v. Gladden*, 55 Conn. 45; *Sherry v. Perkins*, 47 Mass. 212; *Smith v. Peuple*, 25 Ill. 17, 76 Am. Dec. 80; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710; *Re Higgins*, 21 Fed. Rep. 443; *Cœur d'Alene Consol.* &

Mtn. Co. v. Miners' Union of Wardner, 51 Fed. Rep. 280, 19 L. R. A. 382; *United States v. Workmen's Amalgamated Council of New Orleans*, 54 Fed. Rep. 904.

The reason is that the confederacy of numbers to effect an injurious object creates new and additional power to injure, and congregated numbers supply in law the place of actual violence. *State v. Stimpson*, 12 N. C. 504. And therefore, in conspiracy, the unlawful thing proposed, whether as a means or an end, need not be such as would be indictable if proposed to be done by an individual. 2 Bishop, *Crim. L.* 7th ed. § 181. I think the conclusion well summed up by Mr. Wright in his work on "The Law of Criminal Conspiracies," that a combination of men by concerted action, to accomplish some object not criminal, by means which are not criminal, but where mischief to the public is involved; or where neither the object nor the means are criminal, but where injury and oppression are the result,—is a conspiracy condemned by law. That this is the general law of the land, is recognized in those states which, by statute in respect to labor organizations, have changed the general rule. Thus the state of New Jersey passed a statute to this effect: "It shall not be unlawful for any two or more persons to unite, combine, or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage by peaceable means any person or persons to enter into any combination for or against leaving or entering into the employment of any person or persons or corporations."

The supreme court of that state, in the case of *Mayer v. Journeymen Stonecutters' Assn.*, 47 N. J. Eq. 519, 581, declared that by that statute "the policy of the law with respect to such combinations was revolutionized, and what before that time would have been held to have been an unlawful combination and conspiracy, became in this state a lawful association, and acts which had been the subject of indictment became inoffensive to any provision of our law." And to the same effect is the case of *Com. v. Sheriff*, 10 Phila. 393, under the Statute of Pennsylvania of June 14, 1872, and the supplemental Act of April 20, 1876.

suddenly quit the service of the receivers; by threats, force, and violence, would compel other employes to quit such service and, by organized effort and intimidation, prevent others from taking the places of those who might quit; would disable locomotives and cars so that they could not be safely used or used only after expensive repairs; would take possession of the cars, engines, shops, and roadbeds in the possession of the receivers, and otherwise prevent their being used; would so conduct themselves with regard to the property in the hands of the receivers as to hinder and embarrass them, their officers and agents in its management and in the operation of trains, and that such dissatisfied employes, and others not in the employ of the receivers, but co-operating with those employes from a spirit of sympathy or mischief, would, unless restrained by the order of court, have carried out their threats, with the result that the receivers would not only have been compelled to abandon the revised schedules and rates proposed to be enforced, but would have been disabled from operating the railroads in their custody, from discharging their duties to the public as carriers of passengers and freight, and from transporting the mails of the United States, bringing thereby incalculable loss upon the trust property, as well as causing inconvenience and hardship to the public, particularly to the people in that part of the country traversed by the Northern Pacific Railroad, who are dependent upon the regular, continuous operation of that road for commercial facilities of every kind, as well as for fuel, provisions, and clothing.

It will be observed that the motion of the intervenors does not question the power of the court to restrain acts upon the part of the employes or others which would have directly interfered with the receivers' possession of the trust property or obstructed their control and management of it as well as attempts by force, intimidation, or threats or otherwise to molest or interfere with persons who remain in the service of the receivers or with others who were willing to take the places of those withdrawing from such service.

But it was contended that the circuit court exceeded its powers when it enjoined the employes of the receivers "from combining conspiring to quit with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad, and from so quitting the service of said receivers with or without notice as to cripple the property or prevent or hinder the operation of said railroad."

This clause embodies two distinct propositions: one, relating to combinations and conspiracies to quit the service of the receivers with the object and intent of crippling the property or embarrassing the operation of the railroads in their charge; the other, having no reference to combinations and conspiracies to quit or to the object and intent of any quitting, but only to employes "so quitting" as to cripple the property or prevent or hinder the operation of the railroad.

Considering these propositions in their inverse order, we remark that the injunction

It becomes necessary, then, to consider whether there is any statute, national or state, applicable to the railway in question, which can be deemed to be a modification of the general law of the land. It was asserted at the argument with great confidence that the act of congress entitled "An act to legalize incorporation of national trades' unions" (24 Stat. at L. chap. 587) had entirely changed the common law. I think the confidence of counsel in the assertion of the proposition was born of zeal, not of judgment. The statute provides for the formation of national trades' unions, with power to establish constitution, rules, and by-laws to carry out its lawful objects, and defines the term "national trades' union" to be "any association of working people having two or more branches in the states or territories of the United States for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages, and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of the sick, disabled or unemployed members, or the families of deceased members, or for such other object or objects for which workmen may lawfully combine, having in view their mutual protection or benefit." The most that can be claimed for this statute is that it removes the common law disability of combination to raise the price of labor, and to establish the conditions of labor. It contains no suggestion of any right to combine or conspire with a view to injure or oppress or interfere with the rights of others. The organization of labor for the purpose specified in the statute is lawful and commendable, but the statute does not sanction the use of a lawful organization for an unlawful purpose. Nor does it permit such organization to invade the rights of others. Under this act, labor may organize to regulate wages, the hours of labor, and the conditions of labor, and for the protection of individual rights in the prosecution of labor; but such lawful organization cannot be employed to injure property, or for the oppression of others, or to harm the public welfare. There is nothing in

the statute which sanctions that which the law, as above declared, condemns.

The Statutes of Wisconsin (Sanborn & Berryman, Rev. Stat. § 4466a) render it unlawful for "two or more persons to combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his reputation, trade, business, or profession, by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act." By section 4466c it is rendered unlawful for any person, by threats, intimidation, force, or coercion of any kind, to hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as wage worker, or to attempt to so hinder or prevent. By section 4488d a punishment is provided for any one who, individually or in association with others, shall willfully injure or interfere with or prevent the running or operation or shall destroy any locomotive engine or cars or machinery. These statutes are declaratory of the common law, and wholly condemn all conspiracies to injure or oppress, or to interfere with the rights of others. Their efficacy is in no degree impaired by any statutory recognition of the right of organization for the purpose of promoting the welfare of labor. I have been referred to no statute in any state traversed by the Northern Pacific Railroad, and have been able to find none, which in any way changes the law in this regard. I think no state has gone so far in modification of the general rule as have the states of New Jersey and Pennsylvania. But there, as elsewhere, all labor organizations must be for lawful objects, to be accomplished by lawful means. If the ostensible purpose be legal, and the means for its accomplishment legal, still, if the real and secret purpose be illegal,—as for example, that purpose be of extortion or of injury to another,—the wrong cannot be shielded under the guise of a lawful organization. And where the object is to be accomplished by violence, intimidation, and the destruction of property, by coercion and by injury to the public, the organization, although formed

against employés so quitting as to cripple the property or prevent or hinder the operation of the railroad was equivalent to a command by the court that they should remain in the active employment of the receivers, and perform the services appropriate to their respective positions, until they could withdraw without crippling the property or preventing or hindering the operation of the railroad. The time when they could quit without violating the injunction is not otherwise indicated by the order of the court.

Under what circumstances may the employés of the receivers of right quit the services in which they are engaged? Much of the argument of counsel was directed to this question. We shall not attempt to lay down any general rule applicable to every case that may arise between employer and employés. If an employe quits without cause and in violation of an express contract to serve for a stated time, then his quitting would not be of right, and he would be liable for any damages resulting from a breach of his agreement, and perhaps, in some states of case, to criminal prosecution for loss of life or limb by passengers or others directly resulting from abandoning his post at a time when care and watchfulness was required upon his part in the discharge of a duty he had undertaken to perform. And it may be assumed for the purposes of this discussion that he would be liable in like manner where the contract of service, by necessary implication arising out of the nature or the circumstances of the employment required him not to quit the service of his

employer suddenly and without reasonable notice of his intention to do so.

But the vital question remains whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal service of another? An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called or of which we are aware. It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States or in any place subject to their jurisdiction. Courts of equity have sometimes sought to sustain a contract for services requiring special knowledge or peculiar skill, by enjoining acts or conduct that would constitute a breach of such contract. To this class belong the cases of singers, actors, or musicians who, after agreeing for a valuable consideration to give their professional service at a named place and during a specified time for the benefit of certain parties, refused to meet their engagement and undertake to appear during the same period for the benefit of other parties at other places. *Lumley v. Wagner*, 1 De G. M. & G. 604, 617, 5 De G. & S. 485, 16 Jur. 871; *Montague v. Flockton*, L. R. 16 Eq. 189. While in such cases the singer, actor, or musician has been enjoined from appearing during the period named at a place and for parties different from

for an ostensible legal object, is diverted to illegal purposes, and is to that extent unlawful.

Applying the principles of law, as I thus find them established, to the case in hand as presented by the original petition for the writ, it is clear that the facts charged presented to the court the case of an unlawful conspiracy. If it be conceded that the entire force of 12,000 men employed upon this railway had the legal right to abandon the service in a body, that right must be asserted and exercised in good faith. The abandonment of service must be actual not pretentious. The combination cannot be justified on the plea of the lawful exercise of a right when the threatened abandonment of service is a mere pretext, the real intent and design being to cripple the property, and to hinder and prevent the operation of the road; and such was the conspiracy declared to the court,—not denied, but contested by the present motion. It was a conspiracy to compel by intimidation the receivers of the railway against their will to accede to the demands of the conspirators, and, therein failing, to cripple this property, and prevent the operation of the road, the necessary result of which would be to inflict great loss upon the public. The conspiracy disclosed was a conspiracy to extort, and failing to extort, to injure; the pretentious exercise of the right to abandon service being one of the means to effect the object of the conspiracy. If the right to quit service in a body be conceded, the case presented is the ostensible exercise of a lawful right, not in good faith, but for an unlawful purpose, to wit, the intimidation and oppression of others, and the injury to property in their keeping, tending to the prejudice of the public. Such a conspiracy is unlawful. It may also be properly said that the conspiracy was as needless as its results would have been disastrous. This vast property was in the custody of the court, through its receivers. By the schedules which for some years had been in force in the operation of this road, as well as by the new schedules proposed to be adopted by the receivers, a thorough civil service had been established in the management of this railway, recognizing by systematic promotion length of service and skillful and honest performance of labor. The service contemplated was continuous and perma-

nent. No man could be discharged except for cause, of which he was to be informed. The right of a hearing upon such charge was secured to him, with right of successive appeals to the superior officers of the road. The employe, however, had the right to abandon his employment at any time. Thus capital and labor co-operated to assure employment, the reward of skill and faithfulness, and protection from discharge from service, except for justifiable cause. This operated to render the service efficient, conserving the interests of both capital and labor, and advancing the public welfare. It was natural, and to be expected, that in consequence of financial disaster there would arise the question of the reduction of wages. An employe, deeming himself wronged by the action of the receivers in respect thereto, had peaceful remedy. The court was at all times open to him to listen to his complaint, and to redress it, if it should appear to be well founded. Upon such application the receivers would be bound to obey the order of the court in the premises. The employe, nevertheless, not content with the judgment of the court, would have the right to abandon his employment. The case furnishes, as was suggested by counsel, an exceptional instance, where one party to a proceeding in a judicial tribunal is bound by the decision and the other is not. There was, therefore, neither justification nor excuse for a conspiracy to hinder and prevent the operation of this railway, nor necessity for combination for the assertion of any legal right. But, if there were no remedy for the employe except abandonment of service, the law will not sanction a conspiracy, the purpose of which is to extort from the receivers or from the court concessions which they could not properly yield, and, failing to procure them, to hinder and prevent, by the means declared, the operation of this railway, to the injury of the trust, and to the oppression of the public. Such was the combination and conspiracy here disclosed. It was to the prevention of the injury thus contemplated that this writ was directed. Its issuance, in my judgment, is justified by the law.

The second branch of the motion has reference to the writ of injunction issued upon the supple-

those specified in his first engagement, it was never supposed that the court could by injunction compel the affirmative performance of the agreement to sing, or to act, or to play. In *Powell Duffryn Steam Coal Co. v. Taff Vale R. Co.* L. R. 9 Ch. App. 331, 335, Lord Justice James observed that when what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labor and care, the court has never found its way to do this by injunction. In the same case Lord Justice Mellish stated the principle still more broadly, perhaps too broadly, when he said that a court can only order the doing of something which has to be done once for all, so that the court can see to its being done.

The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employé of merely personal services any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. The right of employes engaged to perform personal service to quit that service rests upon the same basis as the right of an employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract between the parties, the one injured by the breach has his action for damages, and a court of equity will not, indirectly or negatively by means of an injunction restrain the violation of the contract, compel the affirmative performance from day to day or the affirmative

acceptance of merely personal services. Relief of that character has always been regarded as impracticable. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 54 Fed. Rep. 730, 740, 19 L. R. A. 395, Taft, J., and authorities cited; Fry, Spec. Perf. Cont. 3d Am. ed. §§ 87, 91, and authorities cited.

It is supposed that these principles are inapplicable or should not be applied in the case of employes of a railroad company which, under legislative sanction, constructs and maintains a public highway primarily for the convenience of the people, and in the regular operation of which the public are vitally interested. Undoubtedly the simultaneous cessation of work by any considerable number of the employes of a railroad corporation without previous notice will have an injurious effect and for a time inconvenience the public. But these evils, great as they are, and although arising in many cases from the inconsiderate conduct of employes and employers, both equally indifferent to the general welfare, are to be met and remedied by legislation restraining alike employes and employers so far as necessary adequately to guard the rights of the public as involved in the existence, maintenance, and safe management of public highways. In the absence of legislation to the contrary, the right of one in the service of a quasi public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such corporations to discharge an employe from service whenever they see fit, must be deemed so far absolute that no court of equity will compel one against his will

mental petition of the receivers, restraining any combination or conspiracy having for its purpose the inauguration of a strike upon the lines of the railway operated by the receivers, and from ordering, advising, or approving, by communication or instruction or otherwise, the employes of the receivers to join in a strike. This part of the motion presents the issue whether a strike is lawful. The answer must largely depend upon the proper definition of the term. It has been variously defined. By Worcester, "To cease from work in order to extort higher wages as workmen;" by Webster, "To quit work in a body, or by combination in order to compel their employers to raise their wages;" the *Encyclopedic Dictionary*, "The act of workmen in any trade or branch of industry when they leave their work with the object of compelling the master to concede certain demands made by them, —as an advance of wages, the withdrawal of a notice of reduction of wages, a shortening of the hours of work, the withdrawal of any obnoxious rule or regulation, or the like;" the *Imperial Dictionary*, "To quit work in order to compel an increase or prevent a reduction of wages;" the *Century Dictionary*, "To press a claim or demand by coercive or threatening action of some kind; in common usage, to quit work along with others, in order to compel an employer to accede to some demand, as for increase of pay or to protest against something, as a reduction of wages; as to strike for higher pay, or shorter hours of work;" Bouvier defines it: "A combined effort of workmen to obtain higher wages or other concessions from their employers by stopping work at a preconcerted time." The definition sanctioned by the court of appeals of New York in *Delaware, L. & W. R. Co. v. Bouns*, 58 N. Y. 561, and embodied by Mr. Anderson in his *Law Dictionary*, is: "A combination among laborers, or those employed by others, to compel an increase of wages, change in the hours of labor, a change in the manner of conducting the business of the principal, or to enforce some particular policy in the character or the number of men employed, or the like." Mr. Black in his *Law Dictionary*, defines it to be: "The act of a party of workmen employed by the same master, in stopping work all together at a preconcerted time, and re-

fusing to continue, until higher wages or shorter time or some other concession is granted to them by the employer." Whichever definition may be preferred, —and possibly no one of them is precisely accurate, —there are running through all of them two controlling ideas: First, by compulsion to extort from the employer the concession demanded; second, a cessation of labor, but not the abandonment of employment. The stoppage of work is designed to be temporary, continuing only until the accomplishment of the design, and upon its accomplishment the resumption of employment. The cessation of labor is not a bona fide dissolution of contractual relations and an abandonment of the employment, but is designed as a means of coercion to accomplish the desired result. The cessation of labor is prearranged by the body of men through their organizations, and is to take effect simultaneously at a stated time, for the purpose of preventing the master from continuing his business, and to compel him to submit to the dictation of his servants. The definition of the term proffered to the court at the argument, recognized by the labor organizations of the country, was this: "A strike is a concerted cessation of or refusal to work until or unless certain conditions which obtain or are incident to the terms of the employment are changed. The employé declines to longer work, knowing full well that the employer may immediately employ another to fill his place; also knowing that he may or may not be re-employed or returned to service. The employer has the option of acceding to the demand and returning the old employes to service, of employing new men, or of forcing conditions under which the old men are glad to return to service under the old conditions." This latter definition recognizes the idea of cessation of labor, but not an abandonment of employment. It suggests that the latter may result at the option of the master. It does not, in terms, declare a combination to extort, or to oppress, or to interfere in any way with the business of the employer, except as injury might result as an incident to the cessation of service. If the latter be the correct definition of a strike, society has been needlessly alarmed. I doubt if, in the light of the history of strikes, the

to remain in such service or actually to perform the personal acts required in such employment or compel such managers against their will to keep particular employes in their service. It was competent for the receivers in this case, subject to the approval of the court, to adopt a schedule of wages or salaries, and say to employes: "We will pay according to this schedule, and if you are not willing to accept such wages you will be discharged." It was competent for an employé to say: "I will not remain in your service under that schedule, and if it is to be enforced I will withdraw, leaving you to manage the property as best as you may, without my assistance." In the one case, the exercise by the receivers of their right to adopt a new schedule of wages could not, at least in the case of a general employment without limit as to time, be made to depend upon considerations of hardship and inconvenience to employes. In the other, the exercise by employes of their right to quit in consequence of a proposed reduction of wages could not be made to depend upon considerations of hardship or inconvenience to those interested in the trust property or to the public. The fact that employes of railroads may quit under circumstances that would show bad faith upon their part or a reckless disregard of their contract or of the convenience and interests of both employer and the public, does not justify a departure from the general rule that equity will not compel the actual, affirmative performance of merely personal services, or (which is the same thing) require employes against their will

to remain in the personal service of their employer.

The result of these views is that the court below should have eliminated from the writ of injunction the words "and from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad."

But different considerations must control in respect to the words in the same paragraph of the writs of injunction, "and from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad." We have said that if employes were unwilling to remain in the service of the receivers for the compensation prescribed for them by the revised schedules, it was the right of each one on that account to withdraw from such service. It was equally their right, without reference to the effect upon the property or upon the operation of the road, to confer with each other upon the subject of the proposed reduction in wages and to withdraw in a body from the service of the receivers because of the proposed change. Indeed, their right as a body of employes affected by the proposed reduction of wages, to demand given rates of compensation as a condition of their remaining in the service was as absolute and perfect as was the right of the receivers representing the aggregation of persons, creditors, and stockholders interested in the trust property, and the general public, to fix the rates they were willing to pay

child would be recognized by this baptismal name. One who has read the history of the strike at Homestead, with its cruel murders and barbarous torture; one who has read of the various strikes on railroads, when cars were fired, rails torn up, engines demolished, and life destroyed; one who has read of the not infrequent summoning of the militia by the authorities of the state to put down riot and turbulence,—the universal concomitants of a strike,—would hardly yield assent to the definition suggested as even faintly conveying the true idea of a strike, as known of all men. The only force suggested is the force of inertia, the compulsion wrought by cessation from labor. Such a strike would be a harmless affair, and generally inoperative to effect the end designed. It could be availing only by the combination of the entire labor force of the country, in the nature of things impracticable. Unless, by other coercive measures, the employer is prevented from obtaining men in the place of those who should cease to work, a strike would be a mere weapon of straw. That is well understood by these organizations. While, according to the definition, the employé knows "full well that the master may immediately hire another to fill his place," he also knows full well that that must, at all odds, be prevented if the strike is to be made successful. Consequently the organizations provide, as confessed at the argument, for the expulsion and social ostracism of all members of the organizations who should not abandon work when the order to strike is given, or who should seek to fill the place of a striking member. Thus one of the most effective engines of compulsion is brought to bear upon unwilling members to effect the design of the combination. With respect to laborers not members and willing to work, other and not less effective means of intimidation must be and are employed in prevention of labor. The history of strikes declares that this intimidation has always taken the shape of threats and personal violence. Constructive violence has failed in large measure to prevent the continuance of operation of business by the master. Naturally, therefore, we find resort to actual violence, the destruction of property, the disabling of railway trains, and the like.

Of the ideal strike, in the definition proposed at the argument, the only criticism, to be indulged in that it is ideal, and never existed in fact. Undoubtedly, in the absence of restrictive contract, workmen have a right by concerted action to cease work to procure better terms of service, no compulsion being used except that incident to the cessation; subject, however, to the qualification, at least with respect to those employments that directly concern the public welfare, that reasonable notice of the quitting should be given. But such is not the strike of history. The definition suggested is misleading and pretentious. To my thinking, a much more exact definition of a strike is this: A combined effort among workmen to compel the master to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand. The concerted cessation of work is but one of, and the least effective of, the means to the end; the intimidation of others from engaging in the service, the interference with, and the disabling and destruction of property, and resort to actual force and violence, when requisite to the accomplishment of the end, being the other, and more effective, means employed. It is idle to talk of a peaceable strike. None such ever occurred. The suggestion is impeachment of intelligence. From first to last, from the earliest recorded strike to that in the state of West Virginia, which proceeded simultaneously with the argument of this motion, to that at Connellsville, Pa., occurring as I write, force and turbulence, violence and outrage, arson and murder, have been associated with the strike as its natural and inevitable concomitants. No strike can be effective without compulsion and force. That compulsion can only come through intimidation. A strike without violence would equal the representation of the tragedy of Hamlet with the part of Hamlet omitted. The moment that violence becomes an essential part of a scheme, or a necessary means of effecting the purpose of a combination, that moment the combination, otherwise lawful, becomes illegal. All combinations to interfere with perfect freedom in the proper management and control of one's lawful business, to dictate the terms upon which such business shall be con-

their respective employes. But that is a very different matter from a combination and conspiracy among employes, with the object and intent not simply of quitting the service of the receivers because of the reduction of wages, but of crippling the property in their hands and embarrassing the operation of the railroad. When the order for the original injunction was applied for it was represented—and the intervenors admit by their motion that it was correctly represented—that unless the restraining power of the court was exerted the dissatisfied employes and others co-operating with them would physically disable and render unfit for use the cars and other property in the possession of the receivers, and by force, threats, and intimidation used against employes remaining in their service and against those desiring to take the places of those quitting, would prevent the receivers from operating the roads in their custody and from discharging the duties which they owed on behalf of the corporation to the parties interested in the trust property, to the government and to the public.

The general inhibition upon combinations and conspiracies formed with the object and intent of crippling the property and embarrassing the operation of the railroad, must be construed as referring only to acts of violence, intimidation, and wrong of the same nature or class as those specifically described in the previous clauses of the writ. We do not interpret the words last above quoted as embracing the

case of employes who, being dissatisfied with the proposed reduction of their wages, merely withdraw on that account, singly or by concerted action, from the service of the receivers, using neither force, threats, persecution nor intimidation towards employes who do not join them, nor any device to molest, hinder, alarm or interfere with others who take or desire to take their places. We use the word "device" here as applicable to cases like that of *Sherry v. Perkins*, 147 Mass. 212, in which it appeared that parties belonging to a labor organization displayed and maintained certain banners in front of the plaintiff's place of business for the purpose of deterring workmen from remaining in or entering his service. As the acts complained of were injurious to the plaintiff's business and were a nuisance, it was held that they could be reached and restrained by injunction. So in *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551, equity interfered by injunction to restrain the conduct of parties, officers of a trades union, who gave notice to workmen by means of placards and advertisements that they were not to hire themselves to the plaintiff pending a dispute between the union and the plaintiff. See also *United States v. Kane*, 28 Fed. Rep. 748; *Emack v. Kane*, 34 Fed. Rep. 46; *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 135, 12 L. R. A. 193; *Walker v. Cronin*, 107 Mass. 555.

These employes having taken service first with the company and afterwards with the re-

ducted, by means of threats or by interference with property or traffic or with the lawful employment of others, are within the condemnation of the law. It has well been said that the wit of man could not devise a legal strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence; the means employed to effect the end being not only the cessation of labor by the conspirators, but the necessary prevention of labor by those who are willing to assume their places, and, as a last resort, and in many instances an essential element of success, the disabling and destruction of the property of the master; and so, by intimidation and by the compulsion of force, to accomplish the end designed. I know of no peaceable strike. I think no strike was ever heard of that was or could be successful unaccompanied by intimidation and violence. Counsel at the argument could recall but one which he was willing to indorse as peaceable. That was the strike upon the Lehigh Valley Railroad during the year 1883. The history of that occurrence does not carry out the declaration of counsel. There, as I understand, the running of trains was constantly interfered with, engines and cars disabled and wrecks caused by the violence of the strikers. The president of the company reported to his board of directors that the loss to freight and equipment by reason of the strike—which continued for less than three weeks—was \$77,000, of which amount \$46,000 was for damage done to locomotives alone. And that strike was not successful, the violence being insufficient. The history and legality of strikes has been well told by Mr. Justice Brewer, of the Supreme Court of the United States, in an admirable address before the New York Bar Association in January, 1893, in language that should be taken to heart by every one who has regard to the safety and peace of society, and the protection of our institutions.

"The common rule," says Mr. Justice Brewer, "as to strikes is this: Not merely do the employes quit the employment, and thus handicap the employer in the use of his property, and perhaps in the discharge of duties which he owes to the public, but they also forcibly prevent others from taking their places. It is useless to say that they only advise; no man is misled. When a thousand laborers gather around a railroad track, and say to those who seek employment that they had better not,

and when that advice is supplemented every little while by a terrible assault on one who disregards it, every one knows that something more than advice is intended. It is coercion; force; it is the effort of the many, by the mere weight of numbers, to compel the one to do their bidding. It is a proceeding outside of the law, in defiance of the law, and in spirit and effect an attempt to strip from one that has that which of right belongs to him,—the full and undisturbed use and enjoyment of his own. It is not to be wondered at that deeds of violence and cruelty attend such demonstrations as these; nor will it do to pretend that the wrongdoers are not the striking laborers, but lawless strangers who gather to look on. Were they strangers who made the history of the Homestead strike one of awful horror? Were they women from afar who so maltreated the surrendered guards, or were they the very ones who sought to compel the owners of the property to do their bidding? Even if it be true that at such places the lawless will gather, who is responsible for their gathering? Weir, the head of a reputable labor organization, may open the door to lawlessness, but Beekman, the anarchist and assassin, will be the first to pass through; and thus it will be, always and everywhere.

This is the struggle of irresponsible persons and organizations to control labor. It is not in the interests of liberty; it is not in the interest of individual or personal rights. It is an attempt to give to the many a control over the few,—a step towards despotism. Let the movement succeed, let it once be known that the individual is not free to contract for his personal services, that labor is to be farmed out by organizations, as to-day by the Chinese companies, and the next step will be a direct effort on the part of the many to seize the property of the few."

No word of mine could give added strength to the thought suggested. The strike has become a serious evil, destructive to property, destructive to individual right, injurious to the conspirators themselves, and subversive of republican institutions. Certainly no court should give encouragement to any combination thus destructive of the very fabric of our government, tending to the disruption of society, and the obliteration of legal and natural rights. Whatever other doctrine may be asserted by reckless agitators, it must ever remain the duty of the courts, in the protection of society,

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ceivers under a general contract of employment which did not limit the exercise of the right to quit the service, their peaceable co-operation, as the result of friendly argument, persuasion, or conference among themselves, in asserting the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal or criminal, although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public. If in good faith and peaceably they exercise their right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free action of others, they cannot be legally charged with any loss to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they were willing to remain in the service. Such a loss, under the circumstances stated, would be incidental to the situation and could not be attributed to employes exercising lawful rights in orderly ways or to the receivers when in good faith and in fidelity to their trust they declare a reduction of wages and thereby cause dissatisfaction among employes and their withdrawal from service.

The combinations or conspiracies which the law does not tolerate are of a different character. According to the principles of the common law, a conspiracy upon the part of two or

more persons with the intent by their combined power to wrong others or to prejudice the rights of the public, is in itself illegal although nothing be actually done in execution of such conspiracy. This is fundamental in our jurisprudence. So a combination or conspiracy to procure an employe or body of employes to quit service in violation of the contract of service would be unlawful, and in a proper case might be enjoined if the injury threatened would be irremediable at law. It is one thing for a single individual or for several individuals each acting upon his own responsibility and not in co-operation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing in the eye of the law for many persons to combine or conspire together with the intent not simply of asserting their rights or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public. An intent upon the part of a single person to injure the rights of others or of the public, is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent and under circumstances that give them when so combined a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal.

The general principle is illustrated in *Callan*

and in the execution of the laws of the land, to condemn, prevent, and punish all such unlawful conspiracies and combinations. Of this duty it was forcibly said by Judge Baker, of the district of Indiana, under like circumstances, in the *Lake Erie & Western Cases*: "It may do for men that are reckless of the welfare of human society, who care nothing for its peace and good order, to imperil life, property, and liberty, and the perpetuity of our institutions by teaching such doctrines; but the judge who tolerates it ought to be stripped of his gown, and be driven from the sacred temple of justice."

The wrongs of labor are not to be righted by war upon society, by turbulence and disorder, by oppression and force. Such action alienates sympathy, and provokes resentment. In this land, only by peaceable means in the courts, and through the lawmaking power, can wrongs be redressed, and justice be established. Let combined labor deal with combined capital, but only in ways sanctioned by the law. When this lesson is learned, and becomes the rule of conduct, labor will acquire in a decade greater privileges and surer protection from wrong than could be extorted by a century of violence.

By the Act of Congress of July 2, 1890 (26 Stat. at L. chap. 647), every combination in restraint of trade or commerce among the several states is declared to be illegal. Under this act it was held by Judge Speer in *Waterhouse v. Comer*, 55 Fed. Rep. 149, 19 L. R. A. 408, that a strike, if it ever was effective, can be so no longer; and this view seems to have been held by Judge Billings in the case of *United States v. Workington's Amalgamated Council of New Orleans*, 54 Fed. Rep. 994. On the other hand, Judge Putnam, in *United States v. Patterson*, 55 Fed. Rep. 605, is inclined to the view that the statute has no relation to labor organizations. I do not find it needful to enter into this field of discussion, or to express an opinion upon the subject, being content to rest my conclusion upon the grounds discussed.

One clause of the supplemental injunction has been characterized as wholly unwarranted. That clause is: "And from ordering, recommending, approving, or advising others to quit the service of the receivers of the Northern Pacific Railroad on January 1, 1894, or at any other time." In fairness, this clause must be read in the light of the state-

ments of the petition. It was therein asserted to the court that the men would not strike unless ordered so to do by the executive heads of the national labor organizations, and that the men would obey such orders instead of following the direction of the court. This clause is specially directed to the chiefs of the several labor organizations. The use of the words, "order, recommend, approve, or advise," was to meet the various forms of expression under which by the constitution or by-laws of these organizations the command was cloaked,—as, for instance, in the one organization the chief head "advises" a strike, in another he "approves" a strike, in another he "recommends" the quitting of employment. Whatever terms may be employed, the effect is the same. It is a command which may not be disregarded, under penalty of expulsion from the order and of social ostracism. This language was employed to fortify the restraints of the other portions of the writ, and to meet the various disguises under which the command is cloaked. It was so inserted out of abundant caution, that the meaning of the court might be clear, that there should be no unwarrantable interference with this property, no intimidation, no violence, no strike. It was perhaps unnecessary, being comprehended within the clause restraining the heads of these organizations from ordering, recommending, or advising a strike, or joiner in a strike. It is said, however, that the clause restrains an individual from friendly advice to the employes as a body or individually, as to their or his best interest in respect of remaining in the service of the receivers. Read in the light of the petitions upon which the injunction was founded, I do not think that such construction can be indulged by any fair and impartial mind. It might be used as a text for a declamatory address to excite the passions and prejudices of men, but could not, I think, be susceptible of such strained construction by a judicial mind. The language of a writ of injunction should, however, be clear and explicit, and, if possible, above criticism as to its meaning. Since, therefore, the language of this particular phrase may be misconceived, and the restraint intended is, in my judgment, comprehended within the other provisions of the writ, the motion in that respect will be granted, and the clause stricken from the writ.

In all other respects the motion will be denied.

v. *Wilson*, 127 U. S. 540, 555, 32 L. ed. 228, 228. That was an information in the police court of the District of Columbia charging the defendants Callan and others with a conspiracy to prevent certain named persons, who had been expelled from a local association, a branch of a larger one known as the knights of labor of America, from pursuing their calling of musicians anywhere in the United States. This result, the information charged, was to be effected by the defendants refusing to work as musicians or in any other capacity with the persons so named, or with or for any person, firm, or corporation working with or employing them; by procuring all other members of those organizations, and all other workmen and tradesmen, not to work in any capacity with or for them or either of them or for any firm or corporation that employed either of them; and by warning and threatening every person, firm, or corporation employing such obnoxious persons that if they did not forthwith cease to employ and refuse to employ them, they should not receive the custom or patronage either of the persons so conspiring or of other members of said organizations. The question in the case was whether the accused were entitled to a trial by jury or whether the offense charged was of the class called "petty," for the trial of which a defendant could not at common law claim, of right, a jury. The court held that the offense charged was not a petty or trivial one but one of a grave character, affecting the public at large, and for the trial of which a jury was therefore demandable as of right.

Among the authorities cited in that case were *Com. v. Hunt*, 4 Met. 111, 121, 38 Am. Dec. 846, in which it was said that "the general rule of the common law is that it is a criminal and indictable offense, for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal to the injury of the public, or portions or classes of the community, or even to the rights of an individual; *State v. Burnham*, 15 N. H. 396, 401, where it was held that "combinations against law or against individuals are always dangerous to the public peace and to public security; to guard against the union of individuals to effect an unlawful design is not easy, and to detect and punish them is often extremely difficult;" and *Reg. v. Parnell*, 14 Cox, C. C. 508, where the court observed, that "an agreement to effect an injury or wrong to another by two or more persons is constituted an offense, because the wrong to be effected by a combination assumes a formidable character; when done by one alone it is but a civil injury, but it assumes a formidable or aggravated character when it is to be effected by the powers of a combination."

One of the cases cited in *Callan v. Wilson* is *Com. v. Carlise*, Bright. (Pa.) 36, 39, 40, in which Mr. Justice Gibson considered the law of conspiracy with care and among other things said: "There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and action, but regulates the motion of the whole. The effort of an individual to disturb

this equilibrium can never be perceptible, nor carry the operation of his interest or that of any other individual beyond the limits of fair competition; but the increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual."

There are many other adjudged cases to the same effect. In *State v. Stewart*, 59 Vt. 373, 286, 59 Am. Rep. 710, it was held after an extended review of the authorities that "a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute, or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common law conspiracy. Such combinations are equally illegal whether they promote objects or adopt means that are *per se* indictable, or promote objects or adopt means that are *per se* oppressive, immoral, or wrongfully prejudicial to the rights of others. If they seek to restrain trade, or tend to the destruction of the material property of the country, they work injury to the whole people." In *State v. Buchanan*, 5 Harr. & J. 817, 852, 355, 9 Am. Dec. 584, the court of appeals of Maryland adjudged that "every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected, which may be perfectly indifferent, and makes no ingredient of the crime, and, therefore, need not be stated in the indictment." Again: "There is nothing in the objection, that to punish a conspiracy where the end is not accomplished, would be to punish a mere unexecuted intention. It is not the bare intention that the law punishes, but the act of conspiring, which is made a substantive offense by the nature of the object to be effected." In *State v. Glidden*, 55 Conn. 46, the court said: "Any one man, or any one of several men acting independently, is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its number increases. . . . The combination becomes dangerous and subversive of the rights of others, and the law wisely says that it is a crime." In *Reg. v. Kenrick*, 5 Q. B. 49, Chief Justice Denman said that by the law of conspiracy as it had been administered for at least the previous hundred years any combination to prejudice another unlawfully was considered as constituting the offense, and that the offense consisted in the conspiracy and not in the acts committed for carrying it into effect.

See also *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Old Dominion SS. Co. v. McKenna*, 30 Fed. Rep. 48; *Cœur d'Alene Canal & Min. Co. v. Miners' Union of Wardner*, 51

Fed. Rep. 260, 287, 19 L. R. A. 382; 3 Whart. Crim. L. 8th ed. §§ 1887 *et seq.*; 2 Archbold, Cr. Pr. & Pl. Pomeroy's ed. 1880, *note*; 2 Bishop, Crim. L. §§ 180 *et seq.*

It seems entirely clear upon authority that any combination or conspiracy upon the part of these employes would be illegal which has for its object to cripple the property in the hands of the receivers and to embarrass the operation of the railroads under their management, either by disabling or rendering unfit for use, engines, cars or other property in their hands, or by interfering with their possession, or by actually obstructing their control and management of the property, or by using force, intimidation, threats or other wrongful methods against the receivers or their agents or against employes remaining in their service, or by using like methods to cause employes to quit or prevent or deter others from entering the service in place of those leaving it. Combinations of that character disturb the peace of society, and are mischievous in the extreme. They imperil the interests of the public, which may rightfully demand that the free course of trade shall not be unreasonably obstructed.

They endanger the personal security and the personal liberty of individuals who, in the exercise of their inalienable privilege of choosing the terms upon which they will labor, enter or attempt to enter the service of those against whom such combinations are specially aimed. And as acts of the character referred to would have defeated a proper administration of the trust estate, and inflicted irreparable injury upon it, as well as prejudiced the rights of the public, the circuit court properly framed its injunction so as to restrain all such acts as are specifically mentioned, as well as combinations and conspiracies having the object and intent of physically injuring the property or of actually interfering with the regular, continuous operation of the railroad by the receivers.

Some reference was made in argument to the Act of Congress of June 29, 1886, legalizing the incorporation of national trades unions. 24 Stat. at L. 86, chap. 567. It is not perceived that this reference is at all pertinent to the present discussion. That act does not in any degree sanction illegal combinations. It recognizes the legal character of any association of working people having two or more branches in the states or territories of the United States, and established "for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members of the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit." Associations of that character are authorized to make and establish such constitutions, rules, and by-laws as they deem proper to carry out their lawful objects. Those objects as defined by congress are most praiseworthy and should be sustained by the courts whenever their power to that end is properly

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invoked. What we have said about illegal combinations has no reference to such associations, but only to combinations formed with the intent to employ force, intimidation, threats or other wrongful methods whereby the public will be injured, or whereby will be impaired the absolute right of individuals, whether belonging to such combinations or not, to dispose of their labor or property upon such terms as to them seems best.

The principle that a combination or conspiracy of two or more persons to injure the rights of others is illegal, although nothing may have been done in execution of that intent, has been embodied in the statutes of Wisconsin, in which state the present cause is pending. By an act passed April 2, 1887, it was declared that "any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his reputation, trade, business or profession, by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be punishable by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars." And by a subsequent act, passed April 25, 1887, it was declared that "any two or more employers who shall agree, combine, and confederate together for the purpose of interfering with or preventing any person or persons seeking employment, either by threats, promises, or by circulating or causing the circulation of a so-called black list, or by any means whatsoever, or for the purpose of procuring and causing the discharge of an employe or employes, by any means whatsoever, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in the county jail for a period of not more than one year, or by a fine of not less than fifty dollars, or by both." 1 Wis. Laws 1887, pp. 299, 880, chaps. 287, 849; 2 Wis. Rev. Stat. §§ 4466a, 4466b.

This legislation was followed by an act published May 8, 1887, providing: "§ 1. Any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as a wageworker, or who shall attempt to so hinder or prevent, shall be punished by fine not exceeding one hundred dollars or by imprisonment in the county jail not more than six months, or by both fine and imprisonment in the discretion of the court. Section 2. Any person who shall individually or in association with one or more others, willfully break, injure, or remove any part or parts of any railway car or locomotive, or any other portable vehicle or traction engine, or any part or parts of any stationary engine, machine, implement or machinery, for the purpose of destroying such locomotive, engines, car, vehicle, implement or machinery, or of preventing the useful operation thereof, or who shall in any other way willfully or maliciously interfere with or prevent the running or operation of any locomotive, engine, or machinery, shall be punished by fine not exceeding one thousand dollars or by imprisonment in the county jail

or the state prison not exceeding two years, or by both fine and imprisonment in the discretion of the court." 1 Wis. Laws, chap. 427, p. 462.

It thus appears that combinations and conspiracies by two or more persons, with the intent to injure the rights of others were illegal at common law, and are public offenses in the state where this cause is pending.

For the reasons stated, we are of opinion that the circuit court properly refused to strike from the writs of injunction the words, "And from combining and conspiring to quit with or without notice the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad."

We come next to that clause in the writ of injunction of December 22, 1893, expressly relating to "strikes."

What is to be deemed a strike within the meaning of the order of the circuit court? In the opinion of the circuit judge, made a part of the record, we are informed that at the argument below the definition proffered to the court by the intervenors as one recognized by the labor organizations of the country was as follows: "A strike is a concerted cessation of or refusal to work until or unless certain conditions which obtain or are incident to the terms of employment are changed. The employee declines to longer work, knowing full well that the employer may immediately employ another to fill his place, also knowing that he may or may not be re-employed or returned to service. The employer has the option of acceding to the demand and returning the old employee to service, of employing new men, or of forcing conditions under which the old men are glad to return to service under the old conditions."

The learned circuit judge said that a more exact definition of a strike was "a combined effort among workmen to compel the master to the concession of a certain demand by preventing the conduct of his business until compliance with the demand." And he said: "It is idle to talk of a peaceful strike. None such ever occurred. The suggestion is an impeachment of intelligence. All combinations to interfere with perfect freedom in the proper management of one's lawful business, to dictate the terms upon which such business shall be conducted, by means of threats or by interference with property or traffic, or with the lawful employment of others, are within the condemnation of the law. It has been well said that the wit of man could not devise a legal strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence; the means employed to effect the end being not only the cessation of labor by the conspirators, but by the necessary prevention of labor by those who are willing to assume their places, and, as a last resort, and in many instances an essential element of success, the disabling and destruction of the property of the master; and so, by intimidation and by the compulsion of force to accomplish the end designed."

Under this view of the nature and object of strikes the injunction was directed, generally against combinations and conspiracies upon

the part of employes with the design or purpose of causing a "strike" on the lines of railroads operated by the receivers, against the ordering, recommending, advising, approving the employes to join in a "strike," and against the ordering, recommending, or advising any committee or class of employes to "strike" or to join in a "strike."

If the word "strike" means in law what the circuit court held it to mean, the order of injunction, so far as it relates to "strikes," is not liable to objection as being in excess of the power of a court of equity; indeed, upon the facts presented by the receivers and admitted by the motion of the intervenors, it was made the duty of the court to exert its utmost authority to protect both the property in its charge and the interests of the public against all strikes of the character described in the opinion of the circuit judge.

But in our judgment the injunction was not sufficiently specific in respect to strikes. We are not prepared, in the absence of evidence, to hold as matter of law that a combination among employes having for its object their orderly withdrawal in large numbers or in a body from the service of their employers, on account simply of a reduction in their wages, is not a strike within the meaning of that word as commonly used. Such a withdrawal, although amounting to a strike, is not, as we have already said, either illegal or criminal. In *Farrer v. Close*, L. R. 4 Q. B. 602, 612, *Sir James Hannen*, afterwards Lord of Appeal in Ordinary, said: "I am, however, of opinion that strikes are not necessarily illegal. A strike is properly defined as 'a simultaneous cessation of work on the part of the workmen,' and its legality or illegality must depend on the means by which it is enforced and on its objects. It may be criminal, as if it be a part of a combination for the purpose of injuring or molesting either masters or men; or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Hilton v. Eckersley*, 6 El. & Bl. 47, 66; or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfillment of an engagement entered into between employers and employes, or any other lawful purpose."

In our opinion the order should describe more distinctly than it does the strikes which the injunction was intended to restrain. That employes and their associates may not unwittingly place themselves in antagonism to the court's authority and become subject to fine and imprisonment as for contempt, the order should indicate more clearly than has been done that the strikes intended to be restrained were those designed to physically cripple the trust property or to actually obstruct the receivers in the operation of the road, or to interfere with their employes who do not wish to quit, or to prevent by intimidation or other wrongful modes, or by any device, the employment of others to take the places of those quitting, and not such as were the result of the exercise by employes in peaceable ways of

rights clearly belonging to them and were not designed to embarrass or injure others or to interfere with the actual possession and management of the property by the receivers.

In our consideration of this case we have not overlooked the observations of counsel in respect to the use of special injunctions to prevent wrongs which, if committed, may be otherwise reached by the courts. It is quite true that this part of the jurisdiction of a court of equity should be exercised with extreme caution and only in clear cases. *Brown v. Newell*, 2 Myl. & C. 558, 570. *Mr. Justice Baldwin*, in *Bonaparte v. Camden & A. R. Co.* 1 Baldw. 205, 217, properly said: "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity that never ought to be extended, unless in cases of great injury where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones not coming within well established principles; for if it issues erroneously an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who pays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its own suitors and its own principles to administer the only remedy the law allows to prevent the commission of the act." The authorities all agree that a court of equity should not hesitate to use this power when the circumstances of the particular case in hand require it to be done in order to protect rights of property against irreparable damage by wrongdoers. It is, *Justice Story* said, because of the varying circumstances of cases "that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld." "And," the author proceeds, "there is wisdom in this course; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs. The jurisdiction of these courts, thus operating by special injunction, is manifestly indispensable for the purposes of social justice in a great variety of cases, and, therefore, should be fostered and upheld by a steady confidence." *Story, Eq. Jur.* § 959b.

In using a special injunction to protect the property in the custody of the receivers against threatened acts which it is admitted would, if not restrained, have been committed and would have inflicted irreparable loss upon that property and seriously prejudiced the interest of the public as involved in the regular, continuous operation of the Northern Pacific Railroad, the circuit court (except in the particulars indicated) did not restrain any act which upon the facts admitted by the motion it was not its plain duty to restrain. No other remedy was

full, adequate, and complete for the protection of the trust property, and for the preservation of the rights of individual suitors and of the public in his due and orderly administration by the court's receivers. "It is not enough," the court said in *Boyce v. Grundy*, 28 U. S. 3 Pet. 210, 7 L. ed. 655, "that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration as the remedy in equity." And the application of the rule that equity will not interfere where there is an adequate remedy at law must depend upon the circumstances of each case as it arises. *Watson v. Sutherland*, 72 U. S. 5 Wall. 74, 79, 18 L. ed. 580, 582. That some of the acts enjoined would have been criminal, subjecting the wrongdoers to actions for damages or to criminal prosecution, does not therefore in itself determine the question as to interference by injunction. If the acts stopped at crime or involved merely crime, or if the injury threatened could, if done, be adequately compensated in damages, equity would not interfere. But as the acts threatened involved irreparable injury to and destruction of property for all the purposes for which that property was adapted, as well as continuous acts of trespass, to say nothing of the rights of the public, the remedy at law would have been inadequate. "Formerly," *Mr. Justice Story* says, "courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation, if the acts done, or threatened to be done, to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If, indeed, courts of equity did not interfere in cases of this sort, there would (as has been truly said) be a great failure of justice in this country." 2 *Story, Eq. Jur.* § 928. So, in respect to acts which constitute a nuisance, injurious to property, if "the injury is of so material a nature that it cannot be well or fully compensated for the recovery of damages, or be such as from its continuance or permanent mischief might occasion a constantly recurring grievance, a foundation is laid for the interference of the court by way of injunction." *Kerr, Inj.* 1666, chap. 64, and authorities there cited. This jurisdiction, the author says, was formerly exercised sparingly, and with caution, "but it is now fully established, and will be exercised as freely as in other cases in which the aid of the court is sought for the purpose of protecting legal rights from violation."

In the course of the argument some reference was made to the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." It is not necessary in this case to decide whether, within the meaning of that statute, the acts and combinations against which the injunction was aimed would have been in restraint of trade or commerce among the several states. This case was not based upon that act. The questions now before the court have been determined without reference to the above act and upon the general principles that control the exercise of jurisdiction by courts of equity.

For the reasons we have stated the order

complained of is reversed in part and the cause is remanded with directions to sustain the motion to strike out, and modify the injunction, to the extent indicated in this opinion.

UNITED STATES CIRCUIT COURT, DISTRICT OF KENTUCKY.

ANDERSON

v.

LOUISVILLE & NASHVILLE R. CO.

(62 Fed. Rep. 48.)

1. The Kentucky statutes requiring all railroad companies to furnish separate coaches or compartments for colored and white passengers does not violate U. S. Const. 14th Amend. prohibiting discrimination by a state because of race or previous condition of servitude, as it prohibits any discrimination in the quality, convenience or accommodations in the cars and compartments set apart for the different classes of passengers.
2. The Kentucky statute requiring all companies operating railroads within the state to provide separate cars or compartments for white and colored passengers is so broad as to embrace all passengers, including those whose passage commences or ends in other states, and is void as an interference with interstate commerce.
3. The provisions of the Kentucky statute requiring separate compartments or cars for white and colored passengers to be furnished by all railroad companies, operating trains within the state in respect to interstate commerce cannot be separated from those relating to commerce wholly within the state and render the whole act void.
4. The prohibition contained in U. S. Const. 14th Amend. against discrimination by a state because of race or previous condition of servitude, though securing to citizens certain fundamental rights as against state action, does not secure the joint and common enjoyment of such rights.
5. A statute requiring separate cars or compartments to be furnished white and colored passengers upon railroads is valid as a proper exercise of the police power of the state when confined to the intrastate commerce of the state and not applying to interstate commerce.

Decided June 4, 1894.

ON DEMURRER to the complaint in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train. *Demurrer overruled.*

The facts are stated in the opinion.

Messrs. Wilbur F. Browder and Reuben A. Miller for defendant in support of the demurrer.

Messrs. John Feland & Son and J. H. Lott for plaintiff, *contra*.

Barr, District Judge, delivered the following opinion:

The plaintiff, who is a colored man and a citizen and resident of the state of Indiana, sues the defendant, the Louisville & Nashville Railroad Company, a Kentucky corporation, which is operating, as a common carrier, a railway between St. Louis, Mo., and Nashville, Tenn., and several other railways in the state of Kentucky, for an alleged wrongful act in putting him and his wife off of its trains on two separate occasions. He alleges that he and his wife, who desired to go from Evansville, Ind., to Madisonville, Ky., purchased, at Evansville, two full first class railroad tickets on defendant's road from Evansville to Madisonville, and then entered the defendant's car, at Evansville, usually designated the ladies' car, where they had a right to be, and that this right was recognized by the conductor of the train by taking up their tickets and exchanging them for the usual conductor's check. He alleges that they remained seated in said car undisturbed so long as the train was without the state of Kentucky, but, when the train came into that state, said

conductor required of plaintiff and his wife to give up their seats in said car, and go into a compartment in a car immediately in front, which had been set apart for colored persons exclusively. He alleged that he and his wife refused to occupy said compartment, and thereupon said conductor wrongfully refused to carry them further on said train, and put them off, without right and against their consent. In the second paragraph the plaintiff alleges that on another occasion he and his wife purchased over defendant's railroad two first class tickets from Henderson, Ky., to Madisonville, in same state, and that they entered the defendant's train, and seated themselves in the car designated for white persons exclusively, and that afterwards the conductor of the train took up their tickets and exchanged them for the usual conductor's checks, and then required that they should give up their said seats, and go into a compartment of a car which was and had been designated for colored persons exclusively; but that plaintiff and his wife refused to go into said compartment, and thereupon said conductor refused to carry them any further, and wrongfully put

them off said train at Robard's Station, which was 80 miles distant from Madisonville, the place of his destination. The defendant has demurred to both of these paragraphs of plaintiff's petition, and thus raises the question of the constitutionality of an act of the Kentucky legislature entitled "An act to regulate the travel or transportation of the white and colored passengers on the railroads of this state," approved May 24, 1892. The 1st, 2d, 3d, 5th, 6th, and 7th, sections of that statute are as follows:

"Section 1. Any railroad company or corporation, person or persons, running or otherwise operating railroad cars, or coaches by steam or otherwise, on any railroad line or track within this state, and all railroad companies, person or persons, doing business in this state, whether upon lines of railroads owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this state; and all foreign corporations, companies, person or persons organized under charters granted or that may hereafter be granted by any other state; who may be now, or may hereafter be engaged in running or operating any of the railroads of this state, either in part or in whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroads. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach, within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place, appropriate words in plain letters, indicating the race for which it is set apart.

"Sec. 2. That the railroad companies, person or persons, shall make no difference or discrimination, in the quality, convenience or accommodations in the cars or coaches, or partitions, set apart for white and colored passengers.

"Sec. 3. That any railroad company or companies, that shall fail, refuse, or neglect to comply with the provisions of sections 1 and 2 of this act, shall be deemed guilty of a misdemeanor, and upon indictment and conviction thereof shall be fined not less than five hundred nor more than fifteen hundred dollars for each offense."

"Sec. 5. The conductors or managers on all railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car or coach or compartment; and should any passenger refuse to occupy the car, coach or compartment to which he or she may be assigned by the conductor or manager said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such passenger off the train; and for such refusal, and putting off the train, neither the manager, conductor nor railroad company shall be liable for damages in any court.

"Sec. 6. That any conductor or manager on any railroad, who shall fail or refuse to carry out the provisions of section 5 of this act, shall, 4 INTER 8.

upon conviction, be fined not less than fifty nor more than one hundred dollars for each offense.

"Sec. 7. The provisions of this act shall not apply to employés of railroads, or persons employed as nurses, or officers in charge of prisoners."

This statute makes no discrimination in favor of white passengers, since any discrimination in the quality, convenience, or accommodations in the cars and compartments set apart for white and colored passengers is prohibited. It may be that some of the railroad companies of this state fail to provide equal accommodations for its colored passengers as they provide for white passengers, but this difference is not authorized by this statute, but prohibited. The 14th Amendment to the Constitution of the United States prohibits discrimination by a state because of race or previous condition of servitude, and, indeed, secures to all of its citizens certain fundamental rights as against state action, but it does not secure the joint and common enjoyment of such rights. It is the equality of right which is secured, and not the joint and common enjoyment of such right. *United States v. Stanley*, 109 U. S. 8, 27 L. ed. 836; *United States v. Buntin*, 10 Fed. Rep. 780; *Claybrook v. Owensboro*, 16 Fed. Rep. 297.

The next inquiry is whether this statute is in violation of the commerce clause of the Constitution of the United States, which gives Congress the exclusive right to "regulate commerce with foreign nations, and among the several states." Const. art. 1, § 8. If this statute be construed to include the internal commerce of the state of Kentucky, and not to apply to interstate commerce, it is a proper exercise of the police power of the state, and is constitutional, as has been settled in the case of *Louisville, N. O. & T. R. Co. v. Mississippi*, 2 Inters. Com. Rep. 801, 133 U. S. 587, 33 L. ed. 784. See also *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636. The case of *Louisville, N. O. & T. R. Co. v. Mississippi* came to the Supreme Court upon the question whether or not the railroad company was obliged, under the requirements of the statute of the state of Mississippi, to furnish separate cars or compartments for colored passengers whose passage commenced and ended in the state, and a majority of the court did not attempt to decide whether the statute would have been constitutional if it had applied to interstate commerce. There was, however, a dissent by Justices Harlan and Bradley, because they considered that statute as an attempt to regulate interstate commerce. The Kentucky statute has never been construed by the court of appeals of the state, and we must determine whether it includes interstate commerce as well as internal commerce. The title of the act is to regulate the travel or transportation of white and colored passengers on the railroads of this state, and in terms it applies to all companies, corporations, or persons operating railroads, by steam or otherwise, within the state, and to all conductors of trains thus operated; and it requires all such conductors, under penalty of a fine, to assign to each white and colored passenger his or her respective car or compartment. This lan-

guage is so broad and comprehensive that we conclude it must embrace all passengers, whether their passage commences and ends in the state or Kentucky, or commences in a foreign country or another state of this Union, and ends elsewhere than in this state. The act seems to divide all persons traveling on railroads in this state, without regard to the place whence they came or whither they go, into classes, and that on the color line; all white passengers being in one class, and all other passengers in another. If this be the correct construction of the act, the question as to the constitutionality of the entire act arises, as the court cannot separate one part of the act from another, and leave the constitutional part valid and enforceable. Where the provisions of an act are distinct and separate, and the court can determine by construction the constitutional parts of an act from the unconstitutional parts, and can presume the legislature would have enacted the constitutional part of the act without the unconstitutional part, it may declare a part of an act unconstitutional and the other enforceable; but this cannot be done with this act. *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, and cases cited.

The transportation of passengers is commerce, and the regulation of commerce "with foreign nations and among the several states" is exclusively in Congress; yet there are many state laws that incidentally affect foreign and interstate commerce which have been held constitutional. The Supreme Court has declined to attempt to lay down a definite rule by which may be determined what is a regulation of foreign and interstate commerce, and how far the several states may legislate upon the subject. It is often most difficult to determine the line of demarkation which separates the power of Congress from that of state legislatures, but we think the principle which determines the case under consideration has been decided by the Supreme Court in *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547. In that case the Louisiana statute, as the state court construed it, forbade common carriers of passengers to separate the passengers carried by them on account of race or color while in their charge in that state, and authorized a recovery of exemplary as well as actual damages by any passenger who was thus separated without his or her consent. The Supreme Court held the act unconstitutional as affecting foreign and interstate commerce, although *De Cuir*, who was a woman of color, took passage upon the steamer Governor Allen at New Orleans to Hermitage, which was a landing within the state of Louisiana. She was refused accommodations, on account of her color, in a cabin of the boat specially set apart for white persons, and brought suit therefor, and recovered damages in the state court. *Chief Justice Waite* said:

"If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be

governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it, Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans to Liverpool, having passengers on board, would be compelled to carry all white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by any one who felt himself aggrieved because he had been excluded on account of his color."

Neither this language nor decision has been modified or changed by the court in *Louisville, N. O. & T. R. Co. v. Mississippi*, 2 Inters. Com. Rep. 801, 133 U. S. 587, 33 L. ed. 784. The court in that case, after quoting a part of the opinion in *Hall v. De Cuir*, *supra*, said:

"So the decision was by its terms carefully limited to those cases in which the law practically interfered with interstate commerce. Obviously, whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with colored passengers, was a question of interstate commerce, and to be determined by Congress alone. In this case the supreme court of Mississippi held that the statute applied solely to commerce within the state; and that construction being the construction of the statute of the state by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a state, and not interfering with commerce between the states, then, obviously, there is no violation of the commerce clause of the Federal Constitution. Counsel for plaintiff in error strenuously insists that it does affect and regulate interstate commerce, but this contention cannot be maintained."

It cannot be doubted that under this latter decision the state of Kentucky could constitutionally pass a law which would require separate cars or compartments for white and colored passengers when their travel commences and ends in the state. See also, *Wabash, N. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Louisville, N. O. & T. R. Co. v. State*, 2 Inters. Com. Rep. 615, 5 L. R. A. 132, 66 Miss. 662; *State v. Hicks*, 44 La. Ann. 770; *Ex parte Plessy*, 18 L. R. A. 639, 45 La. Ann. 80. The trend of recent cases in the Supreme Court has been to fully sustain the doctrine of the exclusiveness of the power of Congress over

interstate and foreign commerce. Thus in the case of *Wabash, St. L. & P. R. Co v. Illinois*, *supra*, the court held unconstitutional a statute of Illinois which enacted that if any railroad corporation shall charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within the state, the same or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road, all such discriminating rates, charges, collections, or receipts, whether made directly or by means of rebate, drawback, or other shift or evasion, shall be deemed and taken against any such railroad corporation as prima facie evidence of unjust discrimination, which was prohibited under penalty by the Act. In *Robbins v. Shelby County Taxing Dist.* 1 Inters. Com. Rep. 45, 120 U. S. 489, 30 L. ed. 694, the court held an act of Tennessee unconstitutional that required that drummers and all persons not having a regular licensed house of business in the taxing district of Shelby county, offering for sale or selling goods, wares, or merchandise therein by sample, shall pay to the county trustee the sum of \$10 per week, or \$25 per month, for such privilege. This was because it applied to persons soliciting the sale of goods on behalf of individuals and firms doing business in another state, and so far was a regulation of commerce among the states. In the case of *Minnesota v. Barber*, 3 Inters. Com. Rep. 185, 136 U. S. 313, 34 L. ed. 455, the court held a statute of Minnesota which required as a condition of sales in that state of fresh beef, veal, mutton, lamb, or pork, for human food, that the animals from which such meats are taken shall have been inspected in that state before being slaughtered, unconstitutional and void as an interference with interstate commerce. And again, in the case of *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, the court held an act of the Kentucky legislature which provided that the agent of an express company not incorporated by that state should not

carry on business in the state without first obtaining a license from the state, and that he could not obtain such license until he satisfied the auditor of the state that the company he represented had an actual capital of \$150,000, was unconstitutional and void. The court said in that case:

"But the main argument in support of the decision of the court of appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the state. But it does not follow that everything which the legislature of a state may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce. We have lately expressly decided in the case of *Leisy v. Hardin*, 3 Inters. Com. Rep. 36, 135 U. S. 100, 34 L. ed. 128, that a state law prohibiting the sale of intoxicating liquors is void when it comes in conflict with the express or implied regulation of interstate commerce by Congress, declaring that the traffic in such liquors as articles of merchandise between the states shall be free."

These and other cases show that the Supreme Court has had occasion and has given the subject of this exclusive power of Congress to regulate foreign and interstate commerce much consideration, and has insisted upon the exclusiveness of this power even as against the exercise of the police power by the several states of this Union. Whether or not a regulation of the defendant company that there should be separate cars or compartments for white and colored passengers, and the passengers be thus separated, is proper and reasonable, cannot arise on this demurrer, as there is nothing in the record showing any regulation or rule by the company. The question of the reasonableness of such a regulation of the company can only arise when the regulation is shown to have been made by the company. *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641.

The defendant's demurrer to the petition must be overruled, and it is so ordered.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN.

Re MITCHELL *et al.*

(62 Fed. Rep. 576.)

A state cannot require a license fee for the privilege of traveling from place to place taking orders from consumers for goods to be delivered by a

merchant doing business in another state where his goods are located.

Decided June 25, 1894.

APPPLICATIONS for writs of habeas corpus to obtain the release of petitioners from custody to which they had been committed for failure to procure licenses for the privilege of soliciting orders for merchandise. *Writs granted.*

The facts sufficiently appear in the opinion.

Mr. Clarence H. Childs for petitioners.
Mr. Henry Fitzgibbon for respondent.

Seaman, District Judge, delivered the following opinion:

These several petitioners are imprisoned in Winnebago county upon convictions in justice court for alleged violation of section 1570 of the Revised Statutes of Wisconsin, and amendments thereof, which provide that no person who is not licensed by payment of a fee prescribed by a subsequent section shall travel from place to place within the state for sale of goods "at retail or to consumers," by sample or otherwise, with numerous exceptions of permanent traders and other classes, not including any under which the petitioners can claim exemption. They were all in the employ of W. A. Edwards, a dealer in various articles of merchandise, residing and having his place of business at Minneapolis, Minn., and all were soliciting orders for sale of the employer's goods for future deliveries, and having only samples with them. It is undisputed and conceded that the goods which they respectively offered for sale were at Minneapolis, and not in Wisconsin, and were legitimate and proper articles of commerce. No orders were in fact taken, and no sales or deliveries were actually made.

The aid of this court is invoked on the ground that the arrest and imprisonment in each case violates well settled rights of interstate commerce, of which the power to regu-

late is expressly reserved to Congress by the United States Constitution. Upon the state of facts here presented, it is clear that the petitioners were in the exercise of "interstate commerce," as defined by the Supreme Court in numerous decisions, and they were not infringing any law of the United States. The only justification for their imprisonment is asserted under the state statute entitled "Of Peddlers" (chapter 67, Rev. Stat. as amended by chapter 510, Wis. Laws, 1889; Sanb. & B. Ann. Stat. § 1570). It is unnecessary to determine whether the terms of this statute would intend the imposition of a license fee in these cases; but it is sufficient that the attempted enforcement is against a clear exercise of interstate commerce, and an interference therewith which is repugnant to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce among the several states." *Robbins v. Shelby County Taring Dist.* 1 Inters. Com. Rep. 45, 120 U. S. 489, 30 L. ed. 694. The decisions of the Supreme Court are numerous and conclusive to this point, and are well summarized in the opinion of Mr. Justice Brewer, handed down April 30, 1894, in *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719. For their protection in this constitutional right the petitioners are entitled, respectively, to the writ, and it will be granted.

MICHIGAN SUPREME COURT.

COIT & CO. v. ELI R. SUTTON, *Plff. in Err.*

(25 L. R. A. 819.)

Foreign corporations selling through itinerant agents and delivering goods manufactured outside of the state are not, in view of the commerce clause of the United States Constitution affected

by state statutes requiring foreign corporations to file their articles of association with the secretary of state and pay a franchise fee as a condition of doing business within the state.

Decided October 16, 1894.

ERROR to the Circuit Court for Wayne County to review a judgment in favor of the plaintiff in an action brought to recover the contract price of certain lead alleged to have been sold and delivered by the plaintiff to the defendant. *Affirmed.*

The facts sufficiently appear in the opinion. **Mr. R. B. Wilkinson**, for plaintiff in error:

A state may exclude a corporation of any other state from doing business therein, or may

prescribe such terms and conditions for such foreign corporation as it may think proper.

Hartford F. Ins. Co. v. Raymond, 70 Mich. 501; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 857.

The true test of the matter is whether the burden of the tax falls on the thing which is the subject of the tax.

General Interest Ins. Co. v. Ruggles, 25 U. S. 12 Wheat. 419, 6 L. ed. 677.

The tax here falls upon the actual capita

NOTE.—The validity of contracts of a foreign corporation which has not complied with statutory conditions of the right to do business in the state is considered with a review of the authorities in a note to *Edison General Electric Co. v. Canadian Pac. Nav. Co.* (Wash.) 24 L. R. A. 315. But the cases there considered were chiefly in construction of the statutes as indicating an intent of the legislature in respect to making such contracts illegal. In the

present case the statute expressly declares void the contracts of a corporation which has not paid the tax, and the question is as to its application to interstate commerce. For the decisions as to the power to exclude foreign corporations as affected by the constitutional provision as to commerce, see note to *Kindel v. Beck & P. Lithographing Co.* (Colo.) 24 L. R. A. 311.

stock of the foreign corporation. It is paid from the money actually in the corporation before any of the goods are imported, and is not directly or indirectly paid out of the proceeds of the goods imported or sold.

Philadelphia & S. Mail SS. Co. v. Com. 104 Pa. 109.

A law imposing a license on all sewing machine peddlers is not void as interfering with commerce between states, and this is so without regard to whether the machines are manufactured outside the state or not.

Hunte Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754.

There is no tax upon the thing which is the subject of commerce, nor is there any way in which the tax falls on the buyer of the article.

Horn Silver Min. Co. v. New York, 148 U. S. 315, 36 L. ed. 168, 4 Inters. Com. Rep. 57.

The plaintiff in the court below did not seem to be able to distinguish between a franchise tax and a tax upon the capital stock of a corporation.

Beach, Priv. Corp. p. 799; *Desty, Taxn.* § 76, and cases cited; *State v. Stonecall*, 89 Ala. 338; 4 Am. & Eng. Enc. Law, 272d, and cases cited in note.

Mr. A. A. Ellis, Atty. Gen., also for plaintiff in error:

I am willing to rest the validity of this act upon the decision of the United States Supreme Court in the case of *Horn Silver Min. Co. v. New York*, 148 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, which sustained the validity of a similar statute.

Under a statute of Ohio, requiring corporations filing their articles with the secretary of state to pay a fee based on the capital stock of the company, a statute very similar to the one under discussion, it was held that it did not impose any charge on interstate commerce or prohibit foreign corporations from engaging in interstate commerce within its confines.

Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 778.

Messrs. Bowen, Douglas & Whiting, for defendant in error:

The act is unconstitutional and void because it is in conflict with that portion of the Federal Constitution which provides that Congress shall have the power to regulate commerce among the several states.

If by a stretch of the imagination the act could be said to be a police regulation, yet it cannot be sustained because it interferes with the exclusive authority of the Federal government to deal with questions of interstate commerce.

New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516.

Though it is a well-settled principle that a state may prescribe any conditions which it chooses to prescribe, under which foreign corporations must act, if they act at all, within that state.

Home Ins. Co. v. Davis, 29 Mich. 240; *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 501; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357.

This principle is subject to some exceptions, and one of these is that any restriction or regulation imposed upon foreign corporations which interferes with interstate commerce is

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invalid because contrary to the "commerce clause" of the Federal Constitution.

Paul v. Virginia, *supra*; *Pennsylvania Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1187; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 523; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 190, 31 L. ed. 654, 2 Inters. Com. Rep. 24; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 25, 35 L. ed. 617, 3 Inters. Com. Rep. 595; *Horn Silver Min. Co. v. New York*, 148 U. S. 314, 36 L. ed. 168, 4 Inters. Com. Rep. 57; *Gunn v. White Sewing Mach. Co.* 18 L. R. A. 206, 57 Ark. 24; *Bateman v. Western Star Mill. Co.* 4 Inters. Com. Rep. 260, 1 Tex. Civ. App. 90; *Simmons Hardware Co. v. McGuire*, 39 La. Ann. 848.

The states have no power to impose restriction or regulation upon interstate commerce.

Brown v. Maryland, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1187; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694; *Bowman v. Chicago & N. W. R. Co.* and *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, *supra*; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 184; *Asher v. Texas*, 138 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181; *Pullman Palace Car Co. v. Pennsylvania*, *supra*; *Crutcher v. Kentucky*, 141 U. S. 58, 35 L. ed. 652; *Horn Silver Min. Co. v. New York*, *Gunn v. White Sewing Mach. Co.*, and *Bateman v. Western Star Mill. Co.*, *supra*; *Lyons-Thomas Hardware Co. v. Reading Hardware Co.* (Tex.) 32 Am. L. Reg. 661; *Ware v. Hamilton-Brown Shoe Co.* 92 Ala. 145; *Singer Mfg. Co. v. Hardee*, 4 N. M. 175; *Re Kimmel*, 3 Inters. Com. Rep. 114, 41 Fed. Rep. 775; *Re White*, 11 L. R. A. 284, 3 Inters. Com. Rep. 531, 43 Fed. Rep. 913; *Re Spain*, 14 L. R. A. 97, 47 Fed. Rep. 208; *Re Nichols*, 48 Fed. Rep. 164; *Re Rozelle*, 57 Fed. Rep. 155; *Wrought Iron Range Co. v. Johnson*, 8 L. R. A. 273, 3 Inters. Com. Rep. 146, 84 Ga. 754; *State v. Agee*, 2 Inters. Com. Rep. 21, 83 Ala. 110; *Simmons Hardware Co. v. McGuire*, *supra*; *McLaughlin v. South Bend*, 10 L. R. A. 357, 126 Ind. 471; *Overton v. Vicksburg*, 70 Miss. 558; *Waterbury v. Egan*, 3 Misc. 355; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719.

Hooker, J., delivered the opinion of the court:

The plaintiff, a corporation of the state of Illinois, recovered a judgment in the Wayne county circuit court, from which the defendant appeals. The finding of facts shows that plaintiff was engaged in the business of shipping from Illinois goods manufactured in that state, to its customers in Michigan, on orders given it by mail, or taken by its agents in Michigan; that on January 23, 1894, the plain-

tiff, through its duly authorized agent, entered into a written contract with the defendant, in the city of Detroit, Mich., for the sale to him of a quantity of white lead at a specified price, to be paid for upon delivery; that on January 27, 1894, delivery of the lead was tendered at Detroit. The defendant refused to receive the lead, claiming the contract to be void. At the time of making such tender the plaintiff had not filed articles of association in this state, and had not paid to the secretary of state a franchise fee, as provided by No. 79 of the Laws of 1893. Counsel for plaintiff seek to avoid the effect of said act, contending that it is in conflict with the provision of the Federal Constitution that "Congress shall have power to regulate commerce among the several states." Article 1, section 8. The defendant relies upon the familiar rule that states may impose conditions upon the right of foreign corporations to do business within their limits. This rule has been recognized by the Federal courts where it does not conflict with the power of Congress to regulate commerce. See *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357. But, where the effect is to restrain or obstruct commerce among the states, it cannot be applied; the Federal decisions, to which we must look for a construction of the Constitution, holding that it is the right of persons residing in one state to contract and sell their commodities in another, unrestrained except where restraint is justified under the police power, by states, or by Act of Congress, and that this right extends to corporations. *Paul v. Virginia*, *supra*; *Brown v. Maryland*, 25 U. S. 12 Wheat. 425, 6 L. ed. 680; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Pen-*

sacola Teleg. Co. v. Western Union Teleg. Co. 96 U. S. 1, 24 L. ed. 708; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137; *Pembina Consol. Silver Min. & M. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 312, 2 Inters. Com. Rep. 134; *Fargo v. Stevens*, 121 U. S. 290, 30 L. ed. 890, 1 Inters. Com. Rep. 51; *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 618, 8 Inters. Com. Rep. 595; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 712.

The law in question imposes a tax upon corporations for the privilege of doing business in Michigan. It is a tax upon the occupation of the corporation, with a provision that all its contracts shall be void until the tax is paid, which, if enforced, would embarrass plaintiff in its commerce with inhabitants of Michigan. It must therefore be held that the act in question does not apply to foreign corporations whose business within this state consists merely of selling through itinerant agents, and delivering, commodities manufactured outside of this state.

The judgment of the circuit court will be affirmed.

The other Justices concurred.

OKLAHOMA SUPREME COURT.

S. F. BUTNER, *Plff. in Err.*,

v.

WESTERN UNION TELEGRAPH CO.

(.....Okla.....)

*1. An act of the territorial legislature which regulates the order of receipt and transmission of telegraphic messages, and prescribes a penalty for its violation, but which does not attempt to regulate the delivery of messages outside the territory, or of messages sent from without the territory, is not in conflict with the constitutional provision giving to Congress the right to regulate commerce between the states and territories.

2. Paragraph 543 of the Oklahoma Statutes of 1890, imposing a penalty of \$50 upon carriers of messages for certain breaches of duty, does not apply to a failure to deliver a message, but only applies to the failure to receive or transmit messages in

the order presented. It is a penal statute, and must be strictly construed.

3. The sendee of a telegraphic message cannot maintain an action against a telegraph company for neglect, delay or nondelivery of a message, in the absence of a showing that it was sent by his agent or was sent for his benefit, and that the carrier had active or constructive notice that it was so sent for the benefit of the sendee.

4. The terms "carelessly, wrongfully, and negligently failed and neglected" to deliver a message, used in a complaint, import ordinary and simple negligence, and nothing more.

5. Damages for mental pain and suffering alone, occasioned by the negligence of a telegraph company in failing to deliver a message announcing the death of a relative, cannot be recovered.

*Headnotes by the Court.

Decided Sept. 7, 1894.

IN ERROR to the district court for Logan county to review a judgment in favor of defendant in an action brought to recover damages for defendant's failure to promptly transmit and deliver a telegraph message. *Affirmed.*

The facts are stated in the opinion.

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Mr. J. A. Baker for plaintiff in error.

Messrs. Asp, Shortell & Cottingham for defendant in error.

Burford, J. delivered the opinion of the court:

The plaintiff in error filed his complaint in the district court of Logan county against the defendant in error to recover damages for delay in the delivery of a telegram. The complaint alleges in substance that the plaintiff is a resident of Logan county, Okla., and that the defendant was on the 1st day of January, 1893, a corporation duly organized under the laws of the state of New York for the transmission of messages by wire for reward, and owned and operated a telegraph line from Mulvane, in the state of Kansas, to Guthrie, in Oklahoma territory, and was at said time a common carrier of messages for reward between said last named places; that on said date defendant received a message at Mulvane, Kan., for transmission to plaintiff, and received the usual charges thereon; that said message was from plaintiff's son-in-law, John Payne, and announced the death of plaintiff's daughter, and is of the following tenor: "Mulvane, Ks., 1-1, 1893. To S. T. Butner, Dep. Sheriff, c-o Hixon. Sheriff Logan Co.: Bertie died this morning, ten o'clock. Come at once. Ans. John Payne." It is further alleged that defendant negligently, carelessly, and wrongfully, and without fault of plaintiff, failed to deliver said telegram to plaintiff, or the person in whose care it was addressed, for a period of 48 hours after the transmission of said message to Guthrie, O. T.; that, by reason of the said careless and negligent conduct of defendant, plaintiff was not informed of the death of his daughter until two days after her said death; that, after receiving said message, plaintiff was unable to communicate the death of his daughter to his immediate family and the members of his household, who were near relatives, and warmly attached to plaintiff's deceased daughter, in time for them to attend her funeral, and they were deprived of attending her funeral; that plaintiff was unable to make a respectful and proper preparation for attending the funeral of his daughter; that, by reason of such negligence and carelessness upon the part of defendant, plaintiff has suffered great mental pain, distress, humiliation, and mortification, to his damage \$5000, for which he prays judgment. To this complaint the defendant demurred for the reason that the facts alleged were not sufficient to constitute a cause of action. The district court sustained the demurrer, and, plaintiff refusing to plead further, judgment was rendered for defendant for costs, and complaint dismissed.

The ruling of the court in sustaining the demurrer is complained of as error. It appears from the briefs of counsel that there is a contention as to whether this is an action to recover for breach of contract, or for a tort. From our view of the case, this question is immaterial. The main question to be determined is whether mental pain or anguish alone, resulting from the negligent nondelivery of a telegram, constituted an independent basis for damages. On this question there is a conflict of authority which is irreconcilable. The

question is an open one in this territory, and in establishing a precedent this court should adopt that rule which best commends itself to reason and justice, and is based on the soundest principles of law and logic. The English courts have invariably held that mental suffering alone, unaccompanied with an physical or corporal injury, cannot be the basis for the recovery of damages, except in such cases as seduction, false imprisonment, libel, slander breach of promise of marriages, malicious prosecution, and other tortious wrongs committed with a willful or malicious intent to do the wrong. In all these instances, unless there exists some corporal injury, the right to recover damages for mental suffering depends upon the element of positive wrong, willfully or maliciously perpetrated. The allegations of the complaint in this case do not bring it within such rule, as only ordinary negligence is alleged. *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 37; *Gregory v. Cleveland, C. C. & I. R. Co.* 112 Ind. 385. The American courts seem to have followed the rule of the English courts until the case of *So Relle v. Western U. Tele. Co.* 55 Tex. 308, 40 Am. Rep. 805, was decided by the supreme court of Texas, in which it was held that damages might be recovered in an action for nondelivery of a telegraphic message similar to the case at bar. The principal of this case has been followed, with some variations, by the same court, in many cases since that decision, and its reasoning has been substantially adopted by the courts of last resort in the states of Indiana, Kentucky, Tennessee, Alabama, and North Carolina. *Gulf, C. & S. F. Tele. Co. v. Richardson*, 79 Tex. 649; *Wadsworth v. Western U. Tele. Co.* 86 Tenn. 695; *Western U. Tele. Co. v. Henderson*, 89 Ala. 510; *Reese v. Western U. Tele. Co.* 7 L. R. A. 588, 123 Ind. 294; *Chapman v. Western U. Tele. Co.* 90 Ky. 265; *Young v. Western U. Tele. Co.* 9 L. R. A. 669, 107 N. C. 370. On the other hand, the right to recover damages for mental anguish occasioned by the delay or nondelivery of a telegraphic message has been expressly denied, and the doctrine condemned, by the highest courts in the states of Georgia, Florida, Mississippi, Missouri, Kansas, Dakota, Wisconsin, Nevada, the United States circuit court of appeals, and by practically the unanimous current of authority in the Federal courts. *Carrson v. Western U. Tele. Co.* 47 Fed. Rep. 544; *Chase v. Western U. Tele. Co.* 10 L. R. A. 464, 44 Fed. Rep. 554; *Kester v. Western U. Tele. Co.* 55 Fed. Rep. 603; *Western U. Tele. v. Wood*, 21 L. R. A. 708, 57 Fed. Rep. 471; *Tyler v. Western U. Tele. Co.* 54 Fed. Rep. 684; *Wilcox v. Richmond & D. R. Co.* 8 U. S. App. 118, 52 Fed. Rep. 264; *Russell v. Western U. Tele. Co.* 3 Dak. 315; *Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222; *Lynch v. Knight*, 9 H. L. Cas. 577; *International O. Tele. Co. v. Saunders*, 21 L. R. A. 810, 82 Fla. 484; *Chapman v. Western U. Tele. Co.* 17 L. R. A. 430, 88 Ga. 763; *West v. Western U. Tele. Co.* 39 Kan. 98; *Salina v. Trosper*, 27 Kan. 544; *Western U. Tele. Co. v.*

Rogers, 13 L. R. A. 859, 68 Miss. 748; *Wynman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Connell v. Western U. Teleg. Co.* 20 L. R. A. 172, 116 Mo. 34; *Johnson v. Wells, Fargo & Co.* 6 Nev. 224; *Ewing v. Pittsburg, C. & St. L. R. Co.* 147 Pa. 40; *Gahan v. Western U. Teleg. Co.* 59 Fed. Rep. 483; *Summerfield v. Western U. Teleg. Co.* (Wis.) Jan. 30, 194. If the authorities holding the affirmative of this proposition presented uniformity of the result obtained, and harmony in the reasoning attempted in support of it, the array would be formidable. Their force, however, is weakened by self-evident disparity of reasoning and conflict of result. Some hold that mental anguish is not a cause of action, but is merely a dependent incident to be taken into consideration in addition to pecuniary damages shown, while others assert that it is an independent cause of action,—a distinct element of damage. Some hold that negligence sufficient to uphold a recovery must be willful; others, that simple negligence will suffice. Some uphold the recovery on the ground of punishment; others, upon the ground of compensation; and some blend both grounds. This conflict exists, not only between the courts of the different states entertaining this view, but in one instance is exhibited in the decisions of a single state. The supreme court of Texas, in the course of its adjudications upon this subject, has held both the affirmative and the negative of all the propositions above enumerated. Numerous other conflicts exist among the decisions of that court; notably, the affirmation and the denial of the rule that the sendee, before he can recover, must identify himself with the contract of transmission. The Tennessee and Alabama cases are not authority in favor of the plaintiff's position, because they refuse to recognize mental pain as an element of damage. They hold it to be an incident merely, to be taken into consideration in addition to pecuniary loss.

There is a decided weight of authority against the right of the plaintiff in error to recover for mental suffering, but we are constrained to rely upon principle, as well as authority, in a case of this kind. The law of telegraph companies cannot trace its distinctive features into the antiquity of the common law. But the duty of the courts, upon the advent of new conditions, is to assimilate the ancient principles of the common law to the new conditions by the process of reasoning called "analogy;" applying old principles, governing previously established relations of a similar character, to the determination of rights arising under the new conditions. If the simple process of inductive reasoning from ancient principles applied to new conditions is inadequate to meet the public conception of expediency and justice, the work of applying new principles to new conditions is a legislative, and not a judicial function. Similar conditions produce similar results. Similar facts left to be dealt with by the judiciary ought to produce uniform rules of law applying to all of such conditions. In entering upon a discussion of this important question, the courts should keep strictly within the line of the judicial path, and not infringe on the province of the legislative branch of government. The question should be resolved by a

reference to the position which mental pain and anguish has heretofore sustained in remedial law as a basis for damages. Mental anguish, prior to the advent of the doctrine contended for in this case, occupied a well defined position in the law of damages, and was not recognized in cases of this character.

It is, however, claimed that the damages in question can be upheld by assimilating them to the damages awarded in cases of physical injury. That mental anguish and suffering can be taken into consideration in cases of corporal injury is too well settled to be for a moment questioned. If some authorities on this question are to be followed as sound law, it might give some countenance to the contention. This we say with a special reference to the decisions of the courts in attempting to draw this argument from this source. They state the premise broadly, in terms which admit all mental suffering resulting from a bodily injury as proper to be considered by the jury in assessing the damages. Such, however, is not the law of any well-considered case that we have been able to find dealing specifically with the question before it for decision as to what mental pain and anguish may be lawfully considered by the jury in cases of corporal injuries. All the well-considered cases dealing explicitly with this question hold that the mental anguish involved in the consideration of the amount of damages to be awarded is that mental anguish connected with the physical suffering,—in short, the mental anguish resulting from the consciousness of physical pain. All independent conceptions of the mind, such as the contemplation of the loss of a goodly appearance, the fear of want, and the like, are to be excluded. *Chicago v. McLean*, 8 L. R. A. 765, 133 Ill. 148; *Kennon v. Gilmer*, 131 U. S. 22, 27, 33 L. ed. 110, 112; *Joch v. Dankwardt*, 85 Ill. 331; *Clinton v. Laning*, 61 Mich. 355; *Trigg v. St. Louis, K. C. & N. R. Co.* 74 Mo. 147, 153, 41 Am. Rep. 305; *Salina v. Trooper*, 27 Kan. 544; *Johnson v. Wells, Fargo & Co.* 6 Nev. 224. It is asserted that mental pain is just as much a proximate result of the wrong in the breach of the contract of transmission of a social telegram as mental pain is the proximate result of the wrong in cases of corporal injury. That statement is true, but the fallacy of this argument rests in the fact that the law does not take notice of mental anguish in cases of corporal injuries merely because it is the proximate result of the wrong. It must be something more. It must be identified with physical pain, of which the law of damages does take notice, before it will be considered. The sorrowful reflections of an injured person over his changed physical condition, of the proximate result of the physical injury, and many other conceptions, arise out of a case of this kind, independently of the physical suffering that proximately result from the injury, which the law entirely disregards. The law recognizes the mental anguish which is connected with and a part of the physical pain, not because it is the proximate result of the injury, but because it is so identified with the physical pain that to disregard it would be to disregard the physical suffering itself. If mental pain were recognized in these cases distinctly and

solely as mental pain, it might afford some argument in favor of the plaintiff in this case; but the plaintiff in the case seeks to recover for mental suffering,—for impressions of the mind wholly distinct from bodily or material complications. The mental suffering regarded as a corporal injury cases is of a wholly different character. It considers mind in its bodily or physical aspect, and disregards it in its purely mental or spiritual sense. This distinction destroys the argument.

For the reasons above outlined, we conceive that the infliction of damages for mental anguish fails to have passed the imposed tests, and cannot be assimilated by the process of analogy to the law obtaining upon any other similar pre-existing relations. On the other hand, heretofore, and even to the present time, with the single exception of the question of the case at bar, it has been uniformly held that in any case resulting from tort or breach of contract, where no other damage than mental suffering can be shown, there is no cause of action.

Suth. Dam. 715; Trigg v. St. Louis, K. C. & V. R. Co. 74 Mo. 153, 41 Am. Rep. 305; Wilcox v. Richmond & D. R. Co. 17 L. R. A. 804, 8 S. App. 118, 52 Fed. Rep. 267. In the case of *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 06, 57 Fed. Rep. 471, the United States circuit court of appeals remarks: "The general rule that mental anguish and suffering, unattended by any injury to the person, resulting from simple actionable negligence, cannot be sufficient basis for an action for the recovery of damages, is maintained and supported by an unbroken line of English authorities by the present state of the general law prior to the *Robtelle* case." In *Masters v. Warren*, 27 Conn. 293, it is said: "No case can be found where a person has been allowed to recover damages for a shock, injury, or outrage to the feelings and sensibilities, arising and caused by the breach of contract, except it is a marriage contract. Such damages can only enter into and become a part of the recovery when the plaintiff has sustained, by the negligence or willful act of another, some corporal or personal injury. They never can be recovered independently and alone, and, if recoverable at all, only in action of tort." The supreme court of Mississippi, in the case of *Western U. Teleg. Co. v. Rogers*, 13 L. R. A. 859, 68 Miss. 748, remarks: "We have given to the investigation the question that consideration which its importance demands, and, though the right of the plaintiff to recover the damages awarded in this case finds support in the decisions of several of the states, we are unwilling to depart from the long established and almost universal rule of law that no action lies for the recovery of damages for mere mental suffering, disconnected from physical injury, and not the result of the willful wrong of the defendant. That such damages are recoverable in actions for breach of contract of marriage is well settled; it is equally true that until recent years this position stood as the marked and single exception in which such damages were recoverable in actions for breach of contract. This action, though in form one for the breach of contract, strikes in several features of the characteristics of an action for the willful tort; and, though the damages recoverable by the plaintiff

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for mental suffering are spoken of as 'compensatory,' the fervent language of the courts indicates how shadowy is the line that separates them from those strictly punitive. . . . We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced. The difficulty of applying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated or imaginary injuries are far less likely to be made than will those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things, money can neither palliate nor compensate the injury he sustained. 'Mental pain and anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone.'" In the case of *Chapman v. Western U. Teleg. Co.* reported in 17 L. R. A. 430, 88 Ga. 763, the supreme court of Georgia forcibly remarks: "But it is urged that the public occupation of telegraph companies creates between them and the public special relations, in which their responsibility is greater than that of other persons. So much of their business and profit is derived from the acceptance of messages involving feelings only that at first view it would seem legitimate and salutary to require them to answer in damages for any dereliction of duty in this important part of their activity. The argument is that, in the exercise of a public employment, they undertake, for hire, to serve the feelings of their customers, and therefore ought to pay for negligent nonperformance or misperformance of this peculiar function. This reasoning is unanswerable, so far as it proves a right of action to arise out of the breach of duty. But how about damages, and the measure of damages? It can scarcely be that a new and exceptional principle of damages emerges, *ex proprio rigore*, from unknown recesses of the law, when occasion seems to require it, or that the court can do more than adapt and apply principles already existing when novel transactions, such as those which make up the business of telegraphy, became the subject of adjudication. Precedents must be followed, else the law will become a wandering, uncertain thing. If our understanding of the law, as heretofore expounded by its accredited oracles, be correct, it would be a judicial innovation to require feelings which had, even under contract or public duty, the right to expect help, to be solaced with damages for the disappointment, however severe, at losing the promised benefit. If the subject needs new law, the lawmaking powers may create it, but we decline to usurp their prerogative." In the case of *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695, Judge Lurton, dissenting, said: "The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages. . . . Such injuries are generally more sentimental than substantial, depending largely upon physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the

suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated, and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as a mere compensation to the plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority. But the rule in question has not been limited, as claimed, to actions based upon physical pain. It has, as we have already seen, upon the authority of *Mr. Wood*, been applied to actions of slander and libel. No matter how gross the insult, or how harrowing to the feelings, there can be no recovery if the slander did not imply a crime, or result in some special damage. The same rule applies in actions brought for the death of another. The plaintiff must have a pecuniary interest in such life, and in such cases there can be no recovery for the injured feelings, the grief, or anguish suffered by the plaintiff, in consequence of the death for which the suit lies. This is the rule, regardless of the relation the deceased bore to the plaintiff. Whether husband or wife, or parent or child, the rule is the same. The damages are for the pecuniary loss sustained. . . . The principles upon which this suit is maintained seems to be so radical . . . a departure from the headlands of the law, and to so seriously threaten the uprooting of doctrines that I have been taught to revere as the very foundation stones of the system of our law upon the subject of contracts and damages, as to make it my duty to give expression to my views upon the questions involved." In our view the departure initiated in Texas, and followed by some other states, is not supported by sound reasoning, and is not in harmony with the well-defined principles of law which the experience of the past have found safe and reliable.

It is insisted by counsel for plaintiff in error that he is entitled to recover the statutory penalty of \$50 provided by the statutes of Oklahoma. Section 28, chap. 11, p. 152, Stat. Okla. 1893, provides: "A carrier of messages by telegraph must, if it is practicable, transmit every such message immediately upon its receipt, but if this is not practicable and several messages accumulate upon his hands he must transmit them in the following order: First, Messages from public agents of the United 4 INTER S.

States or of this territory on public business. Second. Messages intended in good faith for immediate publication in newspaper and not for any secret use. Third. Messages giving information relating to the sickness or death of any person. Fourth. Other messages in the order in which they were received." "Sec. 30. Every person whose message is refused or postponed contrary to the provisions of this chapter is entitled to recover from the carrier his actual damages and fifty dollars in addition thereto." This is a penal statute, and must be strictly construed; and, before one can recover the penalty therein imposed, he must state specifically every fact to bring himself strictly within all its terms. *Western U. Teleg. Co. v. Steele*, 108 Ind. 163; *Kirby v. Western U. Teleg. Co.* (S. D.) Dec. 15, 1893. It will be observed that this statute relates to the receipt and transmission of messages, regulating the order in which they shall be received and transmitted, and does not attempt to regulate the mode, means, or time of their delivery. The message in question was sent from Mulvane, Kan., and any statute of Oklahoma which would attempt to prescribe the order of its receipt at or transmissal from that point would be in conflict with the power of Congress to regulate commerce between the states and territories and would be unconstitutional. *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 28 L. ed. 1067; *Rogers v. Western U. Teleg. Co.* 122 Ind. 395. This statute does not attempt to regulate or interfere with the delivery of messages sent to another state, but simply prescribes the order of transmission, and compels the acceptance of messages when presented in the order mentioned. This is not an interference with interstate commerce, and is a proper exercise of the legislative authority. *Connell v. Western U. Teleg. Co.* 108 Mo. 459. There are no allegations of the complaint that would entitle the plaintiff to recover the statutory penalty.

Plaintiff in error insists that he is, in any event, entitled to recover nominal damages. No damages are claimed in the complaint, except for mental anguish. *Russell v. Western U. Teleg. Co.* 3 Dak. 315. There is nothing on the face of the telegram to indicate to the company or its agents that there was any relationship, of any character, existing between the sender and sendee of the message, or of the deceased mentioned in the message, and no allegation that the defendant was notified of any such relationship, or for whose benefit the message was sent.

We find no error in the record. The judgment of the district court is affirmed, at the costs of the plaintiff in error.

All the justices concurring, except **Dale**, J., not sitting.

UNITED STATES CIRCUIT COURT, DISTRICT OF MASSACHUSETTS.

UNITED STATES

v.

JOHN H. PATTERSON *et al.*

(51 Fed. Rep. 1006.)

1. An indictment for conspiracy in restraint of trade or commerce, under the Act of Congress of July 2, 1890, must declare the means by which it is intended to engross or monopolize the market; and it is not sufficient to declare the conspiracy in the words of the enactment.
2. Allegations of what was done in pursuance of an alleged conspiracy cannot enlarge the necessary allegations of an indictment for conspiracy under a particular statute, such as the Act of Congress against conspiracies in restraint of commerce.
3. Insufficient allegations in an indictment which alleges the offense with reasonable precision, are only surplusage under a general demurrer.
4. A conspiracy to drive certain competitors out of the field by violence, annoyance, intimidation or otherwise is not within the prohibition of the Act of Congress against conspiracies in restraint of trade, where there is no aim to engross, monopolize or grasp the market.
5. Violence and intimidation are as much within the mischief of the Act of Congress against conspiracies in restraint of trade or commerce as negotiations, contracts or purchases, if such means are used for the purpose of engrossing, monopolizing or grasping a particular trade.

Decided Feb. 28, 1893.

ON DEMURRER to an indictment charging a violation of the United States statute against conspiracies to monopolize trade and commerce. *Sustained except as to four counts.*

The fourth count in the indictment charged that defendants did unlawfully, wickedly, unjustly, oppressively, and maliciously engage in a combination and conspiracy in restraint of trade and commerce in cash registers between and among the several states of the United States by means of annoying, harassing and intimidating all persons, firms and corporations then engaged in the said trade and commerce, who by reason of their business then competed with the National Cash Register Company in the said trade and commerce in cash registers, by means of threatening such competing persons, firms and corporations and their members, officers, agents and employes, by causing such members, officers, agents and employes to be assaulted and injured, by inducing them to quit their employment, by employing spies to obtain knowledge of the business secrets, by threatening prospective purchasers with annoyance and with suits for infringement, thereby to stifle competition and render it impossible for competing persons to engage in fair and honest competition in trade and commerce with the National Cash Register Company.

The fourteenth count was similar to the fourth, except that it states that the object of the conspiracy was to monopolize the business.

The ninth count was similar, with the exception that it sets out more in detail the acts of the defendants, and the eighteenth count was similar to the ninth, with the exception that it also alleged an intention to monopolize the trade.

Further facts appear in the opinion.

Mr. Frank D. Allen, U. S. Atty., for complainant.

Messrs. H. W. Chaplin and Elihu Root, for defendants.

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Putnam, Circuit Judge, delivered the opinion of the court:

I do not think there is any constitutional question in this case upon any view of this statute, or upon the face of the indictment. The right of free commerce granted by the Constitution (*Crandall v. Nevada*, 73 U. S. 6 Wall. 35, 18 L. ed. 745, and *Philadelphia & R. R. Co. v. Pennsylvania* ("State Freight Tax") 82 U. S. 15 Wall. 232, 21 L. ed. 146) permits broad legislation; and in no sense is this statute as broad as the Revised Statutes (§ 5508) on the principle of construction applied to the latter in *United States v. Waddell*, 112 U. S. 76, 28 L. ed. 673. See *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429. There may be practical difficulties in applying the statute in such way as to prevent conflicts with state jurisdictions, but these can only arise on the development of the facts at the trial of a particular case, and even then the court will have the guidance of the Supreme Court in *Cross v. North Carolina*, 132 U. S. 131, 33 L. ed. 287, and *Fitzgerald v. Green*, 134 U. S. 377, 33 L. ed. 951. Those cases show that there need not necessarily be a conflict of jurisdiction.

This statute is not one of the class where it is sufficient to declare in the words of the enactment, as it does not set out all the elements of a crime. A contract, combination, or conspiracy in restraint of trade may be not only not illegal, but praiseworthy; as, where parties attempt to engross the market by furnishing the best goods, or the cheapest. So that ordinarily a case cannot be made under the statute unless the means are shown to be illegal, and therefore it is necessary to declare the means by which it is intended to engross or monopolize the market. And by the well-settled rules of pleading it is not sufficient to allege the means in general language, but, if it is claimed that the means used are illegal, enough must be set

out to enable the court to see that they are so, and to enable the defense to properly prepare to meet the charge made against it.

I regard the rule laid down by the Supreme Court in *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516, as applying to this case; and I think the case of *United States v. Simmons*, 96 U. S. 360, 24 L. ed. 819, is easily distinguished. If it is not, the later case will, of course, control. In reference to the suggestion of the counsel for the United States, as to cases at common law alleging conspiracy to prevent a man from pursuing his trade, it is sufficient to say that to conspire to prevent a man from pursuing his trade is in itself illegal. But the case at bar is not at common law, and the proceedings under this statute are peculiar to the statute. I think the rules laid down in *United States v. Hess* distinguish this indictment from all the cases and principles of law relied on by the United States.

The allegations of what was done in pursuance of the alleged conspiracy are under this particular statute irrelevant, and cannot be laid hold of to enlarge the necessary allegations of the indictment, and are of no avail. I think it was so conceded at the argument. If not, there is no question about the law. This disposes of counts 1, 2, 3, 6, 7, 8, 11, 12, 13, 15, 16, and 17.

That the means are alleged with "reasonable precision" in the remaining counts, appears from the practical application of the rules of pleading appropriate to this case made in *United States v. Waddell*, 112 U. S. 76, 28 L. ed. 673. Some of the allegations in each count may be insufficient, but under a general demurrer these are only surplusage. Counts 14 and 18 seem sufficient under the second section of the statute, as will appear from what I have to say hereafter.

The remaining counts, 4, 5, 9, and 10, are laid under the first section. Counts 4 and 9 allege an intent to hinder and prevent all persons and corporations, except the corporation controlled by the defendants, from engaging in the trade and commerce described in the indictment, while counts 5 and 10 only allege a purpose to destroy the competition of the four corporations named, without setting out any purpose of engrossing or monopolizing the business as a whole, or any like purpose. The court does not feel at all embarrassed by the use of the words "trade or commerce." The word "commerce" is undoubtedly, in its usual sense, a larger word than "trade" in its usual sense. Sometimes "commerce" is used to embrace less than "trade," and sometimes "trade" is used to embrace as much as "commerce." They are, in the judgment of the court, in this statute synonymous. The court is well aware of the general rule which has been several times (twice certainly) laid down by the Supreme Court of the United States, that in construing a statute every word must have its effect, and the consequent presumption that the statute does not use two different words for the same purpose; but this rule has its limitations, and it is a constant practice for the legislature to use synonyms. A word is used which it is thought does not perhaps quite

convey the idea which the legislature intends, and it takes another word, which perhaps has to some a little different meaning, without intending to more than make strong the purpose of the expression in the statute.

In the legislation of Congress analogous to this under consideration there is a marked case of the use of synonyms. Rev. Stat. § 5438, uses the words "false, fictitious, or fraudulent;" then the words "any false bill, receipt, voucher;" then the words "agreement, combination, or conspiracy;" then the words "charge, possession, custody, or control," mainly synonyms; while section 5440 uses simply the word "conspire." There would be no question that the word "conspire," in section 5440, means all that the three corresponding synonyms, "agreement, combination, or conspiracy," mean in section 5438; and, rather as a matter of curiosity than because they particularly impress my mind, I have taken off some other instances. The Massachusetts statute cited in *United States v. Britton*, 107 U. S. 670, 27 L. ed. 525, uses the words "secular labor, business, or employment." The words "false, forged, and counterfeited" are used over and over again in *United States v. Howell*, 78 U. S. 11 Wall. 436, 437, 20 L. ed. 196, 197; "peddler and hawker" are in constant use in criminal law; "drinking house or tipping house" is of frequent use in the statutes; so are "goods and chattels." These are all referred to in Bishop on Statutory Crimes as synonymous. There is also the very special case where the criminal statute contained the words "ram, ewe, sheep, and lamb;" and it was held in *Reg. v. McCulley*, 2 Mood. C. C. 34, that the word "sheep" covered the two preceding words, and they might be rejected as surplusage. Sutherland on Statutory Construction says that words which are meaningless have sometimes been rejected as redundant or surplusage. So in this statute I think the words "trade or commerce" mean substantially the same thing. But the use of the word "trade" nevertheless is significant. In my judgment, it was probably used because it was a part of the common law expression, "in restraint of trade," as has been carefully pointed out by the counsel for the defense. This has become a fixed, well-known, common law expression; and by the rule of interpretation as given again in Sutherland on Statutory Construction (§ 253) it has been here used in the sense in which it has been used generally in the law. And these words, "in restraint of trade," lead up directly to what I think is the true construction of this statute on this point.

I think it is useful to analyze the statute. Separating it into parts, we have—first, contract in restraint of trade; second, combination in restraint of trade; and, third, conspiracy in restraint of trade. There can be no question that the second and third parts, as thus put, receive color from the first. Moreover, it is important to note the rule that this whole statute must be taken together. The second section is limited by its terms to monopolies, and evidently has as its basis the engrossing or controlling of the market. The first section is undoubtedly

in pari materia, and so has as its basis the engrossing or controlling of the market, or of lines of trade in various directions. The sixth section also leads in the same direction, because it provides for the forfeiture of property acquired pursuant to the conspiracy. Undoubtedly the word conspiracy in that section has reference to the same subject-matter as in the first. If the intention of the statute was that claimed by the United States, I think the natural phraseology would have been "to injure trade," "to restrain trade."

We are now at the point where the paths separate. Careless or inapt construction of the statute as bearing on this case, while it may seem to create but a small divergence here, will, if followed out logically, extend into very large fields; because, if the proposition made by the United States is taken with its full force, the inevitable result will be that the Federal courts will be compelled to apply this statute to all attempts to restrain commerce among the states, or commerce with foreign nations, such as strikes, boycotts, and every method of interference with foreign commerce, or commerce between the states, by way of violence or intimidation. It is not to be presumed that Congress intended thus to extend the jurisdiction of the courts of the United States without very clear language. Such language I do not find in the statute. Therefore I conclude that there must be alleged in the indictment that there was a purpose to restrain trade, as implied in the common law expression, "contract in restraint of trade," analogous to the word "monopolize" in the second section. I think this is the basis of the statute. It must appear somewhere in the indictment that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market, and it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise.

Something has been said in this connection touching the debates in Congress. It is apparently settled law that we cannot take the views or purposes expressed in debate as supplying the construction of statutes. In *United States v. Union Pac. R. Co.* 91 U. S. 72-79, 23 L. ed. 224-228, and elsewhere, the Supreme Court has laid down this rule. But this does not at all touch the question which presents itself in this case, which is whether or not one can gather from the debates in Congress, as he can from any other source, the history of the evil which the legislation was intended to remedy. The debates on this point are very instructive. They show, to my mind, in connection with history from other sources of what preceded the enactment

of this statute, that the purpose was to prevent the engrossing or monopolizing of the market; but they fail to point out particularly what incidents or details of this great evil were to be reached by this legislation.

What I have already said disposes of counts 5 and 10, which do not allege any purpose except to destroy the competition of four corporations named; and they leave for consideration only the counts 4 and 9, which do allege a purpose of engrossing, monopolizing, or grasping the entire trade in question. Such being the case, acts of violence and intimidation may be alleged as means to accomplish the general purpose. Instead of lying outside of the statute, they may aggravate the offense. They are within the logic and spirit of the statute, which are not to be defeated by distinctions which its letter does not suggest to the ordinary mind. Violence and intimidation are as much within the mischief of the statute as negotiations, contracts, or purchases. The former are often used to compel the latter. This line of reasoning applies to both the first and second sections, and finds a sufficient place for every word in each. I find in all the counts which I allow to stand, allegations of an intent to engross, monopolize, and grasp, and of means clearly unlawful, and adapted to accomplish this intent.

I have examined all the cases which have been cited to me as referring to this statute, and I believe that counsel have cited me every case which has been decided in connection with it: but none of them meet the issue which is raised here. Therefore all the expressions in them supposed to touch this case are to be regarded as mere *dicta*. The result is that counts 4, 9, 14, and 18 stand, and the others are quashed.

On March 7, 1893, a special demurrer to counts 4, 9, 14, and 18 was filed. It was argued on May 5, and on May 17, a motion for rehearing was filed.

On June 1, 1893, the following order was entered:

Leave to the defendants to file special demurrer granted February 28, 1893, annulled as inadvertent. Petition of defendants for rehearing on general demurrer granted. Order overruling demurrer as to counts 4, 9, 14 and 18, entered February 28, 1893, annulled. Matters set out in the so-called special demurrer are, by leave of court, assigned as additional causes for demurrer under the general demurrer. Counsel for the defendants and for the United States heard anew touching demurrer to counts 4, 9, 14 and 18. Demurrer overruled as to those counts, defendants to answer over as provided by statute. Defendants have ten days within which to file and present exceptions.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

RE CHARGE TO GRAND JURY (No. 1).

(62 Fed. Rep. 894.)

1. While every man has ordinarily the legal right to stop work and quit his employment whenever he chooses to do so, in the absence of a
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contract obliging him to continue for a definite time, no man has a legal or moral right, while continuing in the employment of another to re-

fuse to do the work he is employed and engages to do.

2. A combination or conspiracy to obstruct or retard the passage of the mail, or to interfere or restrain commerce between the states, is unlawful.
3. Failure of a railroad company to run any other trains than their regular passenger trains for carrying the mail, is not a violation of law, but failure or refusal to carry mails on regular passenger trains, whether local or through trains,

upon which they are required to carry mails, is unlawful.

4. Railroad companies engaged in interstate commerce shall, unless prevented by circumstances beyond their control, run their trains in a reasonable manner, and as often as the ordinary business of commerce requires, but are entitled to determine how many and what cars and engines shall constitute their trains, and are not required to divide the train and run a less number of cars upon refusal of their employes to move the usual and customary trains.

June 29, 1894.

Charge by Judge **Ross**:

Gentlemen of the Grand Jury: Under and by virtue of provisions of the statutes of the United States all railroads or parts of railroads which are now in operation are post roads, and every railroad company in the United States whose road is operated by steam is authorized to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination. A railroad which is a link in a through line of road by which passengers and freight are carried into a state from other states, and from that state to other states, is engaged in the business of interstate commerce, and every combination or conspiracy in restraint of such trade or commerce is by statute declared to be illegal, and the persons so combining or conspiring are by law guilty of the commission of a crime. Congress has passed laws to regulate such commerce, and has provided, among other things, that any common carrier subject to the provisions of the Interstate Commerce Act, or, whenever any such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone, or with any other corporation, company, person, or party, shall willfully omit or fail to do any act, matter, or thing required to be done by the Act, or shall cause or willfully suffer or permit any act, matter, or thing so directed or required by the Act to be done, not to be done, or shall aid or abet such omission or failure, shall be deemed guilty of a misdemeanor, and punished in a certain prescribed way. It is also declared by a statute of the United States that any person who shall knowingly and willfully obstruct or retard the passage of the mail is guilty of a crime, and shall be punished. It is further declared by a United States statute that, "if two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than \$10,000 or to imprisonment for not more than 2 years, or to both fine and imprisonment, in the discretion of the court." Rev. Stat. § 5440. I charge you, gentlemen of the jury, to forthwith diligently inquire whether any of the laws of the United States to which

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I have specially called your attention have been violated by any person or persons within this judicial district. You must, in the language of the oath which you and each of you took when impaneled as grand jurors, "present no person from envy, hatred, or malice; neither shall you leave any person unpresented from fear, favor, affection, gain, reward, or the hope thereof, but you shall present all things truly as they come to your knowledge, according to the best of your understanding." It is of the first importance that the law be in all things and at all times maintained. This is especially true in times like the present, when there seems to be abroad in the land a spirit of unrest, and, in many instances, a defiance of law and order. Every man should know, and must be made to know, that whatever wrongs and grievances exist, no matter in what quarter, can only be corrected through lawful means; for the great mass of the American people are law-loving and law-abiding, and will never tolerate any high-handed or unlawful attempt to correct wrongs, whether they be real or imaginary. It is true that ordinarily every man has the legal right to stop work and quit his employment whenever he chooses to do so, unless there be a contract that obliges him to continue for a definite time; but no man has a legal or moral right, while continuing in the employment of another, to refuse to do the work he is employed and engages to do; and where such refusal goes to the extent of violating a law of the United States it is the solemn duty of those charged with its administration to take every step requisite and necessary to its complete vindication.

July 2, 1894. Gentlemen of the Grand Jury: I understand, through the district attorney, that you desire some further instructions in regard to the mail. Congress has provided by statute that the Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed, and that officer has, through his subordinates, designated for the Southern California Railway Company and the Southern Pacific Railroad Company in this judicial district the regular passenger trains of those roads for the carrying of the United States mails. Neither of those companies is by the law required to run any other trains than their regular passenger trains for the carrying of the mails, and their failure to do so is not a violation of any law of the United States to which my attention has been called, or that I have been able to find. As I told

you the other day, in effect, any and every person who shall knowingly and willfully obstruct or retard the passage of the mail is guilty of a crime against the laws of the United States, and, if two or more persons conspire to commit that or any other offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy are guilty of a crime; and, if you find from your investigations, which I charged you, and again charge you, diligently to pursue, that any such offense has been committed within this judicial district against the laws of the United States, it is your imperative and solemn duty to find an indictment or indictments against any and every such offending person. Using the substance of the language of *Judge Jackson* in a somewhat similar case that arose in West Virginia in 1893, it is proper for me to say that exactly what is involved in the strike which has brought about all of the trouble here and elsewhere is not for you or me to investigate. At this time it is not necessary to say which side is in the right nor which side is in the wrong, or whether, in fact, either side is in the wrong upon the merits of that question. It may be well to again say that there is but one way to redress a wrong known in this country, and that is through the regularly constituted tribunals of the country. No man, no set of men, no communistic combination of men, can lawfully undertake to redress a wrong except in the way pointed out by law. Whenever men attempt to unlawfully combine themselves together for the purpose or redressing a wrong, they strike at the very foundation of those laws which give them the right of a citizen,—the protection of life, of liberty, and the pursuit of happiness. It is the solemn duty of all good citizens to ponder and think of these things, and be sure that their acts, whatever they are, be within, and not contrary to, the laws of the country; and it is the sworn and imperative duty of those charged with the administration of the laws to take prompt and vigorous measures to bring to the bar of justice any and every infraction of them.

Most of the questions propounded by some of your members are answered in substance by the instructions already given to you by the court. The court has already told you that it is provided by a statute of the United States that the Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed, and that that officer has, through his subordinates, designated for the Southern California Railway Company and the Southern Pacific Railroad Company in this judicial district the regular passenger trains of those roads for the carrying of the United States mails; and, further, that neither of those companies is by the law required to run any other trains than their regular passenger trains for the carrying of the mails, and that their failure to do so is not a violation of any law of the United States. The court has further instructed you, and again repeats, that any and every person who shall know-

ingly and willfully obstruct or retard the passage of the mail is guilty of a crime against the United States, and that any and every person who knowingly and willfully interferes with or obstructs any interstate commerce is guilty of an offense against a law of the United States; and that, if any two or more persons—it makes no difference who they are—conspire to commit either of those offenses against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy are guilty of a crime. Whenever such acts are of a character to prevent and obstruct the carrying of the mails, or to interfere with or obstruct any interstate commerce, and are done for the purpose and with the intent to prevent or obstruct the same, a crime is committed.

July 3, 1894. Gentlemen of the Grand Jury: I especially call your attention this morning to the report of certain acts and declarations of a Doctor Ravlin at a public meeting reported to have been held at Hazard's Pavilion in this city last night, and in connection therewith I instruct you that it is declared by the statutes of the United States that "every person who incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States, or the laws thereof, or gives aid or comfort thereto, shall be punished by imprisonment not more than ten years, or by a fine of not more than \$10,000, or by both of such punishments; and shall, moreover, be incapable of holding any office under the United States" (Rev. Stat. § 5334); and, further, that, "if two or more persons in any state or territory conspire to overthrow, put down, or to destroy by force the government of the United States; or to levy war against them; or to oppose by force the authority thereof; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States contrary to the authority thereof; each of them shall be punished by a fine of not less than \$500 and not more than \$5000; or by imprisonment, with or without hard labor, for a period not less than six months, nor more than six years, or by both such fine and imprisonment." Rev. Stat. § 5336. You will forthwith diligently inquire whether at the time and place mentioned, or at any other time or place within this judicial district, any person or persons have violated either of these provisions of law, or any other provision of law of the United States; and, in the event you find that any such offense or offenses have been committed, you should forthwith find and return to the court an indictment or indictments against the person or persons so offending, to the end that he or they may be dealt with as law and justice demand. And I charge you that, in the event you find that any such offense or offenses have been committed, the very man or men first to be proceeded against should be the prime movers and controllers in such unlawful acts, and the very man or men who should first be arrested and imprisoned are the ones who declare they will not be arrested, if any

such there be. For, gentlemen of the grand jury, it is well to repeat, and have it fully understood in times like the present, that this is a government of law and order, and that the majesty of the law must and surely will prevail. You and I are its ministers now, and not one single duty or responsibility ought to be shirked, evaded, or postponed. The situation of affairs demands prompt and vigorous action on the part of each and every officer of the law, which it should be not only the wish, but the pleasure, of every good citizen to obey.

The questions with which we have to deal are wholly apart from any of the alleged grievances between the employes of the Pullman and railroad companies and their employers; but the overshadowing question here is whether the laws of the United States shall be permitted to be trampled under foot with impunity; and as to that there can be but one answer, and that is in the negative.

July 11, 1894. Gentlemen of the Grand Jury: One of your number has asked for further instruction respecting the law bearing upon the subject under your investigation. You have already been informed by the court that under and by virtue of provisions of the statutes of the United States all railroads or parts of railroads which are now in operation are post roads, and that every railroad company in the United States whose road is operated by steam is authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination; and that a railroad which is a link in a through line of road by which passengers and freight are carried into a state from other states, and from that state to other states, is engaged in the business of interstate commerce, and that every combination or conspiracy in restraint of such trade or commerce is by statute declared to be illegal, and the persons so combining or conspiring are by law guilty of the commission of a crime, whether they be railroad presidents, managers, superintendents, conductors, engineers, brakemen, or firemen. "Commerce with foreign countries and among the states, strictly considered," said the Supreme Court of the United States in *Mobile County v. Kimball*, 102 U. S. 691-702, 26 L. ed. 238-241, "consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." And Mr. Pomeroy, in his work on Constitutional Law (§ 378), referring to the significance of the word "commerce," says: "It includes the fact of intercourse and of traffic and the subject-matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject-matter of intercourse or traffic may

be either things, goods, chattels, merchandise, or persons. All these may therefore be regulated." Congress has passed laws to regulate such commerce, thereby requiring carriers engaged in such transportation of persons and property to transport them in accordance with and subject to the provisions of the Act, and has provided, among other things, that any common carrier subject to the provisions of the Interstate Commerce Act, or whenever any such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party shall willfully omit or fail to do any act, matter, or thing required to be done by the Act, or shall cause or willfully suffer or permit any act, matter, or thing so directed or required by the Act to be done, not to be done, or shall aid or abet such omission or failure, shall be deemed guilty of a misdemeanor, and punished in a certain prescribed way.

In respect to the mails of the United States, it is declared by statute that any person who shall knowingly and willfully obstruct or retard the passage of the mail, is guilty of a crime, and shall be punished. It is further provided by statute of the United States that the Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed, and that officer has, through his subordinates, designated for the Southern California Railway Company and the Southern Pacific Railroad Company in this judicial district the regular passenger trains of those roads for the carrying of the United States mails. Neither of these companies is by the law required to run any other trains than their regular passenger trains for the carrying of the mails, and their failure to do so is not a violation of any law of the United States. But on all of their regular passenger trains, whether they be local or through trains, they are required to carry the mails, and their failure or refusal to do so is unlawful. As respects interstate commerce, railroad companies engaged in such commerce should, unless prevented by circumstances beyond their control, run their trains in a reasonable manner, and as often as the ordinary business of commerce requires. At the same time, as owners of the property, they are legally and justly entitled to determine how many and what cars and engines shall constitute their trains; and, when the composition of trains as usually and ordinarily made up by them is reasonable and appropriate to the services required of them, the law does not, upon the refusal of their employes to move the usual and customary trains, require of such companies to divide the train, and run a less number of cars. The court has further instructed you, and again repeats, that any and every person, whether an employe of a railroad company in high or low position or not employed at all, who shall knowingly and willfully obstruct or retard the passage of the mail, is guilty of a crime against the United States, and that any and every person, whether an officer or employe of a rail-

road company or not, who knowingly and willfully interferes with or obstructs any interstate commerce is guilty of an offense against a law of the United States; and that, if any two or more persons, it makes no difference who they are, conspire to commit either of those offenses against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy are guilty of a crime. Whenever such acts are of a character to prevent and obstruct the carrying of the mails, or to interfere with or obstruct any interstate commerce, and are done for the purpose and with the intent to prevent or obstruct the same, a crime is com-

mitted. When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object.

Since preparing the foregoing instructions, the court is informed that certain lawless and criminal acts were committed in this city last night, and you are instructed to forthwith inquire whether any of such acts fall within the criminal statutes of the United States as heretofore pointed out and explained to you by the court, and, if you find that any of the laws of the United States were thereby violated, you should forthwith indict the offending persons.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS.

Re CHARGE TO GRAND JURY (No. 2).

(62 Fed. Rep. 828.)

1. Insurrection is a rising against civil or political authority, the open and active opposition of a number of persons to the execution of law in a city or state.
2. Opposition to the arrest of persons who have willfully obstructed or retarded the mails, by such a number of persons as would constitute a general uprising in that particular locality, and threatens for the time being the civil and political authority constitutes an insurrection.
3. One who by speech, writing, or other inducements assists in setting on foot an insurrection or carrying it along, or who gives it aid or comfort, is guilty of a violation of law.
4. To constitute an insurrection against the United States, it is not necessary that there should be blood shed, or that its dimensions should be so portentous as to insure probable success, but it is necessary that the rising should be in opposition to the execution of the laws of the United States, and should be so formidable as for the time being to defy the authority of the United States.
5. Men who gather together to resist the civil or political power of the United States, or to oppose the execution of its laws in such force that the civil authorities are inadequate to put them down, and a considerable military force is needed

to accomplish that result, become, with every person who knowingly incites, aids or abets them with whatever motives, insurgents.

6. The corrupt or wrongful agreement of two or more persons with each other, that the employes of several railroads carrying mails and interstate commerce shall quit, and that successors shall by threats, intimidation, or violence be prevented from taking their places, will constitute a conspiracy against interstate trade or commerce.
7. Any concerted action upon the part of others to demand or insist, under any effective penalty or threat, upon railroad employes quitting to the injury of the mail service, or the prompt transportation of interstate commerce, is a conspiracy unless such demand or insistence is in pursuance of a lawful authority conferred upon them by the men themselves, and is made in good faith in the execution of such authority.
8. Proof of demand and insistence under effective penalty or threat that railroad employes quit their service, and of consequent injury to the transportation of the mails or interstate commerce, imposes the burden upon those making such demand or insistence of showing lawful authority conferred by the men themselves, and good faith in its execution.

July 10, 1894.

Charge by Judge Grosscup:

Gentlemen of the Grand Jury: You have been summoned here to inquire whether any of the laws of the United States within this judicial district have been violated. You have come in an atmosphere and amid occurrences that may well cause reasonable men to question whether the government and laws of the United States are yet supreme. Thanks to resolute manhood, and to that enlightened intelligence which perceives the necessity of a vindication of law before any other adjustments are possible, the government of the United States is still supreme.

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You doubtless feel, as I do, that the opportunities of life, under present conditions, are not entirely equal, and that changes are needed to forestall some of the dangerous tendencies of current industries. But neither the torch of the incendiary, nor the weapon of the insurrectionist, nor the inflamed tongue of him who incites to fire and sword is the instrument to bring about reforms. To the mind of the American people, to the calm, dispassionate, sympathetic judgment of a race that is not afraid to face deep changes and responsibilities, —there has, as yet, been no appeal. Men who appear as the champions of great changes

must first submit them to discussion—discussion that reaches, not simply the parties interested, but the under circles of society,—and must be patient as well as persevering until the public intelligence has been reached, and a public judgment made up. An appeal to force before that hour is a crime, not only against the government of existing laws, but against the cause itself; for what man of any intelligence supposes that any settlement will abide which is induced under the light of the torch or the shadow of an overpowering threat? With the question behind present occurrences, therefore, we have, as ministers of the law and citizens of the republic, nothing now to do. The law as it is must first be vindicated before we turn aside to inquire how law or practice, as it ought to be, can be effectually brought about. Government by law is imperiled, and that issue is paramount. The government of the United States has laws designed, first, to protect itself and its authority over those to which, under the Constitution and laws, it extends governmental regulations. For the former purpose,—namely, to protect itself and its authority as a government,—it has enacted that every person who entices, sets on foot, assists, or engages in, any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, “and any two or more persons in any state or territory who conspire to overthrow, put down, or destroy by force the government of the United States,” “or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States contrary to the authority thereof,” shall be visited with certain penalties therein named.

“Insurrection” is a rising against civil or political authority,—the open and active opposition of a number of persons to the execution of law in a city or state. Now, the laws of the United States forbid, under penalty, any person from obstructing or retarding the passage of the mail, and make it the duty of the officer to arrest such offenders, and bring them before the court. If, therefore, it shall appear to you that any person or persons have willfully obstructed or retarded the mails, and that their attempted arrest for such offense has been opposed by such a number of persons as would constitute a general uprising in that particular locality, and as threatens for the time being the civil and political authority, then the fact of an insurrection, within the meaning of the law, has been established. And he who by speech, writing, or other inducement assists in setting it on foot or carrying it along, or gives it aid or comfort, is guilty of a violation of law. It is not necessary that there should be bloodshed, it is not necessary that its dimensions should be so portentous as to insure probable success, to constitute an insurrection. It is necessary, however, that the rising should be in opposition to the execution of the laws of the United States, and should be so formidable as for the time being to defy the authority of the United States. When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force that the civil authorities

are inadequate to put them down, and a considerable military force is needed to accomplish that result, they become insurgents; and every person who knowingly incites, aids, or abets them, no matter what his motives may be, is likewise an insurgent. This penalty is severe, and, as I have said, is designed to protect the government and its authority against direct attack. There are other provisions of law designed to protect those particular agencies which come within governmental control. To these I will now call your attention.

The mails are in the special keeping of the government and laws of the United States. To insure their unhindered transmission, it is made an offense to knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same. It is also provided that “if two or more persons conspire together to commit any offense against the United States and one or more of such parties do any act to effect the object of the conspiracy,” all the parties thereto shall be subject to a penalty. Any person knowingly and willfully doing any act which contributes, or is calculated to contribute, to obstructing or hindering the mails, or who knowingly and willfully takes a part in such acts, no matter how trivial, if intentional, is guilty of violating the first of these provisions; and any person who conspires with one or more persons, one of whom subsequently commits the offense, is likewise guilty of an offense against the United States.

What constitutes conspiracy to hinder or obstruct the mails will be touched upon in connection with the subject to which I now call your attention.

The Constitution places the regulation of commerce between the several states and between the states and foreign nations within the keeping of the United States government. Anything which is designed to be transported for commercial purposes from one state to another, and is actually in transit, and any passenger who is actually engaged in any such interstate commercial transaction, and any car or carriage actually transporting or engaged in transporting such passenger or thing, are the agencies and subject-matter of interstate commerce, and any conspiracy in restraint of such trade or commerce is an offense against the United States. To “restrain” is to prohibit, limit, confine, or abridge a thing. The restraint may be permanent or temporary. It may be intended to prohibit, limit or abridge for all time, or for a day only. The law draws no distinction in this respect. Commerce of this character is intended to be free, except subject to regulations by law at all times, and for all periods. Temporary restraint is therefore as intolerable as permanent and practical restraint by actual physical interference,—as criminal as that which flows from the arrangements of business and organization. Any physical interference, therefore, which has the effect of restraining any passenger, car or thing constituting an element of interstate commerce, forms the foundation for this offense. But to complete this offense, as also that of conspiracy to obstruct the mails, there must exist, in addition to the resolve or purpose, the element of criminal conspiracy.

What is criminal conspiracy? If it shall appear to you that any two or more persons corruptly or wrongfully agreed with each other that the trains carrying the mails and interstate commerce should be forcibly arrested, obstructed, and restrained, such would clearly constitute a conspiracy. If it shall appear to you that two or more persons corruptly or wrongfully agreed with each other that the employés of the several railroads carrying the mails and interstate commerce should quit, and that successors should, by threats, intimidation, or violence, be prevented from taking their places, such would constitute a conspiracy.

I recognize, however, the right of labor to organize. Each man in America is a freeman, and so long as he does not interfere with the rights of others he has the right to do with that which is his what he pleases. In the highest sense, a man's arm is his own, and, aside from contract relations, no one but himself can direct when it shall be raised to work, or shall be dropped to rest. The individual option to work or to quit is the imperishable right of a freeman. But the raising and dropping of the arm is the result of a will that resides in the brain, and, as much as we may desire that such wills should remain entirely independent, there is no mandate of law which prevents their association with others, and response to a higher will. The individual may feel himself, alone, unequal to cope with the conditions that confront him, or unable to comprehend the myriad of considerations that ought to control his conduct. He is entitled to the highest wage that the strategy of work or cessation from work may bring, and the limitations upon his intelligence and opportunities may be such that he does not choose to stand upon his own perception of strategic or other conditions. His right to choose a leader, one who observes, thinks, and wills for him,—a brain skilled to observe his interest,—is no greater pretension than that which is recognized in every other department of industry. So far, and with reasonable limits, associations of this character are not only not unlawful, but are, in my judgment, beneficial, when they do not restrain individual liberty, and are under enlightened and conscientious leadership. But they are subject to the same laws as other associations. The leaders to whom are given the vast power of judging and acting for the members are simply, in that respect, their trustees. Their conduct must be judged, like that of other trustees, by the extent of their lawful authority, and the good faith with which they have executed it. No man, in his individual right, can lawfully demand and insist upon conduct by others which will lead to an injury to a third person's lawful rights. The railroads carrying the mails and interstate commerce have a right to the service of each of their employés until each lawfully chooses to quit; and any concerted action upon the part of others to demand or insist, under any effective penalty or threat, upon their quitting, to be injury of the mail service or the prompt transportation of interstate commerce, is a conspiracy, unless such demand or insistence is in pursuance of a lawful authority conferred upon them by the men themselves, and is

made in good faith in the execution of such authority. The demand and insistence under effective penalty or threat, and injury to the transportations of the mails or interstate commerce, being proved, the burden falls upon those making the demand or insistence to show lawful authority and good faith in its execution.

Let me illustrate: Twelve carpenters are engaged in building a house. Aside from contract regulations, they each can quit at pleasure. A thirteenth and fourteenth man, strangers to them, by concerted threats of holding them up to public odium or private malice, induce them to quit, and leave the house unfinished. The latter in no sense represent the former or their wishes, but are simply interlopers for mischief, and are guilty of conspiracy against the employers of the carpenters. But if, upon a trial for such, it results that, instead of being strangers, they are the trustees, agents, or leaders of the twelve, with full power to determine for them whether their wage is such that they ought to continue or quit, and that they have in good faith determined that question, they are not then, so far as the law goes, conspirators. But if it should further appear that the supposed authority was used, not in the interest of the twelve, but to further a personal ambition or malice of the two, it would no longer justify their conduct. Doing a thing under a cloak of authority is not doing it with authority. The injury of the two to the employer, in such an instance, would only be aggravated by their treachery to the associated twelve, and both the employer and the employés should, with equal insistence, ask for the visitation of the law. If it appears to you, therefore,—applying the illustration to the occurrences that will be brought to your attention,—that any two or more persons, by concert, insisted or demanded, under effective penalties and threats, upon men quitting their employment, to the obstruction of the mails or interstate commerce, you may inquire whether they did these acts as strangers to these men, or whether they did them under the guise of trustees or leaders of an association to which these men belong. And, if the latter appears, you may inquire whether their acts and conduct in that respect were in faithful and conscientious execution of their supposed authority, or were simply a use of that authority as a guise to advance personal ambition or satisfy private malice. There is honest leadership among these, our laboring fellow citizens, and there is doubtless dishonest leadership. You should not brand any act of leadership as done dishonestly or in bad faith unless it clearly so appears. But if it does appear,—if any person is shown to have betrayed the trust of these toiling men, and their acts fall within the definition of crime, as I have given it to you,—it is alike the interest, the pleasure, and the duty of every citizen to bring them to swift and heavy punishment.

I wish again, in conclusion, to impress upon you the fact that the present emergency is to vindicate law. If no one has violated the law, under the rules I have laid down, it needs no vindication; but, if there has been such violation, there should be a quick, prompt, and adequate indictment. I confess that the prob-

lems which are made the occasion of pretext for our present disturbances have not received the consideration they deserved. It is our duty, as citizens, to take them up, and, by candid and courageous discussion, ascertain what wrongs exist, and what remedies can be applied. But neither the existence of such problems, nor the neglect of the public hitherto

to adequately consider them, justifies the violation of the law, or bringing on of general lawlessness. Let us first restore peace, and punish the offenders of the law, and then the atmosphere will be clear to think over the claims of those who have real grievances. First, vindicate the law. Until that is done, no other questions are in order.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

Re CHARGE TO GRAND JURY (No. 3).

(62 Fed. Rep. 840.)

1. Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose as well as the purchase, sale, and exchange of commodities.
2. A combination or conspiracy that will interrupt the transportation of commodities from one state to another is within Act of Congress of July 2, 1890, declaring illegal every combination or conspiracy in restraint of trade or commerce among the several states.
3. Any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in transporting the interstate commerce of the country is a violation of Act of Congress of July 2, 1890, declaring illegal every combination or conspiracy in restraint of trade or commerce among the several states.
4. Willful failure of railroad companies to carry the mails is within U. S. Rev. Stat. § 3905, making it an offense to unlawfully and willfully retard or obstruct the passage of the mail, although their employees refuse to move trains having certain sleeping cars thereon, where the situation is of an extraordinary character, and the interruption to commerce has been serious and long continued and the employees are willing to move trains without such cars.
5. Declarations by one of the parties to a conspiracy during the pendency of the illegal enterprise is evidence against all the others when the combination is proved.
6. To justify the finding of an indictment the evidence must satisfy the grand jury that a conviction of the accused by a petit jury would be warranted.

July 13, 1894.

Charge by Judge Morrow:

Gentlemen of the Grand Jury: You have been summoned and sworn as grand jurors of the District Court of the United States for the Northern District of California. It now becomes my duty to instruct you concerning the duties you will be called upon to perform under the laws of the United States.

The extraordinary occurrences in this state during the past two weeks require your immediate attention, and call for a thorough and sweeping investigation. It is a matter of public notoriety that during this time a great railroad strike has prevailed; that the most important channels of trade and commerce carried by railway service have been closed, the business operations of the state paralyzed, and the passage of the mails seriously retarded and obstructed at several points in the state. The Constitution of the United States provides that Congress shall have power to regulate commerce among the states and establish post-offices and post roads. Pursuant to the first of these provisions, Congress has provided by the Act of July 2, 1890, that—

“Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to

be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding \$5000 or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.”

“Trade” has been defined as “the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale and exchange.” The word “commerce,” as used in the statute and under the terms of the Constitution, has, however, a broader meaning than the word “trade.” Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. *Mobile County v. Kimball*, 102 U. S. 702, 26 L. ed. 341; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 29 L. ed. 161, 1 Inters. Com. Rep. 382. The primary object of the statute was undoubtedly to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the

markets for commodities. *United States v. Patterson*, 55 Fed. Rep. 605. But its provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities from one state to another, and in this view the scope and purpose of the statute have been the subject of consideration in the courts, notably in the case of *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 995. That action was brought by the United States in the eastern district of Louisiana against the Workingmen's Amalgamated Council of New Orleans, La., and others, to restrain the defendants from interfering with interstate and foreign commerce. The facts were that a disagreement had arisen between the warehousemen and their employes and the principal draymen and their subordinates concerning the recognition that should be accorded by the employers to the demands of certain labor organizations in New Orleans, and it was threatened that unless there was acquiescence in these demands all the labor organizations would leave work, and would allow no work in any department of business, and violence was threatened in support of the demands. In some branches of business the effort was made to replace the union men by other workmen. This was resisted by the intimidation springing from vast throngs of the union men assembling in the street, and in some instances by violence, so that the result was that by the intended effects of the doings of the defendants not a bale of goods constituting the commerce of the country could be moved. It was held by the court that the facts of that case brought it within the provisions of the statute. In other words, it was determined that a combination of men who by violence and intimidation restrained trade and commerce among the several states or with foreign nations were acting in violation of this law, notwithstanding they may have had in view some other purpose in relation to their employment. You will observe that in his case the elements of intimidation and violence were present. It was not a case where he men merely quit work, putting their employers to no other inconvenience than of securing other men to fill their places, but it was a case where force and intimidation were used to prevent any one in that locality from engaging in the lawful and necessary business of moving the commerce of the country. The order granting an injunction in that case was affirmed by the circuit court of appeals in the fifth circuit. 57 Fed. Rep. 85. The law as thus declared by a court of recognized ability and authority was recently applied by Judge McKenna of the circuit court of this district in like manner to one feature of the state of affairs to which I am now directing your attention. This law determines that any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in transporting the interstate commerce of the country is a violation of the Act of July 2, 1890.

Another agency of the government is involved in the transportation of the mails, and protect and secure the efficiency of that branch of the service it has been enacted that railroads or parts of railroads which are

now or hereafter may be in operation are established as post roads (Rev. Stat. § 3964); that the Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed (Act March 3, 1879, 20 Stat. at L. 858, § 3); and every railway company conveying the mails shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same. Rev. Stat. § 4000. It is further provided in section 3995 of the Revised Statutes that "any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver or carrier carrying the same, shall for every such offense be punished by a fine of not more than \$100." This statute has also been before the courts in cases where bodies of men operating as labor organizations have prevented the passage of trains carrying the mails. In the case of *United States v. Clark*, in the District Court of the United States for the Eastern District of Pennsylvania (13 Phila. 476, 23 Int. Rev. Rec. 306) the defendant was one of a number of persons who assembled at the depot of the Lehigh Valley Railroad at South Easton, Pa. On the arrival of the mail train at the depot, the defendant, who had no connection with the train, said to persons having charge of it that the mail car could go on, but not the rest of the train. The defendant afterwards got on the train, and, with others, placed it on a siding, where it remained for several days. Judge Cadwallader, in charging the jury upon these facts, said:

"The defendant is charged with retarding the transportation of the mail. . . . The mail, in point of fact, was retarded, as the postmaster testifies, two or three days. The occurrence which retarded it, according to the tendency of the proofs, was that several persons were assembled at the depot at Easton for no lawful purpose, and that one or more of them declared that the mail might go on, but the passenger train should not. They uncoupled the mail, and afterwards coupled it for the purpose of carrying it, as they did, to a siding. If that was the fact, and their purpose was to retard the train which transported the mail, it matters not, in point of law, whether they were or were not willing that the mail car or the baggage car or the particular vehicle carrying the mail should go on."

The learned judge then quotes with approval the opinion of Judge Drummond of Chicago upon the subject, as follows:

"In relation to the transportation of the mails by means of railroads it is true that it appears by the evidence in this case that these defendants were willing that the mail car should go, but it must be borne in mind that the mail car can only go in such a way as to enable the railroad to transport the mail where there are other cars accompanying it. It is not practicable, as a general thing, for a railroad to transport a mail car by itself, because that would be attended by serious loss; so that while nominally they permit the mail car to go, they really, by preventing the transit of other passenger cars, interfered with the transportation of the mails."

You will observe that the law is applicable to the case of an obstruction interposed for a

purpose other than that of retarding the mails. This was decided to be the law by the Supreme Court of the United States as long ago as 1868 in the case of *United States v. Kirby*, where it was said:

"When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object." 74 U. S. 7 Wall. 486, 19 L. ed. 280.

In the case of *United States v. Thomas*, 55 Fed. Rep. 381, the transportation of the mails had been obstructed by some persons acting under the influence of a strike. Judge Jackson, in addressing the jury, submitted observations intended for the strikers. He said:

"You have no right to go into a strike and undertake to stop the transportation of the mails of the United States, undertake to stop the running of the cars of the country, or undertake to stop the business which is carried on the great highways of the country, and which is the mainspring to the success of a country like ours. If all this is done, then you step upon a right which you have no right to interfere with. I make these general remarks on this occasion with a hope that I may reach the ear of the intelligent masses, that they may see at once the error they have fallen into. Rely not upon combination and strikes to protect your interests. They are disastrous, stopping your mills, and stopping the enterprises and business of the community which furnish the wage earner the means to support his home. Do not resort to such measures to stop our manufactures, our mills, or the transportation of the mails of the United States, which is so great and important an element of our country for the comfort and welfare of society. If you take this thing up and look at it, and ponder over it, and see the result that must necessarily follow such a course of action, and the train of circumstances that must necessarily accompany it, you would refuse to enter into these combinations and strikes."

That the passage of the mails over certain lines of railroad in this state has been retarded and obstructed there is no question. The regular receipt and dispatch of mails over the roads of the Southern Pacific Company have in fact been suspended at the San Francisco postoffice for a period of about two weeks. Who is responsible for this state of affairs? The strikers, the railroad company, or both? The railway is a great public highway, and the duty of the railroad company as a common carrier is first to the public. The road must be kept in operation for the accommodation of the public, if it is possible to do so with the force and appliances within reach. Any negligence in this respect is not excused by temporary difficulties capable of being promptly removed. The damage and interruption caused by the elements usually receive prompt attention, that traffic may not be suspended longer than is absolutely necessary. The same energy and good faith should be observed with respect to the removal of labor and other difficulties. *Pittsburg, Ft. W. & C. R. Co. v. Hazen*, 84 Ill. 36. The present controversy between the Southern Pacific and its employes appears to be in relation to the movement of Pullman

cars. Both parties to this controversy have announced in the public press that they have been ready and willing from the first to move freight cars and passenger trains without Pullman cars. In my opinion, the situation has been of such an extraordinary character, and the interruption to commerce and the transportation of the mails so serious and long continued, as to have required of the railroad company to temporarily waive questions concerning the make up of regular trains (as the officers of the company claim to have done) and employ such resources as the company had in the movement of other trains in an effort to relieve the prevailing congestion and distress. This obligation I believe to have been a public duty, and a willful failure to perform this duty with respect to the movement of the mails and interstate commerce is therefore, in my judgment, within the purview of the statute.

It is your duty to determine this question under the law as I have stated it to you, and present the guilty parties to the court for prosecution. In this inquiry you will not limit your examination to the conduct of any particular class of persons, but carefully scrutinize the acts of all parties concerned, whether they are officers of the railroad company or employes, and without fear or favor or influence of any kind point out in the proper manner the persons who have transgressed the law and imperiled the best interests of this state. It is our duty to uphold the authority and majesty of the law, and see to it that those who have violated its provisions, whoever they may be, are brought to the bar of justice.

In your inquiry you may find that parties have so associated themselves together in their conduct as to bring them within the law of conspiracy. The statute of the United States upon that subject is as follows:

Section 5440, Rev. Stat.: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

The elements of this offense are the combination or conspiracy to violate the law, and the overt act or acts to carry the conspiracy into effect. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy.

It is also true that any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, as we have seen, when the combination is proved, are as much responsible as if they had done the act themselves. You will observe in this connection that the act of combination to violate the statute is the important

element in the crime of conspiracy. The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederation of several persons to commit crime requires an additional restraint to those provided for the commission of the crime, and makes criminal the conspiracy, with penalties and punishments, distinctive from those prescribed for the crime the subject of the conspiracy. You can readily appreciate why this is true. A conspiracy becomes powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power, and strength of the combination to effect it. It is also true that, as it involves a number in a lawless enterprise, it is proportionally demoralizing to the well-being and character of the men engaged in it, and, as a consequence, to the safety of the community to which they belong. The statutes I have cited indicate the general character of the investigation you will be required to make concerning the affairs of the railroad company in the transportation of the mails and in the movement of interstate commerce. With the merits of the controversy between the railroad company and its employes you have nothing to do, except in so far as the facts relating thereto may furnish evidence as to the actual parties engaged in violating the laws of the United States. The right of labor to organize for its own benefit and protection is not questioned. It has the same right in this respect as any other association, and, perhaps, in some respects, its freedom is properly greater. The laboring man is entitled to the highest wages and the best conditions he can command, but he is not entitled to interfere with the rights and property of others, and by force or other unlawful means seize upon the appliances of organized industry, and set at defiance the laws of the government. The right of workmen to quit work, either singly or in a body (subject only to the civil obligations of contracts) is not denied, provided that the abandonment of service is accomplished in a peaceful and orderly manner; and here again the privilege or freedom must be exercised without interfering with the rights and property of others. It may be said that this freedom or privilege accorded to the laboring men, with the restrictions named, is of no great value, since he is thereby prevented from securing the protection he ought to have for his labor, and the power to redress his grievances. This may be true, and it may be conceded that the relations of labor to capital present a difficult problem for solution, but it seems to me that the intelligence of the people ought to solve this question in a peaceful and proper manner. It certainly cannot, with the consent of the courts, be settled by violence or any unlawful means.

It will appear to you from what I have said that a very serious and important duty de-

volves upon you as grand jurors of this court. Your oath requires you to diligently inquire and true presentments make "of such articles, matters, and things as shall be given you in charge or otherwise come to your knowledge touching the present service." The oath indicates the impartial spirit with which your duties should be performed. You are to present no one from envy, hatred, or malice, nor should you leave any one unrepresented for fear, favor, affection, hope of reward or gain, but should present all things truly as they come to your knowledge, according to the best of your understanding. In each judicial district there is a United States attorney, appointed by the president to represent the interests of the government in the prosecution of parties charged with the commission of public offenses against the laws of the United States. The United States attorney for this district will therefore appear before you, and present the accusations which the government may desire to have considered by you. He will point out to you the laws other than those I have mentioned which the government deems to have been violated, and will subpoena for your examination such witnesses as he may consider important, and also such other witnesses as you may direct. In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions, and hearsay evidence. Subject to this qualification, you will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused. And more, if in the course of your inquiries you have reason to believe that there is other evidence not presented to you within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced. Formerly it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable. But a different and a more just and merciful rule now prevails. To justify the finding of an indictment you must be convinced, so far as the evidence before you goes, that the accused is guilty; in other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury. To authorize you to find an indictment or presentment, there must be a concurrence of at least twelve of your number,—mere majority will not suffice. You are to keep your deliberations secret, and allow no one to question you as to your own action, or the action of your associates on the grand jury. In the progress of your examinations, should questions arise concerning which you may desire further instructions from the court, you may come into court for that purpose, and the law will be further explained to you with respect to such questions.

INTER 8.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF OHIO.

SAMUEL THOMAS

v.

CINCINNATI, N. O. & T. P. R. CO.

Re F. W. PHELAN.

(62 Fed. Rep. 803.)

1. Any willful attempt with knowledge that a railroad is in the hands of a court through its receiver, to prevent or impede the latter from complying with the order of the court in running the road which, as between private individuals, would give a right of action for damages, is a contempt of court.
2. Instigating the employes of a receiver to leave their employment may be a contempt without being a crime.
3. Inciting the employes of a road in charge of a receiver to quit their service, in pursuance of the plans of an unlawful conspiracy, constitutes a contempt of court.
4. A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose or some purpose not in itself criminal or unlawful, by criminal or unlawful means.
5. A combination of railroad employes to compel railroad companies to injure a manufacturer of cars by breaking their contracts with him, is an unlawful conspiracy.
6. A combination of railroad employes to quit their employment to compel their employer to withdraw from a mutually profitable relation with a third person, for the purpose of injuring the latter, when such relation has no effect on the character or reward of their services, is an unlawful conspiracy.
7. Boycotts are unlawful though unaccompanied by violence or intimidation.
8. A combination between railroad employes with the purpose of paralyzing the interstate commerce of the country by refusal of such employes to perform their duties, is an unlawful conspiracy under Act of Congress of July 2, 1890, declaring illegal every combination or conspiracy in restraint of trade or commerce among the several states.
9. A combination of railroad employes to quit employment for the purpose of preventing their employers from running certain cars, with the intent to stop mail trains as well as others, is an unlawful conspiracy, under U. S. Rev. Stat. § 3906, imposing a penalty for obstructing or retarding the passage of the mail.
10. The right of assembly and free speech secured by the constitution of Ohio, cannot be used to carry out an unlawful and criminal conspiracy to obstruct the operation of a railroad by a receiver.
11. Imprisonment for six months was imposed as a punishment for contempt of court in interfering with the operation of a railroad by a receiver, where, after the service of the restraining order, the defendant continuing in his unlawful course, and aggravated his contempt by speeches to the employes of the receiver.

Decided July 13, 1894.

P**ETITION** for the commitment of F. W. Phelan for contempt in inciting employes of a receiver in charge of defendant railroad to engage in a strike. *Punishment inflicted.*
The facts are stated in the opinion.

Messrs. Harmon, Colston, Goldsmith & Hoadly for receiver.
Messrs. Cogan & Shay for Phelan.

Taft, *Circuit Judge*, delivered the opinion of the court:

Samuel M. Felton was appointed receiver in the above entitled cause, March 18, 1893, and has ever since been engaged under the order of the court, in operating the railroad of the Cincinnati, New Orleans & Texas Pacific Railway Company, which is more commonly known as the Cincinnati Southern Railroad. On Monday, July 2, 1894, he filed an intervening petition in the original action, in which he stated that during the previous week, and at the time of filing the petition, he was greatly impeded in the operation of the road by a strike of his employes, and of the employes of other rail-

4 INTER S.

roads in the city of Cincinnati, who were prevented from receiving from him and delivering to him freight carried or to be carried over his road; that said strike was the result of a conspiracy between one F. W. Phelan, now in Cincinnati, and one Eugene V. Debs and others, to tie up the road operated as the said conspirators well knew, by the petitioner as receiver, and other roads in the western states of the United States, until certain demands or alleged grievance of certain persons not in the employ of the receiver or of any other railroad of the United States were acceded to by persons in no manner connected with the management of any railroad of the United States; that the

demand of the employés of one George M. Pullman, or the Pullman Palace Car Company, at Pullman, Ill., for higher wages was refused, whereupon said Debs, Phelan, and others, members of an organization known as the American Railway Union, combined and conspired with each other and with sundry persons, who became members of the organization for the purpose, to compel the Pullman Company to comply with the demands of its employés, and that for the purpose of injuring the Pullman Company, and of thereby forcing from it the concession demanded, Debs, Phelan, and the others named had maliciously conspired and undertaken to prevent the receiver of this court and the owners of other railroads from using Pullman cars in operating their roads, though they are under contract to do so: that in pursuance of said conspiracy Phelan, a resident of Oregon, came to Cincinnati a week before the filing of the petition, and set on foot and incited a strike among the employés of the receiver, and of other railroad companies whose lines run into Cincinnati; that on June 27th, and at other times and places, Phelan made inflammatory speeches to such employés, well knowing many of them to be employés of the receiver in which he urged them all to quit the service of the receiver and the other railroads of the city, and to tie them all up, and to prevent others from taking their places, by persuasion if possible, by clubbing if necessary; that said Phelan was still in the city, directing and continuing the strike, and interfering with the receiver in the operation of the road; that as a result of the conspiracy and strike the receiver had been obliged at great expense to secure and maintain the protection of armed men for his employés; and that all of the foregoing constituted a contempt of this court, and a ground both for committing Phelan and for enjoining him from a continuance of said acts.

Upon the filing of the petition an attachment was issued for Phelan, the contemner, and on the morning of the 3d of July he was arrested, and brought before the court. He was admitted to bail, and at the same time was enjoined by order of the court from, either as an individual or in combination with others, inciting encouraging, ordering, or in any other manner causing the employés of the receiver to leave his employ with intent to obstruct the operation of his road, and thereby to compel him not to fulfill his contract and carry Pullman cars. On Thursday, July 5, the motion of the receiver, for Phelan's commitment came on to be heard, and a week has since been taken up in the giving of testimony and argument.

I propose first to run over the evidence, as briefly as may be, and determine the facts, and then to consider the law applicable to them.

The American Railway Union is an organization of railway employés, to which are eligible as members all persons in the service of railways below a certain rank. It was organized in June, 1893. On May 11, 1894, at Pullman, Ill., the employés of the Pullman Palace Car Company, engaged in manufacturing railway cars of all kinds, including sleeping cars, left the company's employ because of its refusal to restore wages which had been reduced during the preceding year, and the works were then

closed. On June 11, 1894, the general convention of the American Railway Union met at Chicago, and decided that the American Railway Union would take measures to compel the Pullman company to resume business and to re-employ its employés who had left its service on terms to be fixed by arbitration. It does not appear that at this time the Pullman Company's employés were members of the Railway Union, or eligible as such. At the June convention of 1894 there were present representatives from 450 lodges of the union, and the number of members, as estimated at that time, was 250,000. It is said that the local unions had voted for the Pullman boycott before the convention met. The question where the boycott originated is not very material, but it may be said that, as the Pullman strike occurred but a month before the convention, and as it had been deemed necessary by the union to send men all over the country to explain to its members the merits of the Pullman controversy during the boycott, it is obvious that the boycott had its real origin in the union convention at Chicago, where the subject was brought before it, presumably by its board of directors.

The chief governing body of the union is a board of directors, which elects a president, vice president, and secretary, who are the chief executive officers of the union. Eugene V. Debs is, and has been since its organization, the president. Section 6 of the constitution of the union, as adopted in June, 1893, provides that "the board is empowered to provide such rules, issue such orders, and adopt such measures as may be required to carry out the objects of the order, provided that no action shall be taken that conflicts with this constitution." By section 11 of the same instrument the president's powers are thus described:

"It shall be the duty of the president to preside over the meetings of the board and at the quadrennial meetings of the general union. He shall at each annual meeting of the board and at each quadrennial meeting of the general union submit a report of the transactions of his office, and make such recommendations as he may deem necessary to the welfare of the order. He shall enforce the laws of the order, sign all charters, circulars, reports and other documents requiring authentication. He shall decide all questions and appeals, which decisions shall be final, unless otherwise ordered by the board. He may, with the concurrence of the board, deputize any member to perform any required service, issue dispensations not inconsistent with the constitution or regulations of the order, and perform such other duties as his office may impose; and he shall receive such compensation for his services as may be determined at the time of his election."

Phelan, when on the stand, said that these were sections of the old constitution, but that he understood the constitution had been generally changed. He would not say that extensive or material changes had been made, but simply that general changes had been effected. He was in attendance as a delegate only during the last five days of the convention, and this is his explanation for not knowing what the changes were. Phelan's answers on this sub-

ject had really no effect to show that the foregoing sections are not still in force, but simply illustrated the evasiveness and verbal quibbling to which the witness was continually willing to resort under examination. It is certainly strange that if he was here, as he says, as a representative of the union, he should not know the changes, if any really material ones had been made in the constitution, under which he was initiating men into the union, and was receiving orders from his superior officers. We shall see, as we progress, that the two sections of the old constitution are still in force, if we can judge at all from the actual authority exercised by the officers of the union during the present boycott.

The plan of the boycott, as shown by the evidence, was this: Pullman cars are used on a large majority of the railways of the country. The members of the American Railway Union whose duty it was to handle Pullman cars on such railways were to refuse to do so, with the hope that the railway companies, fearing a strike, would decline further to haul them in their trains, and inflict a great pecuniary injury upon the Pullman Company. In case the railway companies failed to yield to the demand, every effort was to be made to tie up and cripple the doing of any business whatever by them, and particular attention was to be directed to the freight traffic, which it was known was their chief source of revenue. As the lodges of the American Railway Union extended from the Allegheny mountains to the Pacific coast, it will be seen that it was contemplated by those engaged in carrying out this plan that, in case of a refusal of the railway companies to join the union in its attack upon the Pullman Company, there should be a paralysis of all railway traffic of every kind throughout that vast territory traversed by lines using Pullman cars. It was to be accomplished, not only by the then members of the union, but also by procuring, through persuasion and appeal, all employes not members either to join the union or to strike without joining, by guarantying that, if they would strike, the union would not allow one of its members to return to work until they also were restored. I shall allude again to the gigantic character of this combination. For my present purpose, it is sufficient to say that on Sunday, June 24, Phelan came to Cincinnati as the authorized representative of the president and board of directors of the union, to enforce and carry out the contemplated boycott and paralysis of business on all railway lines running into Cincinnati which used Pullman cars until they should cease to use them.

I am aware that Phelan denies that such were his authority and instructions, but as in the case of his answers in respect to the constitution and its provision, his denials do not, in view of the overwhelming proof of the circumstances not denied, and his previous admissions not denied, show the fact to be otherwise, but only decrease the reliance which can be placed on any statement made by him in this case. He says that he came here with no direction except to visit the employes of the Pullman Company at a branch factory at Ludlow, to explain to them the merits of the controversy between their employer and their fellows at Chi-

cago, and then, if they struck, to see that the appointed committees who should keep order among them, and look after the sick. At another time he says he was directed to be in Cincinnati during the boycott, but he strenuously denies he was here for the purpose of laying on the boycott or inciting a general strike. He would have the court believe that what occurred was wholly spontaneous, and not through his agency, and that his business was, if there should be such coincidental spontaneity resulting in a strike, to prevent disorder, and to look after the sick. This hardly accords with his first telegram to Debs, his chief officer, dated noon, Tuesday, June 26, as follows: "Pay no attention to press reports. To be effective, was compelled to postpone action until seven, Wednesday morning." On Sunday, June 24, after Phelan's explanation of the Pullman troubles, the Pullman employes at Ludlow determined to strike, and did so Monday morning at 7 o'clock. Phelan says he did not advise them to strike, but just explained the situation, and then a strike followed. When he had explained, and organized committees among the strikers, after the strike had occurred, through no agency of his, his mission was ended, so far as his instructions went. And yet we find him on Tuesday, June 26, at 12 o'clock noon, telegraphing his chief that he was obliged to postpone action until Wednesday morning at 7 in order to be effective. Now, what action was this which he hoped to make effective? Can any one doubt for an instant that the action thus foreshadowed was that referred to in Phelan's dispatch to Debs of June 28 following, when he said, "The tie-up is successful?" On Tuesday night, June 26, there was a meeting of all the switchmen of Cincinnati at Wuebler's Hall. There is no direct evidence how this meeting was called, but the circumstances leave no doubt. Phelan, having brought out the Pullman men, then set to work upon the railway men, and hence the meeting. The telegram of June 26 indicates that Debs expected him to have the meeting and action earlier, but that he was not able to secure an attendance at any earlier meeting sufficiently general to make the action taken effective. Indeed, when the Tuesday night meeting was held, it was found that action must be still further delayed, and a second meeting for Wednesday night was called. At both of these meetings Phelan explained and discussed the Pullman trouble, and announced the Pullman boycott. Now, what was his object? Was it for the purpose of inducing the men whom he addressed, and others not present, whom he urged them to talk to, to demand of the railway companies assistance in boycotting Pullman, and, on refusal, to tie them up, or was it simply for their general information? He repeats upon the stand with much emphasis that he at no time advised any man to strike. What was he doing? His speeches were all directed to that end, and, even if he did not use the word "advise," his conduct was exactly the same as if he had. His trifling with the truth, and his attempt to seek shelter again behind verbal quibbles, simply disparages him as a witness, without concealing the facts. Now, what was done at this meetings of Tuesday and Wednes-

day night after or during Phelan's speeches? A city committee was appointed, consisting of one employé of each of the great railroads entering the city. This committee Phelan continually refers to in his testimony as "my committee," and the term was properly used, for it seems to have spent all its time in his company, and doing his bidding. On this committee was J. Madison, a switchman in the receiver's employ. The first duty of each member of the committee was on June 27, or on the next day, to notify the yard master of his road that the switchmen and members of the American Railway Union would not handle Pullman cars because a boycott had been laid on them. Madison duly notified McCarty, the yard master of the receiver. The necessary result was that three switchmen on the Cincinnati, Hamilton & Dayton Railroad were discharged or relieved of duty on the afternoon of Thursday, June 28, and within six hours a general strike of all the switchmen and yard men, including yard engineers and firemen, on all the roads coming into Cincinnati, took place. This was exactly in accordance with the plan which Phelan had outlined to Westcott, a reporter for the Enquirer, on Tuesday or Wednesday before the strike, in a conversation which he does not deny. Beginning with Tuesday night, June 26, Phelan has made speeches every night since, in which he continued to explain the Pullman trouble to audiences of railroad men, and has read telegrams from Debs of a character calculated to incite and encourage all railway employés to quit their places to assist in the Pullman boycott. He says he has made as many as twenty speeches. Two, at least, were made at Ludlow, Ky., a railroad town, the inhabitants of which are, or were, many of them, employés of the receiver. It is in evidence that when the meetings began the number of the receiver's employés who were members of the American Railway Union was 150. And yet Phelan denies that he is in any sense responsible for the strike of the receiver's employés, or of any other road in town, or for the paralysis of business which followed.

It is marvelous that Phelan can assume such a position in view of the circumstances and his own declarations. Take the evidence of Westcott, the Enquirer reporter, a witness evidently of much experience in acquiring and detailing accurate information, who has no motive to misrepresent Phelan in any way. He was assigned to report the strike, and seems to have found Phelan his best source of information. He made notes of everything at the time, and prepared them afterwards for publication. Phelan has not attempted to deny anything he says. Westcott testifies that Phelan told him before the strike that his main object in coming here was to enforce a boycott against Pullman cars, by tying up every road in Cincinnati for the American Railway Union; that he frequently and constantly repeated the statement that they intended to tie up every road in town, and keep them tied up until they refused to handle Pullman cars; that after the strike on Thursday he said he had most of the American Railway Union men out in Cincinnati, Ludlow, and Covington, and that those who were not out would be out the

next morning; that after his arrest he explained that his course had been to tie up the freight trains, and not so much to stop passenger trains, because the money was in the freight business. Schaff, Gibson, and Bender, officers of the Big Four Railroad, testify that Phelan said to them on Thursday afternoon, when they met him for the purpose of seeing whether the "embargo," as Phelan and Debs expressed it, could not be lifted from the Big Four, because it was a Wagner sleeping car line, that he proposed to tie up every line in town, and was in a hurry because he must go over and tie up the Pan Handle and the C. & O. before sunset; and that, just to show Schaff what he could do, he had called out some more of the Big Four employés. Phelan and those members of the city committee who accompanied him to this meeting deny that this was said, but by their denial showing nothing save that their loyalty to their chief is greater than their regard for the sanctity of their oaths. Westcott, the Enquirer reporter, talked with Phelan about this Schaff interview, and Phelan said that as Schaff tried to "bluff" him, he had called out some more of his men, to show that he had no hard feelings; and when Westcott expressed surprise at that way of showing friendliness, Phelan said that was the way the American Railway Union showed its friendliness in a fight. On June 28, the day of the strike, Debs telegraphed Phelan to let the Big Four alone, if not handling Pullmans, to which Phelan answered: "I cannot keep others out if Big Four is excepted. The rest are emphatic on altogether or none. The tie-up is successful. Once more will Big Four be let alone." If Phelan was not the chief agent and inciter of the general tie-up in Cincinnati, he has been most unfortunate in the use of the language in his telegrams. What he here said necessarily implied that he had induced all the employés to go out, and was trying to keep them out, and that they threatened to return if the Big Four line was exempted from the tie-up.

What I have said of the credibility of Phelan in reference to his agency in enforcing the boycott and tie-up applies with equal force to nearly all his witnesses, especially to those from his city committee. They would have the court believe that Phelan was merely a peacemaker in this community, with no responsibility for the strike, and no purpose to incite it or continue it. Take Bateman. He was a switchman of the receiver, and on the subcommittee of the road. Debs had been applied to by the president of the stock yards to allow the cattle cars to be unloaded, and Debs—presumably in the exercise of the dispensing power given him by the constitution—had directed Phelan to have this done if no injury to the cause resulted. Pending this matter, Westcott was inquiring into the outcome, and applied to Bateman as a subcommittee for information. Westcott says Bateman told him the stock matter was in Phelan's hands, and that the cattle could not be handled without Phelan's orders; that "whatever Phelan says, goes." Phelan told Westcott substantially the same thing, and a telegram from Phelan to Debs is in evidence, in which he says, "I am having stock un-

loaded." And yet Bateman denies his conversation with Westcott, and another member of the city committee says that Phelan had nothing to do with it, and only applauded when it was done. Every committee man who came upon the stand (and they made the majority of contemner's witnesses) tried to give the impression that they were not acting under Phelan's orders, and so does Phelan, and yet his complete command is so apparent that it cannot escape any one. When Phelan forgot himself he used such expressions as "my committee," "I instructed them to do so and so," and occasionally such telltale words would creep into the evidence of all his witnesses. Another kind of statement indulged in by Phelan and all of the committee was to the effect that these committees were organized solely for the purpose of keeping the peace, and assisting the sick, providing for parades, and hiring halls; but not one word is said about the efforts of the committee to induce men to leave the employ of the various railroads, and yet, if Phelan's injunction was followed, persuasion, explanation, and argument were to be used with all who did not join the cause at once. The committee and subcommittees were seventy-five in number. Phelan told Westcott at one time that he had to visit railroad yards with his committee; at another time that his committee were out visiting the various yards, to see the day crews. Evidently they were visiting the men who remained still at work, for the purpose of inducing them to quit; and this, though not mentioned by a single witness for the defense, was doubtless one of the chief reasons for their appointment.

With the intention of showing that he has been guilty of no interference with a compliance with the orders of this court, Phelan said upon the stand that he knew the Southern Railroad was operated by a receiver appointed by this court, and was therefore anxious to avoid interference with its operation, and prevented the calling out of the coach cleaners in the Ludlow yards on this account. Moreover, Buelte, of his city committee, testifies that the Cincinnati Southern was especially excepted from the operation of the boycott notice because it was in the hands of the court. And yet Tuesday night, in the preparation for the boycott and strike which was to be put into effect on Thursday following, through the action of committees in respect to which Phelan himself admits he made suggestions, and which were appointed under his supervising eye, a switchman from the receiver's yard was made the agent of the American Railway Union and its allies to notify the receiver's yard master of the boycott. The notice was given, and the strike occurred earlier among the receiver's employes than among those on some of the other roads. Phelan told Westcott on Thursday afternoon that the men were all out on the Southern, and yet this was the road he wished to save from the boycott, because it was in the hands of the court. What did he visit Ludlow for on Friday, and address a meeting of railroad employes, if he intended to be careful about interfering with the operation of the Southern Railroad by the court? There are no railway employes in Ludlow but

those of the receiver. What was Bateman, the committee man, doing in that place in attendance at two other meetings, if the respect of Phelan and his committee for the court's orders was so great? The purpose with reference to the Southern, as with respect to every other road, is so clearly shown by the telegrams between Debs and Phelan, that it could hardly be more certain if Phelan had admitted it.

Debs to Phelan:

"June 27, 1894.

"Indications are that all western lines will be tied up solidly before sunset to-day."

Phelan to Debs:

"June 28, 1894.

"I cannot keep others out if Big Four is excepted. The rest are emphatic on all, together or none. The tie-up is successful."

Debs to Phelan:

"June 29, 1894.

"About 25 lines now paralyzed. More following. Tremendous blockade."

Debs to Phelan:

"July 2, 1894.

"Knock it to them hard as possible. Keep Big Four out, and help get them out at other places."

Phelan to Debs:

"July 2, 1894.

"Going out all around. Firemen a unit. Will soon be an avalanche to us. Working outside points."

Debs to Phelan:

"July 2, 1894.

"Hold Big Four solid. Going out to-day at every point. Gaining ground rapidly."

Debs to Phelan:

"July 2, 1894.

"Advices from all points show our position strengthened. Baltimore and Ohio, Pan Handle, Big Four, Lake Shore, Erie, Grand Trunk, and Mich. Central are now in fight. Take measures to paralyze all those that enter Cincinnati. Not a wheel turning on Grand Trunk between here and Canadian line."

I have now gone over, more at length than necessary, perhaps, the evidence concerning Phelan's connection with the boycott and strike, his purpose in coming to Cincinnati, and what he did here, and I find the fact to be that he came here deputed by Debs, president of the American Railway Union, and its board of directors, to enforce a boycott against the cars of the Pullman Company by inciting all the employes of the railroads running into Cincinnati to leave their employ, and thereby to tie up every road, and paralyze all traffic of every kind until all of the railroads should consent not to carry Pullman cars in their trains; and that his plan and his actions were directed as much against the Cincinnati Southern road in the hands of the receiver of this court as against every other road in the city; and that he knew, when he inaugurated the boycott on the Southern road and incited the receiver's employes to strike, that the road was in the hands of the receiver, and was being operated under the order of this court.

We come now to consider the question of fact whether Phelan in any of his speeches advised intimidation, threats, or violence in

carrying out the boycott. He is charged with having said, on Thursday night, June 28, at the meeting at West End Turner Hall, that the strike was then declared on; that it was the duty of every A. R. U. man to quit work, to induce and coax other men to go out, and, if this was not successful, to take a club, and knock them out. He is charged with having said, on the same or another occasion during the same week, that the committees should be appointed to persuade men to go out; that, if they would not go, then the committee should get round behind, and kick them out. The meetings at which these remarks were said to have been made were behind closed doors, and no newspaper reporters were permitted to be present. Only A. R. U. men and railroad employes made up the audience. The first charge is supported by the evidence of one J. O. Sweeney, a timekeeper of the Big Four Railway, and he is, so far as the evidence shows, a wholly disinterested witness; and by the evidence of one E. W. Dormer, a witness whose credibility I shall consider later. They both say that the remark elicited much applause, and that, shortly before or after, Phelan advised them to be law-abiding citizens. To this charge Phelan makes an explanatory answer as follows:

"I told nobody to take a club, and do anything with anybody. I, upon several occasions in this city, have used about that one expression about in the same line with that, the substance of which is about this: I have told the boys—different ones—there was a good deal of demands upon me to go around and see everybody and explain this Pullman trouble. I was worried to death. . . . I said, 'You constitute yourselves a committee of one, each of you, and go to the people,—the community in which you live. Go to the boys,—I mean their acquaintances,—and explain to them this trouble. Talk to them about it. Beseech them to listen, because I want them to get the idea before they would condemn us about it; but do not take a club, and knock them in the head about it.' The peculiarity of the speech elicited applause, but I am afraid it was taken the other way."

With reference to the second charge, it is supported by the evidence of E. W. Dormer, who testifies he heard Phelan say it. An account of the speech in which it was said to have occurred was published in the Cincinnati Enquirer of June 29, and read to Phelan by counsel for the receiver. It was as follows:

"Mr. Phelan addressed the men familiarly. 'He who is not with us in this struggle is against us, and will be so regarded.' Then he spoke in scathing tones of the Pullmans. 'We want no weak-kneed individuals with us; we want warriors.' Mr. Phelan then launched into an eloquent denunciation of Grand Master Arthur of the order of locomotive engineers. 'He has not the courage to declare a strike.'"

So far Phelan admitted the truth of the article. The article proceeded:

"When this strike is declared, as it will be before you go home to-night, the members of the American Railway Union in San Francisco, Oregon, Chicago, and all over the great west will stand by you to the bitter end."

And to this he said he did not recollect it,

though he would not deny it. "It might have accidentally slipped out," he said. The article, after stating the passage of a resolution not to go back to work till the strike was declared off, which resolution Phelan said upon the stand that he never heard of, proceeded:

"Mr. Phelan then resumed: 'We must stand solidly together in this hour of trial, and, if anybody returns to work, or takes the place of strikers, seize them by the back of the neck, and throw them out.'"

Upon this passage the examination was as follows:

"Q. Did you say that? A. I don't recollect. Q. Will you swear to the court you did not say it? A. I don't recollect of saying it. Q. Will you swear you did not? A. I don't recollect of saying it. Q. That is as much as you will say? A. That is as much as I will say. I will state this, however, if you want any qualification on it. Q. I don't want any qualification. A. If I did say it, I meant to throw them out of the organization."

This was not a denial of the remark at all, but a statement that it meant something different from what it purported to mean. Phelan said several times in his examination that in a speech remarks slip out that one does not intend. Certainly, if he did not intend personal intimidation by this remark, it was an unfortunate one.

An attack is made on the credibility of Dormer. He was a detective in the employ of Field's Detective Agency of St. Louis, and in the employ of the receiver, ostensibly as a brakeman at first, and afterwards a striker, under the name of Williams. His character has not been attacked otherwise than by showing his assumption of a false appearance and name. There is evidence tending to show a willingness on his part to involve some of his fellow strikers in a trespass on the company's property, but I am bound to say that his accuracy as to everything else that occurred at the meetings which he attended has been borne out by the evidence of Phelan and his witnesses so far as they are willing to recollect. Were the charges as to Phelan's language dependent on Dormer's statement alone, I should not give them sufficient weight to overcome positive denials from Phelan; but the difficulty with Phelan's case is that he does not really and positively deny the statement of Dormer, but seeks to give the language another meaning, which it cannot bear. He contends in respect to each of the charges of inciting violence that his meaning was misunderstood. Had his evidence and that of his committee upon the main issues in this case not been most evasive and wanting in sincerity, I should still be inclined to give Phelan's explanations credit, and give him the benefit of a doubt on this point; but his whole case breaks down with the attempt of himself and his followers to conceal and pervert the most apparent fact in the case, namely, that he instigated, engineered, and controlled the boycott and strike at Cincinnati from beginning to end. After this his denials and evasions can be given but little weight. It is doubtless true that Phelan did tell his men to be law-abiding, that he did tell them to stay out of saloons, and off the company's prop-

erty, in the public, and that he did not wish his followers to subject themselves to the punishment of the law. Westcott testifies to this, and so do Dormer and Sweeney, and this has doubtless prevented many open assaults and trespasses. But I do not doubt that at the same time he encouraged them in a vicious and malicious disposition towards those of their fellows who did not join with them in this boycott, by expressions of the kind testified to by Sweeney and Dormer, and most evasively denied by Phelan, slyly slipped in where they could be given a double meaning if questioned.

The expressions were for the purpose of bringing into operation that secret terrorism which is so effective for discouraging new men from filling the strikers' places, and which is so hard to prove in a court of justice unless it results in open assault. That Phelan openly discouraged conflict with the law is to his credit as a strike organizer, for he wished public sympathy; but that he wished the aid of that secret terrorism, which is quite as unlawful, seems to me to be established. The town of Ludlow has been in such a state that the receiver's employes who live there have been in constant fear. Two engineers have left the town, and moved their families away. The receiver has boarded employes within guarded precincts. It has been shown that storekeepers of Ludlow have refused to sell goods to the receiver's employes because they were boycotted. Threats have been made, and an assault. Insulting and aggressive language has been used to receiver's employes on both sides of the river. Threats are hard to prove. If effective, they not only keep away the employes from service, but the witness from the stand. The receiver has been obliged to keep a large force of the United States deputy marshals on both sides of the river and on his engines and trains in order to induce employes, new and old, to remain in his service. I cannot presume that such protection was invoked by the employes because of groundless fears. The question of fact whether Phelan used expressions in his speeches behind closed doors to the employes of the receiver which were calculated to induce intimidation is not of primary importance in this case, for, as will hereafter be seen, his interference with the operation of the Southern road by the instigation and maintenance of the boycott and strike against the road was the main contempt of this court. The suggestions leading to intimidations would only be aggravations of the contempt; that is all.

Section 725, U. S. Rev. Stat. provides that: "The said courts [i. e., courts of the United States] shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment at the discretion of the courts contempt of their authority; provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehaviour of any person in their presence, or so near thereto as to obstruct the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

It has been held by Judge Drummond in 4 INTER N.

Secor v. Toledo, P. & W. R. Co. 7 Biss. 513. that any unlawful interference with the operation of a road in the hands of a receiver is a contempt of the court, because it is a disobedience or a resistance by a person to a lawful order of the court. This view has been taken by Judges Brewer and Treat in *United States v. Kane*, 23 Fed. Rep. 748; and in *Re Doolittle*, 23 Fed. Rep. 544; and by Judge Pardee in *Re Higgins*, 27 Fed. Rep. 443. These authorities show that any willful attempt by any one, with knowledge that the road is in the hands of the court, to prevent or impede the receiver from complying with the order of the court in running the road, when the attempt is unlawful, and as between private individuals, would give a right of action for damages, is a contempt of the order of the court. The rights of the receiver with reference to his business in conducting the railroad under order of the court are not different in any respect from those of a private railway corporation. The only difference is in the remedy which the courts will apply to prevent or to punish a violation of them when such a violation prevents or impedes the operation of the road, and is intended to do so.

There is no doubt that Phelan intended to prevent utterly the operation of the Southern road by calling out the receiver's employes. He wished thus to paralyze his business. He did the trust a very substantial injury by stopping all traffic for a time, by making it necessary for the receiver to pay heavy expenses for the unusual police protection, and by putting him to much trouble and expense in securing new employes. Now, if the receiver were a private corporation, could he recover damages for the injury thus inflicted on the business of the road? A malicious or unlawful interference with the business of another by inducing his employes to leave his service is an actionable wrong, and subjects the offender to liability for the loss occasioned. In *Walker v. Cronin*, 107 Mass. 555, it was held that a count in a declaration which alleged that a plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendants, well knowing this, did maliciously and without justifiable cause molest him in carrying on said business, with the unlawful purpose of preventing him from carrying it on, and willfully induced many shoemakers who were in his employment, and others who were about to enter it, to abandon it without his consent and against his will; and that thereby the plaintiff lost their services and profits and advantages, and was put to a great expense to secure other suitable workmen, and was otherwise injured in his business,—stated a good cause of action. See also *Sherry v. Perkins*, 147 Mass. 212.

The real question, therefore, is whether the act of Phelan in instigating and inciting the employes of the receiver to leave his employ was without lawful excuse, and therefore malicious. The question is not whether such an act would subject Phelan to punishment by indictment and trial under the criminal laws, but whether the act was unlawful in the sense that he could be made to pay damages for the loss occasioned. Of course, if the act would

subject him to punishment, for an indictable misdemeanor and crime, *a fortiori* would the act be unlawful; but his act may be a contempt without being a crime.

Now, it may be conceded in the outset that the employés of the receiver had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employé may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory. It follows, therefore (to give an illustration which will be understood) that if Phelan had come to this city when the receiver reduced the wages of his employés by 10 per cent, and had urged a peaceable strike, and had succeeded in maintaining one, the loss to the business of the receiver would not be ground for recovering damages, and Phelan would not have been liable to contempt even if the strike much impeded the operation of the road under the order of the court. His action in giving the advice, or issuing an order based on unsatisfactory terms of employment, would have been entirely lawful. But his coming here, and his advice to the Southern Railway employés, or to the employés of other roads, to quit, had nothing to do with their terms of employment. They were not dissatisfied with their service or their pay. Phelan came to Cincinnati to carry out the purpose of a combination of men, and his act in inciting the employés of all Cincinnati roads to quit service was part of that combination. If the combination was unlawful, then every act in pursuance of it was unlawful, and his instigation of the strike would be an unlawful wrong done by him to every railway company in the city, for which they can recover damages, and for which, so far as his acts affected the Southern Railway, he is in contempt of this court.

Now, what was the combination and its legal character? Was it an unlawful conspiracy? I do not mean by this an indictable conspiracy, because that depends on the statute; but was it a conspiracy at common law? If it was, then injury inflicted would be without legal justification, and malicious. A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful

purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419. What were the purposes of this combination of Debs, Phelan, and the American Railway Union board of directors? They proposed to inflict pecuniary injury on Pullman by compelling the railway companies to give up using his cars, and, on the refusal of the railway companies to yield to compulsion, to inflict pecuniary injury on the railway companies by inciting their employés to quit their services, and thus paralyze their business. It could not have been unknown to the combiners that the Pullman cars were operated by the railway companies under contracts with Pullman. Such large transactions are never conducted without contracts saving the rights of both sides, and the combiners had every reason to believe that it would be a violation of those contracts for the companies to refuse further to haul Pullman cars in their trains. One purpose of the combination was to compel railway companies to injure Pullman by breaking their contracts with him. The receiver of this court is under contract to Pullman, which he would have to break were he to yield to the demand of Phelan and his associates. The breach of a contract is unlawful. A combination with that as its purpose is unlawful, and is a conspiracy. *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55.

But the combination was unlawful without respect to the contract feature. It was a boycott. The employés of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use of Pullman cars as cars. They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their service. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury on the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employés had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service. It is the motive for quitting, and the end sought thereby, that make the injury inflicted unlawful, and the combination by which it is effected, an unlawful conspiracy. The distinction between an ordinary lawful and peaceable strike entered upon to obtain concessions in the terms of the strikers' employment and a boycott is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes the one or the other as quickly as the lawyer or judge. The combination under discussion was a boycott. It was so termed by Debs, Phelan, and all engaged in it. Boycotts, though unaccompanied by violence or

intimidation, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be in Minnesota; and they are held to be unlawful in England.

In *Moore v. Bricklayers Union No. 1*, 23 Ohio L. J. 48, a union which embraces ninety-five per cent of the bricklayers of Cincinnati got into a controversy with Parker, a boss bricklayer, concerning apprentices and other matters. The union boycotted Parker, and notified all material men that any one selling him material would themselves be boycotted. Moore & Co. continued to sell Parker lime. Thereupon the union notified all of plaintiffs' customers and probable customers that none of its members would work Moore & Co's materials, and seriously damaged the business of Moore & Co. There was no violence, actual or threatened, in the case. Moore & Co. sued the Bricklayers' Union and some of its prominent members for the damages caused by the boycott. This case was tried before a jury in the superior court of Cincinnati, and resulted in a verdict for the plaintiffs of \$2500. The motion for new trial was reserved to the general term, where the case was fully considered, and the conclusion reached that the verdict must stand, because the combination to injure Moore & Co. was an unlawful conspiracy. The case was then carried by writ of error to the supreme court of Ohio, and the judgment of the superior court was affirmed without opinion. By the common law of Ohio, therefore, boycotts are illegal conspiracies. I quote from the opinion of the superior court in that case two passages, which seem to me to state the ground for holding boycotts illegal:

"We are dealing in this case with common rights. Every man, be he capitalist, merchant, employer, laborer, or professional man, is entitled to invest his capital, to carry on his business, to bestow his labor, or to exercise his calling, if within the law, according to his pleasure. Generally speaking, if, in the exercise of such a right by one, another suffers a loss, he has no ground of action. Thus, if two merchants are in the same business in the same place, and the business of the one is injured by the competition, the loss is caused by the other's pursuing his lawful right to carry on business as seems best to him. In this legitimate clash of common rights the loss which is suffered is *damnum absque injuria*. So it may reduce the employer's profits that his workmen will not work at former prices, and that he is obliged to pay on a higher scale of wages. The loss which he sustains, if it can be called such, arises merely from the exercise of the workman's lawful right to work for such wages as he chooses, and to get as high rate as he can. It is caused by the workman, but it gives no right of action. Again, if a workman is called upon to work with the material of a certain dealer, and it is of such a character as either to make his labor greater than that sold by another, or is hurtful to the person using it, or for any other reason is not satisfactory to the workman, he may lawfully notify his employers of his objection and refuse to work it. The loss of the material man in his sales caused by such action of the workman is not a legal injury, and not the subject of action. And so it may be said that in these

respects what one workman may do, many may do, and many may combine to do without giving the sufferer any right of action against those who cause his loss. But on this common ground of common rights, where every one is lawfully struggling for the mastery, and where losses suffered must be borne, there are losses willfully caused to one by another in the exercise of what otherwise would be a lawful right, from simple motives of malice.

* * * * *

"The normal operation of competition in trade is the keeping away or getting away patronage from rivals by inducements offered to the trading public. The normal operation of the right to labor is the securing of better terms by refusing to contract to labor except on such terms. . . . If the workmen of an employer refuse to work for him except on better terms, at a time when their withdrawal will cause great loss to him, and they intentionally inflict such loss to coerce him to come to their terms, they are bona fide exercising their lawful rights to dispose of their labor for the purpose of lawful gain. But the dealings between Parker Bros. and their material men, or between such material men and their customers, had not the remotest natural connection either with defendants' wages or their other terms of employment. There was no competition or possible contractual relation between plaintiffs and defendants where their interests were naturally opposed. The right of the plaintiffs to sell their material was not one which, in its exercise, brought them into legitimate conflict with the rights of defendants to dispose of their labor as they chose. The conflict was brought about by the effort of defendants to use plaintiffs' right of trade to injure Parker Bros., and, upon failure of this, to use plaintiffs' customers' right of trade to injure plaintiffs. Such effort cannot be in the bona fide exercise of trade, is without just cause, and is, therefore malicious. The immediate motive of defendants here was to show to the building world what punishment and disaster necessarily followed a defiance of their demands. The remote motive of wishing to better their condition by the power so acquired will not, as we think we have shown, make any legal justification for defendants' acts."

And so here there was no natural relation between Pullman and the railway employes, and their attempt to injure the companies because they would not injure him is without cause, and malicious, and is unlawful, even though the injury is inflicted merely by quitting employment.

Temperon v. Russell [1893] 1 Q. B. 715, was a case quite like the case just cited. There a firm of builders refused to obey certain rules laid down by three trades unions connected with the building trade at Hull. Thereupon a joint committee of the unions boycotted the building firm; that is, they attempted to prevent it from procuring any materials by notifying material men not to furnish them, on pain of being themselves boycotted. The plaintiff, a material man, refused to comply with its demand, and the unions then demanded of his material men not to furnish him any material, with the threat that,

if they did so, their workmen would quit. The result of this was that contracts for supplies to the plaintiff were broken, and others who, but for the threats, would have made contracts, were deterred from doing so. It was held that the boycott was an unlawful conspiracy, and that the joint committee of the unions who were sued were liable in damages for a malicious interference with the plaintiff's business. There was no violence or threatened violence in this case. The case was decided by the court of appeal of England, consisting of Lord Ester, master of rolls, and Lopes and A. L. Smith, *Lord Justices*.

In *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, a contracting stone mason, contrary to the rules of the union, sent some of his material out of the state to be dressed, and his men, members of the union, refused to work for him any longer unless he paid a fine to the union, and did not return until he paid the fine. This was held to be illegal conspiracy for the purpose of extortion and mischief, and the employer was given a judgment for the recovery of the fine and damages.

Boycotts have been declared illegal conspiracies in *State v. Glidden*, 55 Conn. 46; *State v. Steuart*, 59 Vt. 278, 59 Am. Rep. 710; *Old Dominion SS. Co. v. McKenna*, 80 Fed. Rep. 48; *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. Rep. 135; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 54 Fed. Rep. 730, 738, and in other cases.

But the illegal character of this combination with Debs at its head and Phelan as an associate does not depend alone on the general law of boycotts. The gigantic character of the conspiracy of the American Railway Union staggers the imagination. The railroads have become as necessary to life and health and comfort of the people of this country as are the arteries of the human body, and yet Debs and Phelan and their associates proposed, by inciting the employes of all the railways in the country to suddenly quit their service without any dissatisfaction with the terms of their own employment, to paralyze utterly all the traffic by which the people live, and in this way to compel Pullman, for whose acts neither the public nor the railway companies are in the slightest degree responsible, and over whose acts they can lawfully exercise no control, to pay more wages to his employes. The merits of the controversy between Pullman and his employes have no bearing whatever on the legality of the combination effected through the American Railway Union. The purpose, shortly stated, was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do. Certainly the starvation of a nation cannot be a lawful purpose of a combination, and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise.

More than this, the combination is in the teeth of the Act of July 2, 1890, which provides that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby
4 INTER 8.

declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court."

That such a combination as the one under discussion is within the statute just quoted has been decided by Judge Billings of Louisiana in *United States v. Workmen's Amalgamated Council*, 54 Fed. Rep. 994. His view has been followed by the circuit judges of this circuit within the past ten days, by Judges Woods, Allen, and Grosscup of the seventh circuit, and by Judge Woolson of the eighth circuit. A different view has been taken by Judge Putnam in *United States v. Patterson*, 55 Fed. Rep. 605, but, after consideration, Judge Lurton and I cannot concur with the reasoning of that learned judge. The fact that it was the purpose of Debs, Phelan, and their associates to paralyze the interstate commerce of this country is shown conclusively in this case, and is known of all men. Therefore their combination was for an unlawful purpose, and is a conspiracy, within the statute cited.

It could also be shown, if it were necessary, that this combination was an unlawful conspiracy because its members intended to stop all mail trains as well as other trains, and did delay and retard many, in violation of section 3995, U. S. Rev. Stat., which imposes a penalty on any one willfully and knowingly obstructing or retarding the passage of the mail. It would be no defense, under that statute, that the obstruction was effected by merely quitting employment, where the motive of quitting was to retard the mails, and had nothing to do with the terms of employment.

Something has been said about the right of assembly and free speech secured by the constitution of Ohio. It would be strange, indeed, if that right could be used to sustain the carrying out of such an unlawful and criminal conspiracy as we have seen this to be. It never has been supposed to protect one from prosecution or suits for slander, or for any of the many malicious and tortious injuries which the agency of the tongue has been so often employed to inflict. If the obstruction to the operation of the road by the receiver was unlawful and malicious, it is not less a contempt because the instrument which he used to effect it was his tongue, rather than his hand.

But it is unnecessary to consider the question further. It is very clear that Phelan came here to carry out an illegal conspiracy, in the course of which, and in pursuance of which, he attempted, and partially succeeded in tying up the Southern Railroad, operated by a receiver under an order of this court, as he well knew. His purpose in calling out the employes of the Southern Railroad was unlawful by the law of Ohio and the laws of the United States. He intended to prevent entirely its operation. He partially succeeded, and he subjected the receiver to great expense in reducing the loss occasioned by his acts.

It follows that the contemnor is guilty as charged, and it only remains to impose the sentence of the court. This is in the discretion

of the court, to be exercised on any information in reference to the convicted person which the court believes to be reliable. The court would be much more disposed to leniency in this case if the contemnor, after his arrest, had shown the slightest regard for the order of the court which the receiver was attempting to comply with in the operation of the road. Even if he did not fully realize the position in which he had put himself with respect to the order of the court to the receiver to operate the Southern Railroad, his arrest, and the service of the intervening petition, together with the restraining order, should have quickened his conscience and his perceptions of his duty in this regard. It was his duty, therefore, to cease all his operations with reference to the strike in this city which could in any way affect the operation of the Southern Railway, whether by inciting employes to leave the receiver or by preventing his employment of others. What did he do? Instead of ceasing to incite the receiver's employes to leave his employ in pursuance of his unlawful conspiracy, there has been no change whatever in his course from that pursued by him before his arrest. By speeches every night since the arrest he has aggravated his contempt. On the night of July 4, it is in evidence, the contemnor said, in a speech to railroad employes of the city, referring to this trial:

"I don't care if I am violating injunctions. No matter what the result may be to-morrow, if I go to jail for sixteen generations, I want you to do as you have done. Stand pat to a man. No man go back unless all go, and all stay out unless Phelan says go back."

It was a direct invitation to continue the course already taken under his direction of preventing the return of employes to the receiver, and of persuading the striking of others,

and an avowed intention of disregarding the order of the court.

The punishment for a contempt is the most disagreeable duty a court has to perform, but it is one from which the court cannot shrink. If orders of the court are not obeyed, the next step is unto anarchy. It is absolutely essential to the administration of justice that courts should have the power to punish contempts, and that they should use it when the enforcement of their orders is flagrantly defied. But it is only to secure present and future compliance with its orders that the power is given, and not to impose punishment commensurate with crimes or misdemeanors committed in the course of the contempt, which are cognizable in a different tribunal or in this court by indictment and trial by jury. I have no right, and do not wish, to punish the contemnor for the havoc which he and his associates have wrought to the business of this country, and the injuries they have done to labor and capital alike, or for the privations and sufferings to which they have subjected innocent people, even if they may not be amenable to the criminal laws thereof. I can only inflict a penalty which may have some effect to secure future compliance with the orders of this court and to prevent willful and unlawful obstruction thereof.

After much consideration, I do not think I should be doing my duty as a judicial officer of the United States without imposing upon the contemnor the penalty of imprisonment. The sentence of the court is that Frank W. Phelan be confined in the county jail of Warren county, Ohio, for a term of six months. The marshal will take the prisoner into custody, and safely convey him to the place of imprisonment.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF MISSOURI.

UNITED STATES

v.

M. J. ELLIOTT ET AL.

(82 Fed. Rep. 801.)

1. A combination whose professed object is to arrest the operation of interstate railroads until they accede to certain demands, whether such demands are reasonable or unreasonable, just or unjust, is an unlawful conspiracy in restraint of commerce among the states, under Act of Congress of July 2, 1890, declaring every conspiracy in restraint of trade or commerce among the several states illegal.
2. A preliminary injunction will be granted to restrain threatened acts in pursuance of an unlawful conspiracy in restraint of commerce between the states.

Decided July 6, 1894.

SUIT to enjoin defendants from violating the Act of Congress against conspiracies in restraint of trade. On motion for preliminary injunction. *Granted.*
The facts are stated in the opinion.

Mr. William H. Clopton, U. S. Atty., in support of the motion.

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Thayer, *District Judge*, delivered the opinion of the court (orally):

The unusual character of the bill filed by the government renders it proper that the court should state briefly the reasons that have influenced its action in granting a part of the relief prayed for therein.

The Act of Congress approved July 2, 1890 (26 Stat. at L. 209) entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," declares in its first section that:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court."

Ordinarily it is neither lawful nor expedient for a court of equity to award an injunction to prevent the doing of acts that are in themselves crimes. The regular course of judicial procedure requires that persons accused of crime should be prosecuted by information or indictment, and not otherwise. There are, however, well-established exceptions to this rule. When a criminal act is threatened, which is liable to occasion irreparable injury to private persons, or which would give rise to a multitude of suits at law to redress the wrong, if committed, a court of equity may issue an injunction, at the instance of an individual, against parties who threaten to commit the wrong. But the court is not called upon, in this instance, to consider whether the proceeding falls within the ordinary jurisdiction of a court of equity. By the fourth section of the Act of July 2, 1890, which is above referred to, Congress has declared that:

"The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States in their respective districts under the direction of the Attorney General to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed as soon as may be to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

This section of the Act makes the jurisdiction of the court clear over the parties and subject matter, if the bill now before the court, which has been exhibited with the sanction of the Attorney General, shows the existence of a conspiracy among the defendants to restrain trade or commerce among the several states, and that acts have already been done or threatened by the several defendants in furtherance

of the alleged conspiracy. Congress has seen fit, on grounds of public policy, to authorize the law officers of the government to appeal to the courts of the United States by a bill in equity filed in behalf of the people of the United States, to arrest, by writ of injunction or prohibition, the commission of acts which are designed to obstruct the free flow of commerce between the states, and no one can doubt the power of Congress to confer such authority. From the very foundation of the government, it has been accepted as a proposition which admitted of no controversy that the right to regulate commerce among the several states, and to pass laws to protect commerce of that character, pertained to the general government, and that its power in that respect was plenary and paramount.

An examination of the bill which has been exhibited by the United States shows that it charges, in substance, that the various defendants named therein have combined and confederated among themselves to prevent several railroads named in the bill, whose lines radiate from St. Louis, and which are engaged, among other things, in interstate commerce, from conducting their customary business of transporting passengers and freight between points in this state and points in other adjoining states to which their several lines extend. The bill further charges that the several defendants named therein have combined and conspired to induce persons in the employ of said railroad companies to leave the service of their respective companies, and to prevent them from securing other operatives, the object of such conspiracy being to prevent said railway companies from hauling certain cars which are customarily used by them in the transaction of their business as interstate carriers of freight and passengers. The bill also charges the commission of divers and sundry acts by some of the defendants in furtherance of the objects of the aforesaid confederation. Among other things, it is alleged that certain of the defendants have issued orders to persons in the employ of the several railway companies, who act subject to their direction, whereby such employes are commanded and required to cease from operating trains of the respective railroad companies in whose service they are employed. It is also alleged that certain of the defendants named in the bill have asserted and threatened that they will tie up and paralyze the operations of each of said railway companies which refuses to accede to certain demands made upon them, and that it is the purpose and object of the defendants so conspiring, and who have made such threats, to so obstruct and cripple said railroad companies as to prevent them from performing their duties as common carriers of freight and passengers between points in the several states to which the lines of such roads extend. It is also charged in the bill, in substance, that it is the purpose and object of the defendants who are engaged in the aforesaid conspiracy to secure to themselves the entire control of interstate commerce between the city of St. Louis and points to other states to which the lines of the several railroad companies mentioned in the bill extend, and to restrain and prevent the persons owning said roads from exercising any independent control thereof in

the transaction of interstate business. The court thinks it manifest that the allegations of the bill, which have thus been very imperfectly stated, show the existence of a conspiracy in restraint of trade and commerce among the several states, within the language and the fair intent and meaning of the Act of July 2, 1890. A combination whose professed object is to arrest the operation of railroads whose lines extend from a great city into adjoining states, until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states. Under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful pur-

pose, by unlawful means. *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419; *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 346. The construction thus given to the Act of July 2, 1890, is not a new construction. It has already received the same interpretation in other circuits after full consideration,—particularly by the Circuit Court of the United States for the Fifth Circuit in the case of *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, 57 Fed. Rep. 85.

The result is that this court, acting on the ground herein stated, will grant a preliminary injunction, restraining the defendants, during the pendency of this suit, and until final hearing, from doing the acts threatened, in pursuance of the alleged conspiracy.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

SOUTHERN CALIFORNIA R. CO.

v.
C. C. RUTHERFORD ET AL.

(62 Fed. Rep. 796.)

An injunction will lie against railroad employes, who, continuing in employment, refuse to perform their duties, where the direct result of such refusal works irreparable damage to the em-

ployer; and, at the same time interferes with the transmission of the mail, and with commerce between the states, notwithstanding there is no precedent for such injunction.

Decided June 30, 1894.

SUIT to enjoin defendants, employes of the complainant company, from refusing to handle trains with Pullman cars attached. *Granted.*
The facts are stated in the opinion.

Mr. W. J. Hunsaker for complainant.

Ross, District Judge, delivered the following opinion:

Time does not admit of an extended statement of the facts of the case or of the reasons for awarding the injunction applied for. The bill shows, among other things, that the complainant railway company is one link in a through line of road extending from National City, San Diego county, Cal., to the city of Chicago, in the state of Illinois, engaged in the transportation, among other things, of interstate commerce and the mails of the United States; its connecting roads being the Atlantic & Pacific and the Atchison, Topeka & Santa Fé railroad companies. That there is a valid existing contract between the complainant company and its connecting companies and the Pullman Palace Car Company by which all regular passenger trains running over the said through line of road, including that of the complainant, carrying the mail and passengers, shall carry Pullman cars. That the defendants are in the employ of the complainant company, and were employed by it to, among other things, handle and operate its trains so engaged

in carrying the United States mail and passengers and freight between National City, Cal., and Chicago, Ill., and to and from intermediate points, and from the time of their employment up to the time of the commission of the acts complained of by the complainant were duly accustomed to handle and operate such trains, including Pullman cars. That subsequently the defendants, although remaining in the employment of the company, refused, and still refuse, to handle or operate any train of cars of the complainant company to which a Pullman car is attached; and because of the discharge by the receivers in possession and control of the Atchison, Topeka & Santa Fé Railroad Company of certain employes of theirs for refusing to handle or operate any train of that road to which a Pullman car is attached, the defendants to the present bill, while remaining in the employment of the complainant company, refused, and still refuse, to handle or operate any of the trains of the complainant company engaged in carrying the mail of the United States and in the aforesaid interstate commerce, which their regular and

accustomed duties as such employes required, and still require, them to operate and handle. Undoubtedly, in the absence of a valid existing contract obligating the defendants to remain in the employment of the complainant company, they would ordinarily have the legal right to quit the employment and cease work at any time. But the bill alleges that the defendants continue in the employment of the complainant company, and yet refuse to perform their regular and accustomed duties as such employes; and it further shows that such refusal subjects and will continue to subject the complainant to a multiplicity of suits and to great and irreparable damage, in that there is an existing valid contract requiring complainant to attach a Pullman car or cars on all of its through trains for the carriage of passengers and the mail, and also retards and interrupts the complainant in the transmission of the United States mail and the interstate commerce aforesaid.

It is manifest that for this state of affairs the law—neither civil nor criminal—affords an adequate remedy. But the proud boast of equity is, "*Ubi jus, ibi remedium.*" It is the maxim which forms the root of all equitable decisions. Why should not men who remain in the employment of another perform the duties they contract and engage to perform? It is certainly just and right that they should do so, or else quit the employment. And where the direct result of such refusal works irreparable damage to the employer, and at the same time interferes with the transmission of the mail and with commerce between the states, equity, I think, will compel them to perform the duties pertaining to the employment so long as they continue in it. If I unlawfully obstruct by a dam a stream of flowing water, equity, at the suit of the party injured, will compel me by injunction, mandatory in character, to remove the dam, and, prohibitory in character, from further interfering with the flow of the stream; and if I unlawfully erect a wall shut-

ting out the light from another, equity will compel me to tear it down, and to refrain from further interference with the other's rights. It is true that such cases are not precisely like the present one, yet the principle upon which the court proceeds in such cases is not not substantially different. And if it be said that there is no exact precedent for the awarding of an injunction in the present case, I respond, in the language of the court in the case of *Toledo, A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 54 Fed. Rep. 751:

"Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constant and varying demands for equitable relief."

Moreover, the rights of the public in a case of this sort should be considered. "Railroads," said the Supreme Court in the case of *Joy v. St. Louis*, 138 U. S. 50, 34 L. ed. 859, "are common carriers, and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation."

For the reasons thus hastily and briefly stated, I shall award an injunction requiring the defendants to perform all of their regular and accustomed duties so long as they remain in the employment of the complainant company, which injunction, it may be as well to state, will be strictly and rigidly enforced.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

RE CHARGE TO GRAND JURY (No. 4).

(63 Fed. Rep. 436.)

1. The wrongful and corrupt agreement between two or more men connected with the railroad, whatever their position, for the purpose of creating public sympathy in a threatened strike, or any other purpose, to cause the mail trains and trains carrying interstate commerce to be stopped, with acts in pursuance of such agreement, constitutes a conspiracy.
2. An agreement between two or more men connected with a railroad company that, for the purpose of creating public sympathy in a strike, they will discharge men from their employ who would otherwise not have been discharged, intending that such discharge shall stop the running of mail or interstate commerce trains and

thereby raise public indignation, constitutes a conspiracy.

3. An agreement between two or more men connected with a railroad in view of a threatened strike that they will not employ men to take the place of those who quit their service, but will allow mail and interstate commerce trains to stand still for the purpose merely of creating public sympathy or indignation against the strikers, constitutes conspiracy, unless the circumstances and situation were such that the employment of new men, reasonably viewed, would lead to danger to them or to the railroad property, or to any public interest.

July 14, 1894.

Further charge by *Judge Grosscup* (orally):

I think it my duty to give you further instructions. No man is above the law. The line of criminality or innocence is not drawn between classes, but only between men who violate the law and men who do not. The fact that a man may occupy a high position does not exempt him from indictment and trial simply because he does occupy a high position. The fact that a man may occupy a lower position does not exempt him from making known his grievances to you, simply because he may occupy such a position. Your door, therefore, ought to be open to all inquiry coming from every source that is founded on something more than mere rumor or conjecture; in other words, on something that has tangible form. It is stated in public print that some of our fellow citizens believe that the interruption of the mails and of interstate commerce, into which you are inquiring, was the result of a conspiracy upon the part of men higher in the railroads than the employes. If two or more men, no matter what their position in the railroad company may have been, wrongfully and corruptly agreed among themselves, either for the purpose of creating public sympathy in a threatened strike, or for any other purpose, that they would cause the mail trains and trains carrying interstate commerce to be stopped, and did acts in pursuance of that agreement, they are guilty of conspiracy. If two or more men agreed wrong-

fully and corruptly among themselves that, for the purpose of creating public sympathy in this strike, they would discharge men from their employ who otherwise would not have been discharged, intending that such discharge should stop the running of the mail or interstate commerce trains, and thereby raise public indignation, they would be guilty of conspiracy. If two or more men, in view of a threatened strike, agreed wrongfully and corruptly that they would not employ men to take the places of the men who had quitted the service, but would allow the trains to stand still for the sake, merely, of creating public sympathy or indignation against the strikers, they would be guilty of conspiracy, unless the circumstances and situation were such that the employment of new men, reasonably viewed, would lead to danger to those men, or danger to the railroad property, or danger to any public interest. As I said, every man is entitled to bring a complaint of any one of these charges to your attention, if he brings it with tangible evidence,—something that is not mere hearsay, or rumor, but something upon which you can place your judgment; and it is the duty of the district attorney to submit it to you, and of the members of the grand jury to hear it. If there is anything of that kind to be submitted to you, I trust it will be so submitted in your sessions, either during the balance of the day, or when you return next week. That is all I wish to say to you.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF ILLINOIS.

ANTHONY J. THOMAS ET AL.,

v.

WABASH, ST. L. & P. R. CO. ET AL.

LANCASTER MILLS of Clinton, Intervenor.

(63 Fed. Rep. 200.)

1. A state statute prohibiting carriers from limiting their liability for loss by fire cannot be made to apply to property being transported under a bill of sale from a point in one state to a point in another state, both foreign to the state enacting the statute, although the carrier's charter was granted by such state and the point where the loss occurs is actually within its boundaries.
2. Permitting a shipment of cotton to lie at one station for eighteen days is negligence under a contract to transport it within a reasonable time.
3. A carrier who receives under a contract to transport it within a reasonable time, freight for

shipment which must go through a point at which the facilities are so greatly overcrowded that a delay will be necessary at that point, will be liable for the loss of the property caused by the delay at that point.

4. A carrier which receives cotton for transportation under a contract by which it agrees to deliver it to the consignee within a reasonable time, is liable for its loss if it leaves it for eighteen days on a barge moored in a river exposed to sparks from passing boats and engine on the levee above, by some of which it is set on fire.

Decided Sept. 24, 1894.

PETITION by the Lancaster Mills to recover the value of property which had been destroyed by fire while in possession of the Cairo, Vincennes & Chicago Line for transportation. *Petition granted.*

The facts are stated in the opinion.

4 INTER S.

Mr. W. L. Gross with *Messrs. John F. Lewis* and **Curtis Tilton** for petitioner.
Mr. John M. Butler, for Thomas and Tracy, receivers.

Allen, *District Judge*, delivered the following opinion:

The proceedings in this cause were commenced by the Insurance Company of North America to recover from the Cairo, Vincennes & Chicago Line, in the hands of Thomas and Tracy, its receivers, the invoice value of 700 bales of cotton destroyed by fire at Cairo, Ill., on the 28th day of December, 1886. The cotton was insured under the provisions of a general policy, in February, 1886, in favor of the Lancaster Mills, and the petitioners, having paid the loss, claim to have been subrogated to the rights of the assured, and seek a recovery against the carrier. Bowles & Son, of Memphis, Tenn., seem to have bought the cotton for, or as agents of, the Lancaster Mills, had the same sent to a compress company in that city, and afterwards it was delivered by such agents of the Lancaster Mills to Joseph Nash, agent of the Cairo, Vincennes & Chicago Line, who gave in return bills of lading. The bill of lading covering the cotton on barge 49, acknowledged its receipt from Bowles & Son at Memphis, and has on its face the words, "Notify Lancaster Mills, Clinton, Massachusetts." It is a through bill, issued by the "Cairo, Vincennes & Chicago Line, in connection with all trunk lines between Cairo, Toledo, Cleveland, Detroit, Chicago, Buffalo, Pittsburgh, Philadelphia, Boston, New York, New England, and intermediate points," and undertook the carriage of the cotton from Memphis to Clinton, Mass. It is signed by Joseph Nash, agent of the Cairo, Vincennes & Chicago Line, and contains a clause exempting the carrier from liability "for loss or damage to any article or property whatever, by fire or other casualty, while in transit, or while in depots or other places of transshipment, or at depots or landings at point of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on the seas, rivers, lakes, or canals." It bears date, on its face, December 13, 1886, but there is evidently an error as to this date, as barge 49, with the 700 bales of cotton subsequently burned, reached Cairo about midnight of December 10. The bill of lading was probably made on or about the 8th of December. The petition is answered by the receivers of the railroad carrier, and raises numerous questions of fact and of law pertaining to the alleged right of recovery. Much evidence has been taken, and great zeal and ability have been exhibited by counsel on both sides. Many of the issues of fact made by the answer, and questions of law discussed, have ceased to be important, much less controlling, in view of the character of the evidence and the presentation of authorities bearing upon them. No question is made as to the fact that the insurance company paid the Lancaster Mills the amount of the indemnity agreed on between them, nor of law that, having made such payment, it has the same right to recover the insured would have possessed had no payment or subrogation occurred.

One of the first questions presented is made

by the denial on the part of petitioners of the validity of the fire exemption clause in the bill of lading, on account of the force of an Illinois statute passed March 27, 1874, which provides "that whenever any property is received by a common carrier to be transported from one place to another within or without this state, it shall not be lawful for such carrier to limit his common-law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property." When it is remembered that the bill of lading was executed, delivered, and accepted at Memphis, Tenn., that it contemplated a through carriage of cotton from Tennessee to Massachusetts, and that the power of the carrier to make such contract has not been challenged, the authority of the state of Illinois to declare invalid a clause in the contract cannot be admitted. The legislature of Illinois, in regulating commercial contracts, cannot, in binding effect, go beyond the boundaries of the state; and it does not matter, in this regard, that the franchise to the corporation represented by the receivers, Thomas and Tracy, was granted by the Illinois legislature. They had the same rights at Memphis, or in any other place outside the boundaries of Illinois, to limit their common-law liabilities, that were possessed or belonged to any other contracting party, natural or artificial. It may be assumed, then, that the carrier had the right to limit his common-law liability, but this privilege cannot be held to extend to loss of goods, intrusted to him for carriage, caused by his own carelessness or negligence. Counsel for receivers make no such contention. The intervening petition in this case alleges "that the loss of cotton by said fire was the result of the carelessness and negligence and delay of said receivers of said Cairo, Vincennes & Chicago Line while the said cotton was in their possession in course of transportation in pursuance of the contract of transportation aforesaid." Under the contract of affreightment, evidenced by the bill of lading, the Cairo, Vincennes & Chicago Line had the privilege of selecting its own line of transportation. It made choice of the Mississippi Valley Transportation Company from Memphis to Cairo. The barge containing the cotton left Memphis on the 8th or 9th of December, 1886, and was in the city of Cairo about midnight of the 10th of December. The undertaking bound the carrier to safely carry and deliver the cotton to the consignee within a reasonable time. I cannot, after the best consideration I have been enabled to give the evidence, resist the conclusion that the cotton was unreasonably detained at Cairo. Reaching there on the 10th, it remained on the same barge in the same harbor until the 28th, when it was burned. It is urged, in explanation by counsel for the receivers, that when all the circumstances existing at Cairo at that time are duly and fairly considered, press of business, limited facilities, the precedence of cotton coming on steamboats

to that arriving on barges, etc., the 18 days between the arrival and the destruction of the cotton do not constitute negligence or unreasonable delay on the part of the carrier. And it is also urged that Bowles & Son, agents for the Lancaster Mills at Memphis, knew of the conditions at Cairo when the contract for transportation was made with Nash. It is sufficient to say, with reference to this explanation, that the carrier was bound to know, when he accepted the cotton, that he had or could avail himself of the facilities to transport it within a fairly reasonable period. Knowing the conditions at Cairo, he should not have received the cotton at Memphis. It is unnecessary to cite authorities in support of the position that a carrier is not bound to receive freight when he has no facilities for transporting it, or when his line is already overtaxed and congested by freight previously accepted for transportation. The Cairo, Vincennes & Chicago Line was under no obligation to accept or receive freight at Memphis, when it had no ability to transport it to the destined point within a reasonable time. It chose to do so, however, and cannot be relieved from its undertaking because of difficulties in the way of the performance of the contract, when its agent knew of such difficulties at the time the contract was executed.

The contention is made, however, by counsel for receivers, that, even if unusual delay had occurred at Cairo after the arrival of the cotton, and before it was destroyed,—which is denied,—this would not render the receivers liable for the loss of the cotton burned, because such delay would, at the most, only be a remote, and not the proximate, cause of the loss of the cotton by fire. Many well-considered cases have been referred to by the learned counsel for the receivers in support of his position, and it may be that it announces a sound rule. It will be borne in mind, however, that the negligence imputed to the carrier in this case in the petition is not merely delay, but "that the loss of the cotton by said fire was the result of the carelessness and negligence and delay of said receivers while the said cotton was in their possession, in course of transportation in pursuance of the contract of transportation as aforesaid." If mere delay constituted all the alleged negligence to be found in the pleadings and evidence, the question might present less difficulty, for the negligence must be the proximate, and not the remote, cause of the burning, to render the carrier liable. Had lightning set the cotton on fire, or had one of the frequent river storms destroyed it, the delay preceding the accident might not be regarded as the proximate cause of the destruction; and in such or a like case in fact or principle the cases cited by counsel for the receivers, of *Memphis & C. R. Co. v. Reeres*, 77 U. S. 10 Wall. 176, 19 L. ed. 909; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Denny v. New York Cent. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *St. Louis, I. M. & S. R. Co. v. Commercial U. Ins. Co.* 189 U. S. 223, 85 L. ed. 154; *New York Lighterage & Transp. Co. v. Pennsylvania R. Co.* 43 Fed. Rep. 172; *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106,—and others on that line, would be in point. The petition, how-

ever, and the evidence in support of it, go far beyond mere delay, charging and proving satisfactorily that the carrier company, on reaching Cairo with the cotton, on December 10th, did not proceed to North Cairo, where the Cairo, Vincennes & Chicago Line had a wharf-boat, from which cotton on that line of transit was carried up an incline by tracks into the cotton shed, to be loaded on cars for the east; but, on the contrary, tied up Barge 49, containing the cotton, a distance of more than one mile, at the foot of 10th Street, at the public levee, in a position, not only exposed to the sparks of passing steamboats, but in close proximity to the tracks of the Illinois Central Railroad upon the top of the levee. A position more exposed to sparks from the numerous vessels in a busy harbor, and from the smoke-stacks of the engines almost constantly passing on the railroad, could not have been chosen in Cairo. And it was at this exposed point that the barge containing the cotton was moored, till it was destroyed by fire on the 28th of December; the fire originating most likely from sparks emitted from boats on the river or engines on the levee. It is not mere delay, therefore, but negligent delay in a dangerous place, willful, it may be said, and deliberate exposure of the cotton to danger from fire, that fixes the liability of the carrier. The danger could have been foreseen, should have been foreseen, and guarded against.

Another ground of defense, urged apparently with much confidence by counsel for the receivers, is that the owner of the cotton burned on barge 49 expressly assumed the fire risk while the cotton was on the barge, and expressly relieved the Cairo, Vincennes & Chicago Line and its receivers from liability for loss of the cotton by fire while on the barge; or, to put the matter in the language of counsel's brief: "The receivers, by Nash, their agent, purchased and paid for an interest in the insurance of the cotton already effected by the owner in its open policies of insurance issued by the Insurance company of North America, to the extent of the risk while the cotton was on barge 49. By these contracts the insurance held by the owner inured to the benefit of the receivers to the extent of the risk while the cotton was on barge 49." This defense, and the alleged facts on which it is founded, are controverted and vigorously denied by petitioners. The receivers insist that the shipper assumed the river risk, and produce two instruments of writing purporting to be signed by William Bowles & Son, per Hayes, in support of this view. Nash testifies that the money mentioned in the instruments was for the assumption by Bowles & Son of the river risk. These two papers and Nash's testimony constitute the substance of the receivers' evidence upon the point. The petitioner produces William Bowles, Jr., and Mr. Hayes, who characterize the papers as forgeries, and deny positively that the shippers, Bowles & Son, ever assumed the "river risk" or insurance risk between Memphis and Cairo. These two witnesses and others do say, however, that Bowles & Son were paid a rebate by Nash of two to eight cents per 100 pounds; that competition at Memphis for eastern consignments was sharp, and the payment of re-

bates usual, if not universal. The cross-examination of the witnesses upon the disputed point, together with the various circumstances and explanations offered in evidence, satisfies me that the shipper did not assume any such risk; and that, if he was paid anything by

Nash in connection with the transportation of the cotton, it was in the nature of a rebate. No other point or question is deemed of sufficient importance to warrant further discussion in the case. There will be a decree in favor of petitioner for \$35,867.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF LOUISIANA.

FRANK T. COPP

v.

LOUISVILLE & N. R. CO.

(50 Fed. Rep. 164.)

The statute of limitations of the state in which the offense was committed applies in actions under the Interstate Commerce Act to recover back

freight paid to a carrier in excess of that charged other shippers.

Decided April 21, 1892.

ON MOTION for new trial in an action to recover back excessive freight charges. *Granted.*
The facts are stated in the opinion.

Mr. B. R. Forman for plaintiff.

Messrs. Bayne & Denegre for defendant.

Billings, *District Judge*, delivered the following opinion:

The plaintiff has brought suit under the Act of Congress known as the "Interstate Commerce Act" (24 Stat. at L. 380, §§ 3, 9) to recover the amount of freight paid by him to the defendant in excess of that paid to it by others for similar service. An exception was filed by the defendant, interposing the plea of the limitation or prescription in force under the statute of the state of Louisiana. The statute relied upon is Rev. Civ. Code, art. 3536, which provides that "the following actions are also prescribed by one year: That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or *quasi* offenses." It is claimed by the defendant that this is an action for a *quasi* offense, and it is controlled by the state statute. Code Prac. art. 28, declares that "personal actions are grounded on four causes: Contracts, *quasi* contracts, offenses, and *quasi* offenses," and article 32 further defines personal actions arising from *quasi* offenses to be when the ground of action is the injury done to another by one of those faults which are not considered as real crimes or offenses. It has not been questioned, and I think cannot be questioned, that the fault complained of by the plaintiff is included within the definition of "*quasi* offenses."

The question is whether this state statute of limitations applies to this action. The action

arises from a law of Congress against discrimination in the charges for the transportation of merchandise. Where there has been discrimination, Congress has created a right of action in favor of the party against whom it has been made for the excess of the charge collected from him, as compared with that collected from others. It is to be observed that in the Act of Congress there is no limitation as to time, and that, unless the state statute applies, there is no limitation. On the other hand, the action is authorized in case of discrimination, with or without damage; and to that extent it is a statute in the nature of a statutory provision for an action to protect the interests of the public, *i. e.*, to secure a uniform rate of charge for the transportation of merchandise by common carriers, and giving an action even in case the party discriminated against had paid no more than the value of the service of transportation. Nevertheless it is a purely civil action, and, by denomination or definition, is within the meaning of the state statute of limitations. The question is whether section 721 of the United States Revised States, being a portion of section 34 of the Judiciary Act of September 24, 1789, includes the limitation or prescription for actions known as "*quasi* offenses" contained in the Louisiana statute. In Angell on Limitations, § 24, the rule is laid down as follows:

"Under the 34th section of the Judiciary Act of 1789, the acts of limitations of the sev-

eral states, where no special provision has been made by Congress, form a rule of decision in the courts of the United States; and the same effect is given to them as is given to them in the state courts."

This passage from Angell is adopted by the Supreme Court as a correct statement of the law in *Hanger v. Abbott*, 73 U. S. 6 Wall. 537, 18 L. ed. 942. In *Toiensen v. Jemison*, 50 U. S. 9 How. 414, 13 L. ed. 197, the Supreme Court quotes approvingly that in the courts of the United States the law of the former governors, and says that "statutes of limitation, unless the plaintiff can bring himself within their exceptions, appertain *ad tempus et modum actionis instituenda*, and not *ad calorem contractus*." In *McIver v. Ragan*, 15 U. S. 2 Wheat. 29, 4 L. ed. 176, Chief Justice Marshall says: "It would be going far to add to these exceptions;" *i. e.*, those exceptions made by the legislature. In *McCluny v. Silliman*, 28 U. S. 3 Pet. 270, 7 L. ed. 676, where the Act of Congress made it the duty of the registers of the land office to enter, upon application, certain lands, and the action was brought against a register for not having entered lands upon the proper application of the plaintiff—the action being an action upon the case, and the statute of Ohio (the suit was brought in the United States circuit court in the district of Ohio) limited to six years all actions upon the case,—the Supreme Court held that the plea setting up the state statute of limitations was a good plea. In that case one of the errors assigned was—

"That no statute of limitations of the state of Ohio, then in force, is pleadable in an action upon the case brought by a citizen of one state against a citizen of another, in the circuit court of the United States, for malfeasance or nonfeasance in office in a ministerial officer of the general government, and especially when the plaintiff's rights accrued to him under a law of Congress."

In reply to this objection, the court, at page 278 [678] says:

"Where the statute is not restricted to par-

ticular causes of action, but provides that the action, by its technical denomination, shall be barred, if not brought within a limited time, every cause for which the action may be prosecuted is within the statute."

In *Ross v. Duval*, 38 U. S. 13 Pet. 45, 10 L. ed. 51, the Supreme Court applies the statute of limitations of the state of Virginia to judgments rendered in the United States circuit courts. At page 60 [58] the court says:

"If this, then, be a limitation law, it is a rule of property; and, under the thirty-fourth section of the Judiciary Act, is a rule of decision for the courts of the United States."

In *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 32 L. ed. 1080, it is reiterated, as the result of all the decisions of the Supreme Court, that the statutes of limitations were laws of the several states, and under the thirty-fourth section of the Act of 1789, in the absence of special provision by Congress, were binding upon the courts of the United States, as they would be upon the courts of the state in which the United States courts sit. In this case the supreme court of this state has held that the United States circuit courts had exclusive jurisdiction over the actions arising under the Act of Congress under which this action is brought. But I do not see that the exclusive jurisdiction of the United States courts affects the question presented here; for, if the statute would control the matter in the state courts in case they had jurisdiction, the statute is nevertheless the rule of decision. The binding force of the state statute of limitations upon the United States courts in cases where they have jurisdiction comes from section 34 of the Judiciary Act, and the statute made a rule of decision, in cases to which it applies, equally whether the state courts also have jurisdiction or not. The statute becomes a rule of property in the United States courts, if it would include a similar action in the state court. My conclusion is that the statute of limitation of the state applies to this case.

The motion for a new trial will therefore be granted.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF IOWA.

MURRAY

v.

CHICAGO & N. W. R. CO.

(62 Fed. Rep. 24.)

1. The principles of the common law apply to controversies in the Federal courts in matters of national control so far as they are applicable to the subject-matter.
2. The duties and obligations of carriers to their patrons when engaged in interstate commerce are governed by the common law, in the absence of any legislation of Congress on the subject.
3. The fact that a subject like interstate commerce is beyond state legislative control is not *ipso facto*

exclude the jurisdiction of state courts from cases growing out of such commerce.

4. The concealment from a shipper of the fact that the rates charged him were excessive and that rebates were secretly given to others and false representations as to these facts, do not take a cause of action for the recovery of the excess paid by him out of the statute of limitations, as the case is not based on fraud.

Decided June 14, 1894.

ON DEMURRER to the petition in an action brought to recover back unreasonable charges for the transportation of freight. *Demurrer sustained.*
The facts are stated in the opinion.

Messrs. Hubbard & Dawley for defendant, in support of demurrer.
Messrs. Rickel & Crocker for plaintiff, *contra.*

Shiras, District Judge, delivered the opinion of the court:

In the amended petition filed in this cause it is averred that during the years 1875 to 1887, inclusive, the plaintiff was engaged at Belle Plaine, Iowa, in the business of buying and shipping to Chicago grain, cattle, and hogs, the same being shipped in car-load lots over the line of railway owned and operated by the defendant company; that, at the several times when the shipments were made, the defendant company had posted at its stations, including that at Belle Plaine, printed lists containing the tariff rates charged by the company for the transportation of freight over its line; that, when plaintiff shipped his stock, he applied to the defendant and its station agent at Belle Plaine for the lowest freight rates charged, and was answered by the defendant and its station agent that the posted rates were the lowest and only rates charged by the company, no rebates or concessions in any form being made therefrom to any one; that thereupon the plaintiff shipped his stock, and paid the posted rates therefor; that in fact such representations were false, and were made to mislead the plaintiff; that in fact, as the defendant and its agents well knew, rebates and concessions were then being made to other parties who were competitors in business of the plaintiff, to the great injury of plaintiff; that the fact that these rebates were allowed to the competitors of plaintiff was kept concealed by the defendant, and was not discovered by the plaintiff until within 18 months previous to the commencement of this action; that upon shipments of grain made from points west of Belle Plaine to Chicago the defendant charged the shippers thereof some \$15 per car less than it was then charging the plaintiff for shipping the same kind of grain from Belle Plaine to Chicago, thus discriminating against the plaintiff, and compelling him to pay an excessive and unreasonable rate. To recover the damages claimed to have been thus caused him, the plaintiff brought this action in the superior court of the city of Cedar Rapids, Iowa, whence it was removed to this court upon the application of the defendant company. On part of the defendant, a motion for a more specific statement has been filed, followed by a demurrer, and both have been submitted to the court.

The principal point made in the demurrer is that the petition on its face shows that the shipments made from Belle Plaine, Iowa, to Chicago, Ill., were in the nature of interstate commerce, the regulation of which is reserved to Congress, exclusively, by section 8, art. 1, of the Constitution of the United States.

and that, at the dates of the several shipments in the petition described, there was no Act of Congress or other law regulating commerce between the several states. If I understand correctly the position of the defendant company, it is that, as this action was commenced in the state court, this court, upon removal, succeeds only to the jurisdiction which the state court might have exercised rightfully in case no removal had been had; that in the state court the action could not be maintained for two reasons: First, that as section 8, art. 1, of the Constitution of the United States confers the right to regulate interstate commerce exclusively upon Congress, thereby depriving the states of the power to legislate touching the same, it follows that state courts are deprived of all jurisdiction over cases growing out of interstate commerce; and, second, that there is no common law of the United States; that the common law of England has become the common law of the several states, in such sense that each state has its own common law; and that the common law of the state of Iowa cannot be applied to interstate commerce, in view of the provisions, already cited, of the Constitution of the United States. Dealing with these propositions in the reverse order of their statement, is it true that the principles of the common law are not in force in the United States with respect to such subjects as are placed within the exclusive control of Congress? It will not be questioned that, before the Revolution, the common law was in force, so far as applicable, in the several colonies then existing. Thus, in *United States v. Reid*, 53 U. S. 12 How. 361-363, 13 L. ed. 1023, 1024, it is said:

"The colonists who established the English colonies in this country undoubtedly brought with them the common and statute laws of England, as they stood at the time of their emigration, so far as they were applicable to the situation and local circumstances of the colony."

When the Constitution of the United States was adopted, it was based upon the general principles of the common law, and its correct interpretation requires that the several provisions thereof shall be read in the light of these general principles. The final disruption of all political ties between the colonies and the mother country did not terminate the existence of the common law in the colonies. It came originally into the several colonies, not by force of legislative enactments to that effect by the parliament of Great Britain, and the effect of which might be held to have terminated when the colonies became independent, but, as is said by *Mr. Justice Story*, speaking for the Supreme Court

in *Van Ness v. Pacard*, 27 U. S. 2 Pet. 137-144, 7 L. ed. 374-377.

"Our ancestors brought with them its general principles and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."

In *Cooley*, Const. Lim. 31, it is said:

"From the first the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law, as then existing in England, was not suited to their condition and circumstances in the new country, and those particulars they omitted as it was put in practice by them. They also claimed the benefit of such statutes as, from time to time, had been enacted in modification of this body of rules; and, when the difficulties with the home government sprung up, it was a source of immense moral power to the colonists that they were able to show that the rights they claimed were conferred by the common law, and that the king and parliament were seeking to deprive them of the common birthright of Englishmen. . . . While colonization continued,—that is to say, until the war of the Revolution actually commenced,—these decisions were authority in the colonies, and the changes made in the common law up to the same period were operative in America also, if suited to the condition of things here. The opening of the war of the Revolution is the point of time at which the continuous stream of the common law became divided, and that portion which had been adopted in America flowed on by itself, no longer subject to changes from across the ocean, but liable still to be gradually modified through changes in the modes of thought and of business among the people, as well as through statutory enactments. The colonies also had legislatures of their own, by which laws had been passed which were in force at the time of the separation, and which remained unaffected thereby. When, therefore, they emerged from the colonial condition into that of independence, the laws which governed them consisted—First, of the common law of England, so far as they had tacitly adopted it, as suited to their condition; second, of the statutes of England or of Great Britain, amendatory of the common law, which they had in like manner adopted; and, third, of the colonial statutes. The first and second constituted the American common law, and by this, in great part, are rights adjudged and wrongs redressed in the American states to this day."

Thus it appears that, when the Constitution of the United States was adopted, the general rules of the common law, in so far as they were applicable to the conditions then existing in the colonies, and subject to the modifications necessary to adapt them to the uses and needs of the people, were recognized and were in force in the colonies, and the people thereof were entitled to demand the enforcement thereof through the judicial tribunals then existing. The adoption of the Constitution did not deprive the people of the several colonies of the protection and advantages of the common law. The Consti-

tution itself recognizes the fact of the continued existence of the common law, and indeed it is based upon the principles thereof, and its correct interpretation requires that its provisions shall be read and construed in the light thereof. By section 2, art. 3, of the Constitution it is declared that:

"The judicial power shall extend to all cases in law and equity, arising under this Constitution; the laws of the United States, and treaties made or which shall be made, under their authority; . . . to all cases of admiralty and maritime jurisdiction."

In this section we have a clear recognition of the existence of the several systems of law, equity, and admiralty. The section does not create these systems, but, recognizing their existence, it declares the extent of Federal jurisdiction in regard thereto. The rules and principles which form the laws maritime are not created by the Constitution, for, as is said by Chief Justice Marshall, in *American Ins. Co. v. 356 Bales of Cotton*, 26 U. S. 1 Pet. 511-546, 7 L. ed. 242-256:

"A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself, and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise."

In *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344-390, 12 L. ed. 465-485, it is declared that:

"By the Constitution, the entire admiralty power of the country is lodged in the Federal judiciary, and Congress intended, by the ninth section, to invest the district courts with this power, as courts of original jurisdiction."

The Constitution does not create a system of maritime law, nor does it enact that the system, as prevailing in England or in Europe, shall become the law of the United States; but, recognizing the fact that the law maritime was then in force in the colonies, it confers the jurisdiction upon the Federal courts. The same is true of the equitable jurisdiction. It is certainly not necessary to cite authorities in support of the proposition that the Constitution of the United States neither created nor enacted a system of equitable jurisprudence and procedure, but, recognizing the existence of the system, it conferred upon the courts of the United States jurisdiction in equity, maintaining the pre-existing distinction between equitable and legal remedies. Is it not clear that the same is true in regard to the common law? At the time of the adoption of the Constitution there was in existence in the colonies the system of the common law, of equity, and of admiralty. It was not the purpose of the Constitution to abrogate any one of these systems. One of the main objects sought to be accomplished was to establish the extent of the legislative and judicial powers of the national government then being created. Owing to the fact that it was not proposed to destroy the state governments then existing, but, continuing these, to create a national government, to be paramount and supreme within its limited

sphere, it became a necessity that the extent of the powers of each government should be defined; and, in a general sense, it may be said that the plain adopted was to confer upon the national government the power of control over subjects affecting the country or people at large, reserving to the states control over all that are local, or which do not require a uniform system or law for their proper regulation. Can it be denied that, at the time of the adoption of the Constitution, the people of the several states possessed the rights, and were subject to the duties and obligations, recognized and enforced by the principles and modes of procedure forming the separate systems of law, equity, and admiralty? Is there any ground for holding that it was the purpose of the Constitution to recognize the continuing existence of the systems of equity and admiralty, but to deny the existence of the common law, or to refuse its recognition? Such a construction of its provisions is clearly inadmissible. The principles and modes of procedure of the three systems of law, equity, and admiralty, in force previous to the adoption of the Constitution, remained in force after its adoption, save as to such modification as were created by the provisions of the Constitution. That this is the true view of the question appears, not only from the references found in the Constitution, and the amendments thereto, to the common law, as a recognized and existing system, but in the Judiciary Act of 1789 the several branches of the law, such as the law of nations, the common law, the admiralty and maritime law, and equity are fully recognized as then existing, and the jurisdiction arising under the same is divided between the courts created by that Act. That the principles of the common law have always been recognized and enforced in proper cases by the courts of the United States is a proposition so plain that a citation of the cases is not necessary for its support; yet, to show the course of judicial action in this particular, a few of the numerous cases to be found in the decisions of the Supreme Court will be quoted from.

In *Cox v. United States*, 31 U. S. 6 Pet. 172-204, 8 L. ed. 359-371, wherein suit was brought in the United States court in Louisiana upon the bond of a navy agent, it was held that the bond must be deemed to be a contract performable at the city of Washington, "and the liability of the parties must be governed by the rules of the common law." To the same effect is the ruling in *Duncan v. United States*, 32 U. S. 7 Pet. 435, 8 L. ed. 739. In *Swift v. Tyson*, 41 U. S. 16 Pet. 1-18, 10 L. ed. 865-871, —a case involving the law of negotiable paper, —the Supreme Court held that the provisions of the thirty-fourth section of the Judiciary Act of 1789 did not require the courts of the United States to follow the ruling of the state courts upon the principles established in the general commercial law, it being said by *Mr. Justice Story*, speaking for the court, that:

"We have not now the slightest difficulty in holding that this section, upon its true intent and construction, is strictly limited to local statutes and local usages of the

character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

To the same effect is the ruling in *Oates v. First Nat. Bank of United States*, 100 U. S. 239, 25 L. ed. 580, and *Brooklyn City & N. R. Co. v. National Bank of the Republic*, 102 U. S. 14, 26 L. ed. 61. In the latter case it is said:

"The decisions of the New York court, which we are asked to follow in determining the right of parties under a contract there made, are not in exposition of any legislative enactment of that state. They express the opinion of that court, not as to the rights of parties under any law local to that state, but as to their rights under the general commercial law existing throughout the Union, except where it may have been modified or changed by some local statute. It is a law not peculiar to one state, or dependent upon local authority, but one arising out of the usages of the commercial world."

In *Fenn v. Holme*, 62 U. S. 21 How. 481-484, 16 L. ed. 198, 199, it is said:

"In every instance in which this court has expounded the phrases 'proceedings at common law' and 'proceedings in equity,' with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal, and the latter as meaning the administration with reference to equitable, as contradistinguished from legal, rights of the equity law, as defined and enforced by the court of chancery in England."

In *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, the question of the power of a common carrier to exempt himself by contract from the liability placed upon him by the common law is discussed at length, and it was held that the court was bound to decide the question upon the ground of public policy, and according to the principles of general commercial law.

The case of *Kohl v. United States*, 91 U. S. 367, 374-376, 23 L. ed. 449, 452, presented the question whether the United States could exercise the right of eminent domain for the purpose of condemning land in the city of Cincinnati, to be used as a site for a public postoffice. The right was maintained, it being said that:

"When the power to establish postoffices and to create courts within the states was conferred upon the Federal government, included in it was authority to obtain sites for such offices and for such courthouses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means, well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. . . . The right of eminent domain always was a right

at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. . . . It is difficult, then, to see why a proceeding to take land by virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right."

In *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346, the question was, by what law is the Court of Claims to be governed in respect to the admission of evidence in the hearings had before it? and the Supreme Court held that:

"In our opinion it must be governed by law; and we know of no system of law by which it should be governed other than the common law. That is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law. The great majority of contracts and transactions which come before the Court of Claims for adjudication are permeated, and are to be adjudged, by the principles of the common law."

In *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667-681, 28 L. ed. 291-296, it is said:

"The Atchison, Topeka, & Santa Fé Company, as the lessee of the Pueblo & Arkansas Valley Railroad, has the statutory right to establish its own stations, and to regulate the time and manner in which it will carry persons and property, and the price to be paid therefor. As to all these matters it is undoubtedly subject to the power of legislative regulation, but, in the absence of regulation, it owes only such duties to the public, or to individuals, associations, or corporations, as the common law, or some custom having the force of law, has established for the government of those in its condition."

In *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 378, 37 L. ed. 778, was presented the question whether the engineer and fireman of a locomotive engine are fellow servants, so that the fireman could not recover from the railway company damages for injuries caused by the negligence of the engineer, there being no statutory enactment to that effect in the state of Ohio, wherein the accident happened. Under the decisions of the supreme court of Ohio, liability on part of the railway company existed; but the Supreme Court of the United States refused to follow these rulings, holding that:

"The question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this respect, as in others; but, in the

absence of such legislation, the question is one determinable only by the general principles of that law."

Citations of this character from the decisions of the Supreme Court might be continued almost without limit. From them it appears, beyond question, that the Constitution, the Judiciary Act of 1789, and all subsequent statutes upon the same subject are based upon the general principles of the common law, and that, to a large extent, the legislative and judicial action of the government would be without support and without meaning if they cannot be interpreted in the light of the common law. When the Constitution was adopted, it was not the design of the framers thereof to create any new systems of general law, nor to supplant those already in existence. At that time there were in existence and in force in the colonies or states, and among the people thereof, the law of nations, the law admiralty and maritime, the common law, including commercial law, and the system of equity. Upon these foundations the Constitution was erected. The problem sought to be solved was not whether the Constitution should create or enact a law of nations, of admiralty, of equity, or the like, but rather how should the executive, legislative, and judicial powers and duties based upon these systems, and necessary for the proper development and enforcement thereof, be apportioned between the national and state governments. The principles, duties, and obligations inhering in these systems of law were already in force. The Constitution neither created nor adopted them, but, recognizing the fact that they were in fact in existence, and were the possessions of the people, it proceeded to apportion the exercise thereof between the national and state governments. The general line of division, as already said, is based upon the principle of national control over subjects affecting the country and the people as a whole, and wherein uniformity of rule and control is desirable, if not indispensable, and of state control over subjects of local interests. The result was that upon the national government was conferred, as to some subjects, paramount and exclusive control; as to others, paramount, but not exclusive, control, unless Congress by legislation excluded state action; as to others, control concurrent with the states. The division thus made is as to the subjects of legislative and judicial jurisdiction, and not a division of systems of law. The Constitution does not place under national control the law of nations and of admiralty, and under state control common law and equity, but it divides the subjects of governmental control, and each subject carries with it the law or system appropriate thereto. The subject-matter of dealing with other nations is conferred exclusively upon the national government, and of necessity all questions arising under the law of nations and the right to seek changes in this law by conventions with other governments are committed to the national government. The right to regulate foreign commerce is conferred exclusively upon Congress, and of necessity that confers upon the national legis-

lature and judiciary the duty of enforcing the law maritime. The right to regulate interstate commerce is conferred exclusively upon Congress, and, when it legislates, the resulting statute will be interpreted with reference to the general principles of the common law. In the absence of congressional regulation of interstate commerce, the courts called upon to decide cases arising out of interstate commerce must apply the principles of the common law. So, also, when called upon to decide cases arising out of intrastate commerce, when there is no state statute or law applicable thereto, the courts must apply the common law. The apportionment of control over foreign, inter- and intrastate commerce, made by the Constitution, did not affect the applicability of the common law thereto. It divided the control over the general subject of commerce, and apportioned to the national government exclusive legislative control over foreign and interstate commerce; and this apportionment carried with it the right to confer upon the national judiciary jurisdiction over cases involving foreign and interstate commerce, and, in the exercise of this jurisdiction, the courts are bound by the general principles of the common law, save where the same have been changed by legislative enactment.

To me it seems clear, beyond question, that neither in the Constitution, nor in the statutes enacted by Congress, nor in the judgments of the Supreme Court of the United States can there be found any substantial support for the proposition that, since the adoption of the Constitution, the principles of the common law have been wholly abrogated touching such matters as are by that instrument placed within the exclusive control of the national government. But it is not to be denied that support to the proposition is to be found in part of the reasoning employed by *Mr. Justice Matthews* in announcing the opinion of the Supreme Court in *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804. This case came before the Supreme Court upon a writ of error bringing into review a judgment of the supreme court of Alabama affirming a judgment of the city court of Mobile in habeas corpus proceedings, and which presented the question whether a statute of the state of Alabama, providing for the examination and licensing engineers engaged in operating locomotive engines in that state, was void, as applied to engineers running interstate trains, on the ground that it was an attempt to regulate interstate commerce. The case did not in fact involve any question in regard to the common law. The judgment of the court was that the statute was passed to secure the safety of the public in person and property, and any effect it had upon interstate commerce was incidental and remote; and the validity of the statute was sustained. In the course of the opinion it is pointed out that the laws of the states provide for remedies in cases of nonfeasance or misfeasance on part of common carriers, and that it had never been held that such laws were void, as being unconstitutional regulations by the state of interstate com-

merce. Following these propositions, we find it said:

"But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or, if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular state does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which, until displaced, covers the subject. There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England, as adopted by the several states, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statute. . . .

There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction, which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject and constitutes a common law, resting on national authority."

The meaning to be given to this last sentence quoted from the opinion of *Mr. Justice Matthews* is not at all clear. If it be true that the Supreme Court, in construing the provisions of the Constitution, and the laws and treaties made in pursuance thereof, has the right to adopt, as the basis of its Constitution, so much of the common law as may be implied in the subject, which proposition seems to be affirmed, then is it not true that the principles of the common law, so far as applicable to the subject-matter, are recognized as in force touching matters of national control? It is evident that it was present to the mind of the learned justice whose opinion we are considering, that it would not do to hold that the failure of Congress to legislate touching the duties and obligations of common carriers engaged in interstate commerce left the public without any law for its protection, and therefore the suggestion is made that:

"The failure of Congress to legislate can

be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law."

The rules prevailing in the different states may be variant or antagonistic. A delivery of goods may be made to a common carrier in California, for transportation to New York. Do the legal relations, duties, and obligations existing between the shippers and carrier vary and change as the shipment passes state boundaries, so as to accord with the local law of each state through which the carrier may choose to take them? Upon such a theory, what becomes of the principle that the exclusive control of foreign and interstate commerce was committed to Congress in order to secure a uniform rule touching the same? I would amend the statement of *Mr. Justice Matthews* so that it should read:

"The failure of Congress to legislate can be construed only as an intention not to disturb what already exists; and as, at the time of the adoption of the Constitution, common carriers, under the principles of the common law, were subject to certain duties and obligations, the failure on the part of Congress to legislate thereon evinces the legislative intent to leave the rules and principles of the common law in full force, as controlling and defining the relations, duties, and obligations of common carriers engaged in interstate commerce."

It will be further noticed that it is suggested in the opinion that it might be implied that Congress has supplied a law or rule governing foreign and interstate commerce. Is there not as good ground to be found in the provisions of the Constitution, and the statutes based thereon, for implying the recognition of the principles of the common law, as there is for implying the recognition of the law of nations, or the maritime law as applied to foreign commerce? Suppose a merchant or manufacturer residing in the United States makes a shipment of goods by land into the dominion of Canada, and another shipment of goods to England by sea, in both instances the goods being delivered to common carriers for transportation and delivery; would not the duty and obligations resting upon the steamship line to which the goods destined for England were delivered be measured by the law maritime? What express provision of the Constitution or of the statutes of the United States declares that shipowners engaged in foreign commerce are subject to the law maritime? Has Congress ever adopted a code of laws declaring what the rules and principles are that are applicable to foreign commerce carried on over the high seas or the navigable waters of the country? It has adopted specific provisions modifying the general principles of the law, but it has always recognized the existence of the general system. Can it be contended that, in the absence of legislation by Congress expressly adopting the law maritime, foreign shipments upon the ocean are without legal protection; that, from the acceptance of the goods for transportation and delivery, no implied contract

is created; that the respective rights and duties of the parties are such and such only, as may be created by express contract between the parties? Even if an express contract is entered into, by what rules and principles are its provisions to be construed? That the law maritime has been in force, and is now in force, in the United States, cannot be questioned; and yet it was not created or expressly enacted in the Constitution or any Act of Congress. That system of law was in existence when the Constitution was adopted, and its existence is recognized in the Constitution, and provision is made for enforcing the same by conferring admiralty jurisdiction upon the courts of the United States. From this the inference, and the only inference, is that it was not the intent of the Constitution to abrogate the then existing maritime law, but, recognizing its existence, to provide for its enforcement in all matters to which it is applicable, including foreign commerce. There is no doubt, therefore, that, as to that part of foreign commerce which is carried on through the agency of common carriers upon navigable waters, there is a system of law applicable thereto, and courts having jurisdiction to enforce the principles of the system. How is it, in regard to that part of foreign commerce carried on with neighboring countries, where the transportation is by land, as in the case supposed of a shipment of goods to Canada? It is said that the common carrier engaged in foreign commerce cannot be held subject to the principles of the common law, because Congress has not expressly adopted the common law, and therefore it cannot be applied to shipments made to foreign countries. Is not the existence of the common law as fully recognized in the Constitution, and the laws of Congress based thereon, as is the existence of the law maritime? Do not the Constitution and the Judiciary Act confer upon the courts of the United States full common law jurisdiction? Are not the courts of the United States, therefore, authorized to enforce the principles of the law maritime and the common law in all cases to which they are applicable, and which are within the jurisdiction of the Federal courts? Suppose a shipment of goods is made from San Francisco, through New York, to England. The carrier receives the goods to be sent by land to New York, and thence by ship to England. No special contract is made. This shipment is a matter of foreign commerce. When placed on shipboard at New York for transportation to England, is there any doubt that the law maritime is applicable thereto, and that, if litigation should arise regarding the ocean transportation, the courts of the United States would apply the principles of the law maritime thereto? If litigation with the common carrier should arise touching the land transportation, would not the courts of the United States have the right to apply the principles of the common law thereto? Upon what fair principle of construction can it be held that the Constitution so far recognizes the law maritime that it must be held to be in force, but that the recognition of the common law is not suffi-

cient to keep it in force in matters of national concern?

In *Swift v. Philadelphia & R. R. Co.* 58 Fed. Rep. 858,—a case decided by the United States Circuit Court for the Northern District of Illinois,—it is held that the law of the state of Illinois could not be applied to contracts for shipments of property into other states; that interstate commerce cannot be controlled by the local law of the state, either statutory or common; that, previous to the enactment of the Interstate Commerce Act by Congress, there was no Act of Congress regulating interstate commerce; that the United States had never adopted the common law; that, previous to the adoption of the Interstate Commerce Act in 1887, there was therefore no law controlling the relations of carriers and shippers in regard to interstate commerce. If it be true that the principles of the common law are not in force in this country in regard to such matters as are placed under national control, then it is difficult to escape the conclusions reached by Judge Grosscup in the case just cited; but I cannot concur in the proposition that the principles of the common law have no existence in this country, as applicable to national affairs, or that these principles have only a local existence, due to their adoption by the several states. It is certainly a novel proposition that up to the date of the enactment of the Interstate Commerce Act, in 1887, all the foreign and interstate commerce of the country was without the pale of law, and that there were no legal rules or principles which governed or controlled the relations between the shippers or carriers engaged in that business; and yet such seems to be the conclusion in *Swift v. Philadelphia & R. R. Co.* In *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 10 U. S. App. 480, 52 Fed. Rep. 912,—a case involving the construction of the Interstate Commerce Act,—Mr. Justice Brewer, speaking for the court, held:

"It was the first effort of the general government to regulate the great transportation business of the country. That business, though of a quasi public nature, and therefore subject to a governmental regulation, has, as a matter of fact, been carried on by private capital through corporations. The fact that it was a quasi public business always prevented the owners of capital invested in it from charging, like owners of other property, any price they saw fit for its use. A reasonable compensation was all they could exact, and he who felt aggrieved by a charge could always invoke the aid of the courts to protect himself against it."

Mr. Justice Brewer is here speaking of the condition of affairs before the enactment of the Interstate Commerce Act, and he expressly declares that, prior to that Act, common carriers engaged in interstate commerce were bound to charge only a reasonable compensation, or, in other words, they were subject to the principles of the common law.

It is further argued that it has been repeatedly decided that the inaction of Congress, up to 1887, in passing any law regarding interstate commerce, shows that the

intent was to leave such commerce free from all restraint, and therefore common carriers assumed no common law liability in undertaking shipments of goods from one state to another. The decisions of the Supreme Court in the numerous cases involving the validity of state laws affecting foreign and interstate commerce have always held that the inaction of Congress could not be construed to mean that the states were at liberty to legislate in regard to these subjects in the absence of congressional legislation, but that such inaction evidenced that it was the intent of Congress to leave commerce, foreign and interstate, free from all legislative restrictions. It has never been held, however, that the freedom of commerce meant that those engaged in carrying it on were not under legal restraints and obligations growing out of the relations of carriers and shippers. If the theory now contended for by the defendant company be correct, then from the foundation of the government up to April 4, 1887, when the Interstate Commerce Act took effect, it was open to all the common carriers engaged in foreign or interstate commerce to act as they pleased in regard to accepting or refusing freights, in regard to the prices they might charge, in regard to the care they should exercise, and the speed with which they should transport and deliver the property placed in their charge. What more disastrous restraint upon the true freedom of foreign and interstate commerce could be devised than the adoption of the doctrine that the inaction of Congress left the carriers engaged therein entirely free to accept and transport the property of one man or corporation, and to refuse to accept the like property of another, or to transport the products of one locality, and to refuse to transport those of another; to charge an onerous toll upon the property of one, and carry that of his neighbor for nothing? Can it be possible that the transcontinental railways and other Federal corporations engaged in foreign and interstate commerce, in the absence of congressional legislation, were not under any legal restraints, and that the citizen, in his dealings with them, was without legal remedy or protection? In the absence of congressional legislation, what law could be applied to them, with regard to matters under the exclusive control of the national government, except the principles of the common law or the law maritime? I cannot yield assent to the broad proposition that, as to those subjects over which Congress is given exclusive legislative control, there is no law in existence if Congress has not expressly legislated in regard thereto. The true doctrine, in my judgment, is that the Constitution of the United States, when it was adopted, gave full recognition to the existing systems of the law of nations, of admiralty and maritime, of the common law, and equity. It apportioned to the national government, then created, control over certain subjects, exclusive as to some, concurrent as to others. This apportionment of control over certain subjects necessitated the exercise of both legislative and judicial powers, and provision was made for the former in the

creation of Congress, and for the latter in the creation of the Supreme Court, and by conferring authority on Congress to create other courts. The courts thus created were vested with jurisdiction in admiralty and at common law and in equity. If there is no common law jurisdiction to be exercised, and no common law principles to be enforced, why create courts for that purpose? But it is said in *Swift v. Philadelphia & R. R. Co.*, and the same thought is found in other cases, that "the courts of the United States have had many occasions to enforce the common law, but in every instance it has been as the municipal law of the state by which the subject-matter was affected." This may be generally, but it is not universally, true. In *Mississippi Mills v. Cohn*, 150 U. S. 202, 37 L. ed. 1052, we find a case which was originally brought in a court of the state of Louisiana, in which state the civil and not the common law is in force. The suit was removed into the United States circuit court, and was by that court dismissed for want of jurisdiction, upon the ground that, being a suit in equity, it could not be maintained, because the remedy at law was sufficient. The Supreme Court reversed the ruling, holding that even if, under the law of the state of Louisiana,—that is, the civil law,—the remedy at law was sufficient, yet that fact would not defeat the jurisdiction in equity of the Federal court, for the reason "that the inquiry, rather, is whether, by the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the Constitution of the United States, the relief here sought was one obtainable in a court of law, or one which only a court of equity was fully competent to give." In this ruling the Supreme Court was certainly not enforcing the municipal law of the state of Louisiana. If courts of the United States can only recognize and enforce the principles of the common law when the same form part of the municipal law of the state, how comes it that the Supreme Court directed the circuit court in Louisiana to apply the principles of the common law and of equity, as they existed when the Constitution was adopted, to the decision of the question of jurisdiction arising in that case? Suppose a state should enact that all questions of title to realty should be triable only in a court of equity, and in accordance with the principles of equity; would that enactment confer upon the courts of the United States the same jurisdiction, and thus permit a question of strict legal title to be tried in equity in the courts of the United States, if, according to the principles of the common law in force when the Constitution was adopted, an action in ejectment would afford an ample remedy? Clearly, the Federal court could in such case entertain only the common law action, and in so doing it would be acting under and enforcing the principles of the common law, not the municipal law of the state, for it would be disregarding that, but the common law brought by our ancestors from the mother country.

Perhaps the most forcible illustration of
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the fact that the government of the United States does recognize and enforce the principles of the common law with regard to subjects wholly within national control, and not as part of the municipal law of any state, is found in connection with the organization and proceedings of the Court of Claims. This court is not a court in and for the district of Columbia, nor is it a court of any district or circuit. It has jurisdiction over cases arising in any of the states or territories. It has jurisdiction to hear and determine cases against the United States. Of all the courts in the Union, it is the one dealing with matters of national concern, arising under the Constitution and laws of the United States, and not under the local law of the several states. The form of procedure is statutory, supplemented by rules of its own adoption. As to this court thus organized, and clothed with a jurisdiction wholly national in its character, the express ruling of the Supreme Court is to the effect that the general law controlling its action is the common law. To repeat a quotation already made from the opinion of the Supreme Court in *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346, in regard to the Court of Claims:

"In our opinion, it must be governed by law; and we know of no system of law by which it should be governed other than the common law. . . . The great majority of contracts and transactions which come before the Court of Claims for adjudication are permeated and are to be adjudged by the principles of the common law."

To the same effect is the ruling in *United States v. Clark*, 96 U. S. 37, 24 L. ed. 696, and there are no decisions to the contrary. There is no Act of Congress which adopts the common law as the rule of action for the Court of Claims. The reasons which declare the common law to be the system governing its action apply equally to the other courts of the United States. By the provisions of the Act of Congress of March 3, 1887, concurrent jurisdiction with the Court of Claims is conferred upon the district and circuit courts of the United States. Many of the claims against the United States arise out of implied contracts; that is, the facts are such that, according to the principles of the common law, an obligation to pay for the use of property is implied, in the absence of an express contract. Thus, in *United States v. Palmer*, 128 U. S. 262, 32 L. ed. 442, the judgment of the Court of Claims awarding to Palmer the sum of \$2256.75 as a reasonable compensation for the use, by the government, of certain patented military equipments, was sustained by the Supreme Court. It being said that "we think an implied contract for compensation fairly arose under the license to use, and the actual use, little or much, that ensued thereon." In this case there was no express agreement for compensation nor for the amount thereof. Applying the principles of the common law to the facts, the Court of Claims held that the law would imply a contract to pay a reasonable compensation, and the Supreme Court affirmed the judgment. Had Palmer brought

the suit in a circuit court of the United States instead of in the Court of Claims, is it possible he would have been defeated on the ground that the local law of the state did not apply, and that the common law could not be invoked in a circuit court of the United States, and therefore there was no law applicable to the situation in the absence of an express contract? The right of recovery in such cases is not dependent upon the court in which the action may be brought, but upon the question of the principles of law—that is, the system of law—which are applicable to the situation, and which define the rights and obligations of the parties. Under the principles of the common law, as the same existed at the time of the separation between the colonies and Great Britain, common carriers of goods assumed certain duties and obligations to their patrons. The adoption of the Constitution of the United States certainly did not change the relation existing between the carrier and the public, nor in any way affect the obligations assumed by the carrier. The Constitution conferred legislative control over foreign and interstate commerce upon Congress, reserving to the several states legislative control over intrastate commerce. This division of legislative control did not, however, abrogate the common law principle then in force. Thus, in *Boyce v. Anderson*, 27 U. S. 2 Pet. 150, 7 L. ed. 379, the question presented was whether the strict rule of the common law in regard to liability for goods lost could be applied in the case of slaves; and it was held that it would not be applied, as slaves were human beings having a volition of their own; but it was held that “the ancient rule that the carrier is liable only for ordinary neglect still applies to them.” In determining the rights of the parties in this case, the Supreme Court, speaking by Marshall, *Ch. J.*, relied upon the common law for its guidance. In *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 874, the question arose as to the liability of the express company for certain packages of money sent from New Orleans, La., to Louisville, Ky., and which were destroyed by fire while in transit, the bills of lading containing stipulations in respect to the liability of the company. It will be noticed that the shipment was from one state to another, and therefore was of the nature of interstate commerce. In the course of the opinion it is said:

“We have already remarked that the defendants were common carriers. . . . Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers. The duty of a common carrier is to transport and deliver safely. He is made, by law, an insurer against all failure to perform this duty, except such failure as may be caused by the public enemy, or by what is denominated the act of God. . . . The exception or restriction to the common law liability introduced into the bills of lading given by the defendants . . .”

Thus we have the express declaration that

a common carrier engaged in interstate commerce is subject to the common law liability pertaining to his occupation. Many other cases of like import are to be found in the Supreme Court reports, in which it is assumed that the principles of the common law are applicable to common carriers engaged in foreign or interstate commerce; and I can see no good reason for holding that the duties and obligations imposed upon a common carrier by the common law are not operative when he undertakes the transportation of property from state to state. It is said in argument that the obligations imposed upon common carriers are largely based upon considerations of public policy; that each state determines for itself what its public policy demands; and that the courts of the United States can recognize and enforce only the public policy of the state. There is a public policy of the nation as well as that of the several states. As to all such matters as are reserved to the states, and are therefore without the plane of national control, it may well be that it is for each state to determine what public policy dictates with regard thereto. The rule of the common law is that no one can lawfully do that which is injurious to the public, or which conflicts with the prevailing sentiment or interest of the community. In determining whether a given act or course of conduct is injurious to the public interests, regard must be had to the circumstances. That which the public interests may demand in one locality may not be suited to the interests of another locality. There are many matters of a local nature which it is for each state to regulate and control for itself, either by legislation, or by judicial declarations of the results derivable from the application of common law principles to the existing surroundings. On the other hand, there are many matters which affect the entire country, which are therefore of national importance, and which must be dealt with accordingly. In deciding legal questions arising out of the latter class of cases, courts are not confined to the inquiry whether the particular state in which the court may be sitting, has an established public policy touching the subject-matter, but they will apply the recognized principles of general jurisprudence, to wit, the principles of the common law, or of the law of nations, or of the law maritime, as the nature of the particular case may demand. Thus, in *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539, the Supreme Court held that a contract entered into between a consul general of the Ottoman government residing at New York, and a company engaged in supplying arms, whereby the former was to be paid a commission upon all contracts secured through his aid was void, even though it might be valid in Turkey, it being said:

“But admitting this to be otherwise, and that the Turkish government was willing that its officers should take commissions on contracts obtained for it by their influence, that is no reason why the courts of the United States should enforce them. Contracts per-

missible by other countries are not enforceable in our country if they contravene our laws, our morality, or our policy."

The variety of cases in which this doctrine is applied may be seen by reference to *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 314, 14 L. ed. 953; *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 868; *Burke v. Child*, 88 U. S. 21 Wall. 441, 22 L. ed. 623; *Mequire v. Corneine*, 101 U. S. 108, 25 L. ed. 899; *Texas v. White*, 74 U. S. 7 Wall. 700, 19 L. ed. 227; *Hanauer v. Doane*, 79 U. S. 12 Wall. 342, 20 L. ed. 439; *Thomas v. Richmond*, 79 U. S. 12 Wall. 349, 20 L. ed. 453; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 643, 32 L. ed. 819. In these cases, and others of similar import, the Supreme Court does not base the rulings upon the local law of any state, for in the majority of the cases the question arose in connection with matters outside the plane of state control. Thus, in *Burke v. Child*, *supra*, a bill in equity was filed to enforce an agreement for services rendered in getting through Congress a bill for payment to Trist of a remuneration for his services to the United States in negotiating the treaty of Guadalupe Hidalgo with Mexico. Mr. Justice Swayne, speaking for the court, declared that:

"It is a rule of the common law, of universal application, that where a contract, express or implied, is tainted with either of the vices last named as to the consideration on the thing done, no alleged right founded upon it can be enforced in a court of justice."

Applying this rule of the common law to the facts of the case, the agreement sought to be enforced was held void.

The conclusion I reach upon this subject is that at the time of the separation of the colonies from the mother country, and at the time of the adoption of the Constitution, there was in existence a common law, derived from the common law of England, and modified to suit the surroundings of the people; that the adoption of the Constitution and consequent creation of the national government did not abrogate this common law; that the division of governmental powers and duties between the national and state governments provided for in the Constitution did not deprive the people who formed the Constitution of the benefits of the common law; that, as to such matters as were by the Constitution committed to the control of the national government, there were applicable thereto the law of nations, the maritime law, the principles of equity, and the common law, according to the nature of the particular matter; that, to secure the enforcement of these several systems when applicable, the Constitution and Congress, acting in furtherance of its provisions, have created the Supreme Court of the United States and the other courts inferior thereto, and have conferred upon these courts the right and power to enforce the principles of the law of nations, of the law maritime, of the system of equity, and of the common law in all cases coming within the jurisdiction of the Federal courts, applying, in each instance, the system which the nature of the case demands;

that, as to all matters of national importance over which paramount legislative control is conferred upon Congress, the courts of the United States (the Supreme Court being the final arbiter) have the right to declare what are the rules deducible from the principles of general jurisprudence which control the given case, and to define the duties and obligations of the parties thereto; that the common law now applicable to matters committed to the control of the national government is based upon the common law of England, as modified by the surroundings of the colonists, and as developed by the growth of our institutions since the adoption of the Constitution, and the changes in the business habits and methods of our people; that the binding force of the principles of this common law, as applied to matters affecting the entire people, and placed under the control of the national government, is not derived from the action of the states, and is no more subject to abrogation or modification by state legislation than are the principles of the law of nations or of the law maritime. The transactions out of which the present controversy arises pertain to interstate commerce. The defendant company, when engaged in transporting the grain and cattle of plaintiff from Iowa to Chicago, Ill., was acting as a common carrier of property, and assumed all the duties and obligations pertaining to that occupation. In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action, and therefore, in the present case, all shipments made before the adoption of the Interstate Commerce Act are governed by the common law, and those made since the adoption of that Act by the common law as modified by that Act.

A further point is made in support of the demurrer, to the effect that this court succeeds only to the jurisdiction of the state court in which the action was originally brought, and that state courts have no jurisdiction over cases arising out of interstate commerce, the argument being that, as the state cannot legislate touching interstate commerce, the state courts are without power to determine cases of the like character. This position is not well taken. The limitations upon the legislative power of the nation and of the several states do not necessarily apply to the judicial branches of the national and state governments. The legislature of a state cannot abrogate or modify any of the provisions of the Federal Constitution nor of the acts of Congress touching matters within congressional control, but the courts of the state, in the absence of a prohibitory provision in the Federal Constitution or acts of Congress, have full jurisdiction over cases arising under the Constitution and laws of the United States. The courts of the states are constantly called upon to hear and decide cases arising under the Federal Constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the

law of the state, when the adverse parties are citizens of different states. The duty of the courts is to explain, apply, and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of Federal origin, the legislature of a state cannot abrogate or change it, but the courts of the state may apply and enforce it; and hence the fact that a given subject, like interstate commerce, is beyond state legislative control, does not, *ipso facto*, prevent the courts of the state from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the state court in which it was originally brought, that court would have had jurisdiction to hear and determine the issues between the parties, because Congress has not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the state court was full and complete.

The demurrer also presents the question of the statute of limitations, it being claimed that, under the provisions of the statute of Iowa, all right of action is barred in five years from the date of the shipments on which it is claimed unjust charges were made. The petition contains five counts. In each the real ground of complaint is that the defendant company charged plaintiff unjust, excessive, and unreasonable rates upon the shipments made by him. It is averred that the defendant company was performing the same service for other parties at less rates, thus discriminating against the plaintiff; but, as I construe the counts of the petition, the averments of discrimination are made as evidence in support of the charge that the rates exacted of the plaintiff were excessive and unreasonable. The action was commenced on the 25th day of August, 1892, and on part of the defendant it is claimed that the statute bars the suit as to all shipments made prior to August 25, 1887. In the petition it is charged that the unreasonable rates were exacted during the years from 1875 to 1891, both inclusive, it being further averred that, from time to time, plaintiff, when about to make shipments, made inquiry of the station agent of the defendant at Belle Plaine for the lowest rates, and was assured by such agent that the published rates were the lowest given; that no secret rebates or commissions were allowed to other parties; that the rate demanded of plaintiff was the same, and as favorable, as that demanded of all others making like shipments; that these representations were in fact false; that the defendant company was giving other shippers rebates and concessions, keeping the fact secret, which amounted to \$25 per car; that plaintiff, relying upon the assurances made him, paid the rates demanded, which were in fact excessive, and greater than those paid by other shippers, and that plaintiff did not discover the fact that rebates had been allowed others until within a year last past. There can be no doubt that whatever cause of action exists in favor of the plaintiff, by reason of the charge of excessive or unreasonable rates, accrued to him as each shipment

was made. If the facts are as is alleged in the petition, then, upon the payment by plaintiff of the excessive charges upon each shipment, a right of action accrued to the plaintiff for the recovery of the damages thus caused him, which was then as full and complete as it is at the present time. The ordinary rule is that the statute begins to run when the right of action is completed. Does the case fall within any exception to this rule? The provision of the statute applicable to the case is the general one, to wit, "and all other actions not otherwise provided for in this respect, within five years." Iowa Code, § 2529. By section 2530, Iowa Code, it is declared that "in actions for relief on the ground of fraud or mistake, and in actions for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake or trespass complained of shall have been discovered by the party aggrieved;" but it is settled that this statutory exception is not applicable to cases of the character of that now under consideration. *Boomer Dist. Twp. v. French*, 40 Iowa, 601; *Carrier v. Chicago, R. I. & P. R. Co.* 6 L. R. A. 799, 79 Iowa, 80. It is, however, claimed by plaintiff that, under the principles of the common law, it will not be held that the cause of action has accrued until actual discovery of the fraud or concealment has been had. In *Boomer Dist. Twp. v. French*, *supra*, the supreme court of Iowa held that where a treasurer of the district, by false and fraudulent entries upon his books, concealed the fact of a misappropriation of a sum of money coming into his hands, the statute did not begin to run until discovery of the fraud thus practiced. In *Carrier v. Chicago, R. I. & P. R. Co. supra*, the supreme court of Iowa held the common law exception applicable in an action of a similar character to that now before the court, upon the authority of *Boomer Dist. Twp. v. French*; stating, however, that, "if the question was before us for the first time, we might hesitate to declare the rule announced in *Boomer Dist. Twp. v. French*." The conclusion reached in *Carrier v. Chicago, R. I. & P. R. Co.* is followed and affirmed in *Cook v. Chicago, R. I. & P. R. Co.* 3 Inters. Com. Rep. 383, 9 L. R. A. 764, 81 Iowa, 551. These decisions are based, not upon a construction of the provisions of the Iowa statute, but upon the view therein taken of the rule of the common law; and the conclusion reached is not, therefore, binding upon the courts of the United States when they are called upon to construe the common law, and apply its principles to cases arising between citizens of different states. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772.

As already stated, this action is not based upon the fraudulent representations made. It is not an action in the nature of trespass on the case or of deceit, according to the common law form of procedure, and based upon the false assertions or representations, and for the recovery of the damages caused thereby, but rather in the nature of an action for money had and received to recover back the alleged excessive part or portion of the

rates charged and paid. A right of recovery would be established by proof showing that the plaintiff had been compelled to pay an unreasonable rate, even though it might appear that the plaintiff knew at the time that the rate was unreasonable, for a shipper may be so circumstanced that he is compelled to ship, and cannot exercise an option to ship or not; and, if he cannot ship except by paying the unreasonable charge, he may do so, and may then sue to recover back the excess wrongly exacted from him. *Robertson v. Frank Bros. Co.* 132 U. S. 17, 23, 33 L. ed. 286, 238. Where the action is not founded upon the alleged fraud or concealment, but is in the nature of an action for money had and received, the decided cases are not in accord upon the question whether concealment of the fact of an excessive charge will prevent the running of the statute. Where a party seeks relief on the ground of fraud, either in the nature of a proceeding in equity for the purpose of canceling the transaction, and restoring the parties to their original position and rights, or by means of an action at law for the damages, there is certainly strong ground for holding that the same principle should be applied to either form of action, and that the statute should not be held to apply except from the discovery of the fraud which constitutes the basis of the action; and this is the conclusion of the Supreme Court in *Bailey v. Glover*, 88 U. S. 21

Wall. 342, 22 L. ed. 636. The form of the action is not, therefore, the determinative consideration, but the question is whether, in an action at law to recover the amount of the excessive charges made by defendant, or of the damages caused thereby, the bar of the statute can be avoided by showing that the defendant fraudulently concealed the fact that lesser rates were charged upon like shipments of property made by other parties. Technically, the action is not based upon the fraudulent concealment of the fact that rebates were allowed other parties, but upon the fact that unreasonable rates were exacted of the plaintiff. No case decisive of this question in this court has been cited by counsel. Other cases of like character are pending in the court, and the expense of trying the same upon the facts will be great. In view of this fact I deem it most desirable that the question of the applicability of the statute of limitations should be finally settled before further expense is made in these cases, and, as the question presented by the demurrer can be readily presented to the court of appeals at small cost, and with little delay, I shall sustain the demurrer on the question of the statute of limitations, to the end that the parties may secure a ruling from the court of appeals upon the questions involved before incurring the expense necessarily attending a jury trial.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI.

UNITED STATES, v. GEORGE W. HOWELL ET AL.

(56 Fed. Rep. 21.)

1. But one overt act need be proved to sustain an indictment for conspiring to violate the United States Act of March 2, 1889, against obtaining transportation for property over railroads at less than regular rates.
2. Interstate shipments only are affected by the United States Act of March 2, 1889, against obtaining transportation for property over railroads at less than regular rates.
3. Variance between allegations and proof as to the point of shipment of property for which less than schedule rates was obtained is immaterial if both points were within the same state and subject to the same rates for shipment to the points of destination in another state.
4. To sustain an indictment for conspiring to obtain less than established rates for the shipment of property over a railroad, it is not necessary that the rate should have been published by posting it as required by the interstate commerce law.
5. Employers who knowingly permit their employees to obtain less than schedule rates for transportation of their property over railroads, and who receive the benefit of such conduct, either directly or indirectly, may be punished under the United States Act of March 2, 1889, against obtaining transportation at rates less than the schedule.
6. Conspiracy is an agreement, combination, or undertaking entered into between two or more persons to do something which is against the law of the country.
7. Residence within the territorial jurisdiction of the court is not necessary to render one punishable by such court for a conspiracy committed there.
8. One who joins a conspiracy for the purpose of furthering its design is punishable as though he had been a party to it from the beginning.
9. A conspiracy may be established by circumstantial evidence.
10. Circumstantial evidence which is equal in proving power to the testimony of one positive, uncontradicted, creditable eye witness is sufficient to sustain a conviction of conspiracy to violate the United States Act against obtaining illegal shipping rates.
11. Although a conviction may be had on the testimony of accomplices, if it produces on the minds of the jury a full and complete conviction of its truthfulness, it is a prudential rule that such wit-

- nesses should be corroborated by circumstances or otherwise as to some material point of their testimony.
12. To impeach a witness the evidence must reflect the opinions of the people in the community in which he lives.
 13. The testimony of defendants is to be considered in the light of their relation to the case.
 14. To sustain a conviction the proof must be suf-

ficient to establish all the material allegations in issue so that reasonable men upon a matter of importance or concern would be satisfied of their being true.

15. A reasonable doubt which will require acquittal must be a real and substantial one and not a mere conjecture or a surmise as to the possibility of innocence.

Decided December 21, 1892.

CHARGE to the jury upon trial of an indictment for alleged violation of the United States statute against conspiring to obtain discrimination of rates for transportation of freight. The facts sufficiently appear in the charge.

Mr. George A. Neal, U. S. Atty., for the United States.
Messrs. Hall & Pike for defendants.

Parker, District Judge, charged the jury as follows:

You have heard the evidence in this case, and the arguments of counsel upon the case. It now becomes the duty of the court to give you the principles of law to apply to that state of the case which you find to be true from the testimony. You are aware that your verdict, as does the verdict of every other jury, consists of two things,—the truth as you find it, and the principles of law applicable to that truth. In that way you get at the result which we call a "verdict." The principle of law given you is that which defines the crime, aside from other principles given by the court, instructing you as to how you should view the evidence of witnesses, and some other subordinate matters of that kind. The definition of a crime is that which the law declares to be the offense, and to which you are to take and apply the evidence to see whether the evidence makes out such a state of case as the law says shall be established to make the crime. Now, this is not a charge for the actual commission of an overt crime, but is only a charge where it is alleged the parties agreed to commit a crime called in law a "conspiracy." It is laid down under the law as it now stands, by section 5440, Rev. Stat. as amended by the Act of Congress, as follows:

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than \$1000 and not more than \$10,000, and to imprisonment not more than two years."

You are aware of the fact that under the law of the United States you do not fix the punishment, but you pass upon the question of the guilt or innocence of the party charged. This is the statute under which this offense is charged. There are other statutes that have been passed, comprehended in what is usually

called the "Interstate Commerce Act," together with the several amendments that have been passed since that time. It is by this Act that the overt act—that is, the open act; the actual act done in furtherance of the conspiracy or to effect the object of the conspiracy—is alleged to be a crime. It was first made an offense under that Act for common carriers of property for hire to do certain things which are set out in the section of the law as amended by the Act of Congress of March 2, 1889. It is provided there that any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates, then established and enforced on the line of transportation of such common carriers, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district where such offense was committed, be subject to a fine not exceeding \$5000, or imprisonment in the penitentiary for a term not exceeding two years, or both, in the discretion of the court, for each offense.

That is the section of the law which has reference to the common carrier. There was no provision under this Act that undertook to declare it a penal offense for the shipper to do certain things. There was no penalty that was applicable to the act of the shipper until the amendment of this law, March 2, 1889. On its first enactment it was manifest to the law-makers that the railroad companies alone were the parties who would make this unjust discrimination against the people of the country, against the consumer, against the man of small business, against the man who is selling in small quantities, against the man who is will-

ing to assist his neighbor by setting up that generous rivalry in trade that promotes the welfare of the consumer. It was not conceived by the lawmaker who would be the principal party in interest that would be benefited by this discrimination. But the great shipper, the large wholesale dealer, the man running the combine, or the trust or the combination entered into by vast enterprises, would be the one that would seek and was promoting this discrimination in the freight rates of the country when this last law was passed. It was accordingly seen that that would be the purpose of parties so interested. It was therefore declared by the amendment passed on the 2d day of March, 1889, that for certain conduct upon the part of shippers a penalty should be prescribed. The law is as follows:

"Any person, and any officer or agent of any corporation or company, who shall deliver property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and enforced on the line of transportation, shall be deemed guilty of a fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term not exceeding two years, or both, in the discretion of the court."

Now, that enumerates the different methods that may be used by the carrier for the purpose of carrying on this discrimination, and it contains a general sweeping clause providing that all other devices or means, such as by reporting falsely to the carrier the contents of the package, and in that way getting a discrimination, or by any other means or contrivance or device, if he seeks to obtain this discrimination for his own benefit, he is liable to a penalty. You and I are to take a view of all the facts and circumstances, and are to enforce the law if it has been violated. If a law is a bad law, it should be enforced in order that it may be the sooner known and repealed, and, if it is a good law, it should be enforced in order that justice may be done. We have nothing to do with the good or bad policy of the law. The question, and the only question, that we are to inquire into, is to first ascertain what the law is, and then whether it has been violated; and we sometimes are enabled to take a more comprehensive and proper view of the state of case by understanding the good or bad policy of the law. Now, it seems to me at a glance that the good policy of this law is apparent, and especially of this provision prohibiting the conduct of the shipper, who is more largely interested in getting reduced rates than any one else—Gentlemen, the shipper, and especially the large shipper, has a great interest to induce

him to get a discrimination of rates in his favor,—to get an "underrate," as it is called; and the man who gets a discrimination in his favor in the shipment of his freight, especially if he is doing a large business, seeks thereby a large personal benefit to the detriment of his rival in a small business, and by the same process works an injury to business all over the country, whether he be a lumberman, a wholesale groceryman, or a large shipper.

How can he do that? In the first place, by means of this discrimination he is able to overcome all rivals, and press out smaller business not as well situated in that respect as he is; and not only the rival wholesale dealer, but he is so situated as to be able to do as the proof shows these defendants did. He is able to have branch retail houses all over the country, and operate a business of that kind, caused by the discrimination in his favor. It is therefore agreed that the purpose of this law was to protect the people. That was the intention of it. There was great wisdom in providing that, if there was a discrimination to be made by this means, there should be a penalty attached to such conduct. These are the two provisions of the law that create an offense of the character I have named upon the part of the common carrier or his agent, and also conduct of a like character, or conduct that may be similar to some extent, upon the part of the shipper. The shipper may commit the offense with or without the concurrence of the other party.

It is alleged in this indictment, in connection with other things, that the purpose of this conspiracy was to enable S. R. Howell, George W. Howell, and Herbert N. Jewett to obtain this discrimination of rates or to obtain rates less than the regular rates charged by this railroad company, specified in the indictment. That was the purpose of the conspiracy. Remember, you are not trying them for doing that, but for conspiring to do that. You are required to find that Mott, who is alleged to be the man who did the overt act,—and he could do it with the concurrence of anybody, or without the concurrence of anybody,—that he did certain things in furtherance of this design. The law requiring that some one of the conspirators shall have done some overt act—some actual act—to carry out the common design and the common criminal enterprise, the act so done by some one of the conspirators must be a crime under the law of the United States. Now, under this section two things are required to make this an offense: First, there must be a conspiracy as affecting these parties, or at least two of them, and, in furtherance of that conspiracy, the man Mott must have done that which it is alleged he did in furtherance of this conspiracy, and the proof offered must show it accomplished,—the purpose enumerated in the indictment.

I will now tell you what is necessary to be found in this indictment. Now, there are different kinds of allegations in the indictment. There are those which go to the very gravamen of the offense, and others that are material, but subordinate. They do not occupy that importance in the indictment that others may occupy, yet they are all necessary to make the offense. Let us see what is charged in

this indictment, and ascertain what is necessary to be proven; and after that we will define this crime known as a "conspiracy;" and after that we will enumerate to you what must be shown to have been done by Mott in furtherance of that conspiracy; then we will give you the rules of law that are to be considered by you in weighing the testimony of the witnesses.

You will understand that if you should believe that these different shipments, charged in this indictment,—and there are only two sets of shipments, by the way, although they were charged in four counts,—if these shipments were all made in pursuance of the common agreement, one agreement (you will bear in mind that a conspiracy may be continuous) then they are acts done in furtherance of the one agreement. Your recollection will not fail you when you refer to the condition of things at the time of the whiskey frauds in this country, and the proof showed them to have been continuous for years; men were connected with them for years. Now, in this case, if there was a common criminal understanding entered into, and I mean by that a conspiracy to do the offense charged in this indictment, and all that is alleged in the indictment to have been done was done in pursuance of that one agreement, then there is but one offense in all these charges and the overt acts or the actual acts done causing the conspiracy. It is for the agreement to do the acts you are to first make search. And I repeat, in order that you may make no mistake, that if there was an agreement, and acts were continually done as are charged in the different counts of this indictment, then there is but one offense. There are four counts. They do not undertake to charge but one offense; that is, provided you find there was but one conspiracy. If you find that to be the case, then the effect of these four counts is only to charge one crime. Although there may have been many different sets of overt acts done in furtherance of this conspiracy, the proof of one overt act is enough for you to find to establish that branch of the case.

It is not necessary to find both of the others charged in the indictment. The doing of one overt act by at least one of the conspirators is sufficient to make out that element of the offense, if done in furtherance of it. Both of the overt acts do not make it any the less a conspiracy. Now, the first count in this indictment charges the shipper of certain lumber with doing certain things; and I want to say to you that all these counts run together. The first and third are the same, with the exception of the allegation of the relation of these defendants to each other. The second count alleges that S. R. Howell and George W. Howell and Herbert N. Jewett were partners. The third count alleges that S. R. Howell and Herbert N. Jewett were partners, and that George W. Howell was their agent, together with Pierce & Tibbetts.

The crime as charged in the third count has the same relation to the transaction or to the business. It includes Pierce, the witness here, and the defendant Tibbetts; that is, the charge in the third count. Now, if you should be-

lieve that that was the relation of the parties, and that they were not partners, as charged in the first count, then your finding would be properly made under the third count in the indictment. The same offense is charged, the same conspiracy to accomplish the same purpose, and the same overt act is set out, in the third as in the first count of the indictment. Now, again, the second count charges the same conspiracy as the first count. Provided you find there was no break in the agreement, you then find there was but one unlawful act. It charges the same conspiracy. It charges, also, that S. R. Howell, George W. Howell, and Herbert N. Jewett were partners, as does the first count, but it charges the doing of a different overt act. The shipping to the different destinations of the cars and the amount of lumber shipped, and that it was of different weight from the lumber described in the first count, and that the underweighing was in greater proportion than in the first count,—that is the difference between that count and the first count,—I say it depends upon whether you find there was any break in the criminal understanding or agreement. The proof shows, as I am compelled to remind you, gentlemen, a continuous transaction of this character, that it was a continuous business, and you would have a right to consider the continuing nature of the business to ascertain that there was but one conspiracy. Now, the mate of the second count is the fourth count. It charges the same overt act. It charges the same character of conspiracy, or to accomplish the same results. I mean it charges the weighing of the same amount of lumber in pounds and the same destination for the lumber, but, like the third count, it alleges a different relation of these defendants to each other. It sets out, as does the third count, that S. R. Howell and Herbert N. Jewett were partners, and George W. Howell was their agent, as in the third count, and that he occupied the relation to the transaction as did Pierce and Tibbetts. That is the only difference between that count and the second count in the indictment. If you should find that that overt act was one done in the same way as the one that is alleged to have been done under the third count in the indictment, your proper finding would be: "We, the jury, find the defendants S. R. Howell and H. N. Jewett guilty as charged in the fourth count of the indictment." If you find they were all partners under the first count of the indictment, then the proper finding would be upon the first and second counts of the indictment. Now, let us see what is necessary to be found. I have called your attention to the fact as to the different relations of these parties that are set up. It is alleged in addition that Edward Pierce and Edward Tibbetts were engaged by said parties or said company as agents in and about the shipment of lumber. That is necessary to be found,—that they were the agents,—because in ascertaining the extent of this conspiracy it is your duty to gather in all the parties connected with it. It becomes twofold your duty in a case like this, because you will understand that it takes at least two persons to make a conspiracy. You may find a party

guilty, provided he acted with others, not even indicted, so as to make the two in the conspiracy.

Then you will remember that the principle as indirectly invoked, that those two witnesses, Mott and Pierce, occupy the relation before you as accomplices; that is to say, they confess or admit they were accomplices. You are to consider their relation to the case, before you can consider it. You must believe their relation as accomplices, and to believe they were accomplices you must find a condition in which as accomplices they acted in this conspiracy, because, if you do not, you cannot find the condition of an accomplice. But they confess by their evidence that they were accomplices. Therefore it becomes necessary that you should gather up in your minds the condition as shown by the testimony, and in this way judge whether that relation or not existed. In addition you are required to find that the Chicago, Rock Island & Pacific Railroad Company and the Chicago, Kansas & Nebraska Railroad Company were companies—railroad companies—engaged in the business of common carriers shipping for hire, and, in addition to that, it is necessary to find they occupied such a relation under the law as that the law applies to their shipments, because, as remarked by counsel on the part of the defendants in this case, this law has nothing to do with shipments in the state. It must be interstate shipments to give Congress power to pass such a law, and punish under such a law.

And the proof is sufficient, as the court has told you, if they were acting as *de facto* corporations, and engaged in this matter of common carriers from one state in the United States to another, and in this case we think as to this commodity, this merchandise or lumber, if you please, was shipped from one state to another. The court in that connection yesterday intimated that in its judgment the allegation in the indictment that this lumber was delivered to these parties at Atchison, Kan., for shipment in Kansas, the rate being the same from Atchison as from East Atchison or Winthrop, and the condition as to its being interstate commerce being the same,—that allegation in the indictment as to shipment from points in Kansas,—becomes a subordinate allegation, and the variance between the allegations and the proof was not material, because it cannot possibly work any substantial injury to the defendants. The material inquiry on that point is whether this overt act was done and this conspiracy was entered into in this jurisdiction, and consequently whether these elements of this crime transpired in this jurisdiction; and, again, whether or not the lumber, as a matter of fact, was shipped through this jurisdiction or from the state of Kansas to some other state in the Union, and that it passed into this jurisdiction and was weighed in the jurisdiction. That is, the overt act that goes to make out that requisite of the crime, provided it was underweighed.

These things are required to be found, and then it is required to be found that they undertook to ship this lumber to the towns named in the indictment, or to some one of them, either to Deshler, Neb., Du Bois, Neb., or Lewistown, in the state of Nebraska, or to the 4 INTER S.

towns of Arriba and Burlington, in the state of Colorado. The court tells you in this connection that the proof shows such a relation upon the part of this railroad company to this transaction as to show that it becomes subject to the law of Congress,—the law passed in 1887, and amended in 1889. You first are required to find, in addition to these propositions, that the said corporations, the ones which I have named, and that are set out in the indictment by the name of the Chicago, Rock Island & Pacific Railroad Company, the Chicago, Kansas & Nebraska Railroad Company, and the St. Joseph & Iowa Railway Company, had established schedules or tariffs of transportation for persons and property along the lines of transportation of such common carriers. If a rate had been established, if it was known by the people in charge of these railroads as an established rate, as a fixed rate, having a uniform character, undertaking to treat all shippers alike in proportion to the distances shipped, if that rate was then and there a fixed rate of that character, in my judgment it is not necessary that it should be published by posting the rate up. That is a thing required by this law to be done by the railroad company for the information of the people, that this practice may not be indulged in by the shippers, and any companies may not discriminate in favor of one and against others, and, if these companies did not do that, there is a penalty attached to it: but that is a different duty from the one prescribed by this statute. If they have an established rate, if that rate is established, if it is so far established as to become a fixed rate under which they act, and parties as shippers, or parties as agents of common carriers, combined for the purpose of evading that rate, of getting an underrate in their favor, or of securing a discrimination as against the people generally, they may be held under this law which charges them with conspiring to do an unlawful act. You are required, of course, to find that a rate has been established by the railroad company. You may take into consideration, in ascertaining the establishment of that rate, that testimony of the witness or witnesses who had charge of that sort of business, and you may also take into consideration the poster put up by them to inform the public as to where these rates could be seen. It is the evidence of the established rate upon their part, and that is one of the elements that must be found in this case. Now, you are required, in addition to that, to find that at the time alleged in the indictment, which was upon the 28th day of May, 1889, or within three years prior to November 6, 1891, the date upon which the indictment was found, Mr. Mott—W. D. Mott—was a person acting for or employed by said railroad companies in weighing and reporting weights of all freights taken and received by them for transportation by said corporations at the city of Winthrop or East Atchison.

That is material to be shown, or so much of it as that he was employed to make the weighing alleged to have been made in the indictment. Whether he was generally employed for that purpose does not matter. If he was employed for the purpose of making these weights, where there was an underbilling,

where there was an underweighing, where there was an attempt to secure a discrimination in favor of the shipper, that would be responsive to that allegation. If he was working for this weighing company, and these railroad corporations were members of that company, he would be their agent. That is necessary to be found. In addition, you are required to find that as far as the first count is concerned, and I have given you the difference between these counts and the one difference that exists—I am talking now as to what is necessary to be found under the first count, and the same thing must be found under the other counts, varying according to the difference in the overt acts charged, and the difference existing in the relation of these parties to each other. The first count has charged that S. R. Howell, George W. Howell, and Herbert N. Jewett were doing business as partners. Then you are required to find that that relation existed between them; that they occupied that relation to each other; and that in attempting and designing to ship large amounts of lumber from Winthrop to points in other states, to wit, to Deshler, in Nebraska, to Du Bois and Lewiston, Neb., and Arriba and Burlington, in the state of Colorado, to some one of these points in Nebraska or Colorado that are named in this indictment, they were there representing the shipper; that these parties, Pierce and the other defendants, were the agents of these parties when they were intending to make these shipments, and that they were acting for said parties as their agents, and acting in this transaction with the knowledge and procurement of S. R. Howell, George W. Howell, and Herbert N. Jewett,—because it is necessary to show the relation of the Howells in this transaction if they are to be convicted. If this business was the business of the Howells, or, if you please, it was the business of George W. Howell and Herbert N. Jewett, and that Pierce and Tibbetts, or Pierce and Tibbetts and George W. Howell, as charged in the third and fourth counts of the indictment, did things that are charged that they did do, in furtherance of the common design to connect these other parties, the parties who owned the business, the heads of the firm, as it were, the business must be done with their knowledge and procurement. If they knew about it, and they permitted it to go on and received the benefits from it, they are directly or indirectly interested in it. It matters not, in this case, whether the benefit was directly received by the consignee or the consignor of this lumber or by the shipper. It makes no difference.

If the purchaser receives the benefit of the transmission of this lumber, then it was a direct benefit to him, and also a direct benefit to the man who was the seller, because by means of cheaper rates, of under prices, he makes customers and builds up trade, and by means of trade holds out inducements to men to purchase from him because of the advantage he has with the railroad company. So, in every case, it is either a direct or an indirect advantage to him. If the man who is the buyer pays the freight, as a natural consequence he will buy more goods from such a firm than if it were a house that could not

control these freight rates. That is one of the reasons why such a law was enacted, that one man in business should not create such a trust or combination or monopoly as would destroy the trade and commerce of the country if it was regulated by his dictation and by his control. It is in pursuance of this, in pursuance of the trade and policy of such men, legislation is leveled at the heads of these men, these combinations, these trusts, that are reaching out and grasping all the concerns of this country, so that the consumer and small dealer and everybody else has to pay toll to the combinations, or to the large dealers. Then it makes no difference, I say, whether the benefit to the shipper was direct or indirect, or to the owner of that business in this case,—either the two Howells and Jewett, or S. R. Howell and Jewett,—the transactions carried on by Pierce and Tibbetts must have been done with their knowledge and procurement.

If they had the knowledge of it, if they permitted it to go on, if they received benefits from it, directly or indirectly, it was by their procurement as much as though they had directly or indirectly commanded it to be done, because it is the duty of a business man so situated to see to it that the law shall not be violated by his subordinates through his neglect of his duty to attend to his business and to protect the public. If you find that the proof does not show the connection to that degree of certainty that the case must be proven that S. R. Howell was so connected with this transaction, that is, that he either knew of it and commanded it, or that he had knowledge of its being done and permitted it to be done, and that the firm received the benefits of it, he would be entitled to an acquittal at your hands, unless the evidence shows his relation to that transaction, as I have stated, beyond a reasonable doubt, as it must show it before you can find him guilty. Now, while these parties occupied this relation to each other, some as owners of the business and shippers, and some as agents of the shippers, and another as agent of the railroad company, and the party who did the weighing while they were occupying that relation, you are required to find that all these parties conspired with one another to commit an offense against the United States,—that is to say, that they did, on the day mentioned, or at any time within three years prior to the 6th of November, 1891, conspire, combine, and agree together falsely and fraudulently to ship a quantity of lumber at less than the actual weight, and they were then within this jurisdiction, that is, the St. Joseph division of the western district of Missouri,—and also to find the one charged with doing the overt act, as alleged, did, by false billing, false weighing, and false representations of weights, knowingly and willfully assist, obtain, suffer, and permit the said George W. Howell, S. R. Howell, and H. N. Jewett, of said company of Howell, Jewett & Co., to obtain transportation for their said property. In this case the proof must show you the combination and means resorted to in furtherance of it and the purpose for which they entered into it, to wit, to enable this firm of the Howells and Jewett or of Howell and Jewett, as the case may be, to obtain transportation for their property,—that

is, lumber alleged to have been transported and underbilled,—to obtain from them that privilege to secure the carriage of the lumber to the points designated, and from the place where it was billed and weighed, at less than the regular rates then and there established and in force. That is the allegation of the conspiracy; that is the allegation of the purpose in view when they did conspire. There is but one other clause in this indictment, and that is that while that was the purpose of these parties, while that was their object, W. D. Mott, in furtherance of the common design of which he was a part, of which they were all alleged to have been a part,—the common design which bound them together for the purpose of obtaining the shipments at underweights,—that in furtherance of that design to accomplish it he did a certain thing. What is it? That he weighed a car or cars of lumber and shipped them out at less than their actual weight; that is, by falsely weighing, falsely billing freight to be shipped. That is the allegation of the act done by Mr. Mott in furtherance of this common design; that is what is necessary to be found in this indictment; and it must be found, if you find under any of the counts in this indictment.

Now, what is the nature of this charge of conspiracy? *Mr. Justice* Dillon, in his trial of the whiskey cases, gives a very happy definition of this crime called a "conspiracy." He says: "A conspiracy means a combination formed by two or more persons to effect an unlawful end; said persons acting under a common purpose to accomplish the end desired." *United States v. Babcock*, 3 Dill. 586. An agreement or an undertaking, or a combination, if you please, entered into between two or more persons to accomplish an illegal result, and what is meant by accomplishing an illegal result is doing something which is against the laws of the country; entering into a combination to do anything of that kind; to do something which by law is a crime. Two men may agree to go out here and steal a horse. That is an offense against the laws of the United States, provided it occurs in a place where the United States has jurisdiction, as in the Indian territory. They agree to go out and steal a horse. They do not steal the horse, but one of them goes to the stable and gets a horse, that they may safely get away with the horse. They are intercepted. They did not steal the horse at all. Now, they may be indicted for attempting to steal the horse, in entering into a conspiracy to steal the horse, but they cannot be convicted for the offense of stealing, even if one of them went so far as to do an overt act in furtherance of the design. Not only this unlawful combination shall be entered into, this agreement to violate a law of the United States, but one of the parties to the conspiracy must do the overt act charged, that we can see there is something more than a mental purpose to commit the crime. These are the two things that make up this crime: The overt act I have enumerated to you; such act alleged in this indictment to have been done by Mott; the act that was agreed upon to have been done by these other parties in furtherance of this conspiracy. The agreement upon the part of the alleged conspirators was to secure

a shipment of freight at an underweight as established by the railroad that did the shipping. That was the purpose of the combination, and if it was accomplished in the manner enumerated by the statute, if he did that which would make him responsible under the paragraph of the law as to the shippers, who would become responsible under that act for the crime committed by him, he might become guilty under the law. Now, these are the two elements that go to make out this crime. The doing of the overt act in furtherance of the common criminal design is one of the things you must find. You are required to find, first, in this case, was there such a conspiracy, as is alleged, as affecting at least two of these persons? It is not necessary that the two should be on trial. Was there such a conspiracy as is described in this indictment, and was any one of these overt acts that are alleged here to have been done in furtherance of it done as alleged? These are the propositions necessary to be found to establish this case, such as is stated in this indictment. After you have found these propositions,—that is, whether they are true or not,—then you are to look into this evidence to see how many defendants were connected with this unlawful combination. Now, what is necessary to make a conspiracy? You will understand that this is a crime that may be committed at long range. A man may be living in Chicago and be guilty of a conspiracy in this district. In the whiskey trials it was alleged that men living in the city of Washington were so connected in the conspiracy in the eastern district of Missouri as that they could be tried in that district; and it is true that a man may be connected with this kind of a crime, and be responsible for it in a given jurisdiction where it has its headquarters, where the agreement is made out, where it is entered into; he may be connected with it as though he had been living in that jurisdiction. In this case it is not necessary for S. R. Howell to have been living in the jurisdiction at the time of the formation of the conspiracy. He may become a party when it was created, by acts of a certain nature, even though living in Chicago, or he may be responsible after it was formed, provided he went into it or had anything to do, as charged in the indictment.

Does the law require you, under your oath as jurymen, to see the thing itself in order that it may be found to exist? It gives you the right of judging the intent from the act done. You cannot find it except in one way, and that is by circumstances. Especially is that true with a conspiracy. The conspirator has two objects in view. He would hardly think it worth while to enter into a conspiracy unless there was some motive which prompted the desire to consummate it. Because he has that motive to consummate it, it is necessary to have a secret understanding. People do not put it in writing, as you do a deed which conveys your land to another, or have it recorded in a book as evidence of the title that you pass to another. If the officers of the law would lay their hands upon them before they had consummated the conspiracy, their purpose would fail; then they may act with secrecy because of the desire to accomplish a result. It is not necessary to be made by so many formulated

words. I know that not one of you gentlemen has a criminal purpose in view, but I have explained this for the purpose of showing to you the principle, and in construing it you must be guided by the light of human experience and human understanding; but if I knew that one of you gentlemen had a criminal purpose in view, and with that knowledge I joined you for the purpose of consuming that object, and in furtherance thereof I entered upon the same design with the purpose of aiding you in its commission, then it is the same, for I have joined the conspiracy as though I had been a party to it in the beginning, for that is what the law seeks and calls a "design" or an "agreement" entered into with the knowledge of assisting in the perpetration of that which is against the law, and which is called "conspiracy." It may be entered into in either one of these ways. If it is a secret, how are you to find it? I may read a little in reference to the nature of conspiracy. Judge Dillon says, in the case of *United States v. Babcock*, 3 Dill. 585:

"It is not necessary, to constitute a conspiracy, that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plans or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators."

Any act done in shipping this lumber to its final destination out of the district, if done by all or any one of these parties, would be an overt act, you can notice, if done in the jurisdiction. A combination formed by two or more persons to effect an unlawful end is a conspiracy, said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto from that time as if he had originally entered into it. That is the nature of this crime. How are we to find it? We must find it, if we are to find it at all, alone by circumstances, because we cannot find it by positive evidence. Positive evidence may be introduced to show the existence, as in this case, of the overt act, done in furtherance of the conspiracy. We can have positive proof of it, and this witness who did the weighing would be a positive eyewitness. Pierce or any other witness would be a positive witness. That is something which is tangible and real, and something to which you can apply one of the five senses. It is not necessary to prove that underbidding was done in secret, although it matters not whether it

was so done so far as that part of the offense is concerned. As to the overt act, you have positive evidence of its occurrence, and you may resort to this class of testimony called "positive evidence," because proved by an eyewitness of the underbidding. There is another kind of testimony that you can resort to, and, while sometimes have a prejudice against this class of evidence, Judge Dillon said, in a case he tried while he was on the circuit bench of Iowa, that although this was one of the resorts of lawyers to make a hobgoblin, to frighten jurymen into a prejudice against this class of evidence, yet circumstantial evidence was one of the most important classes of testimony. Although we know there are men who have some prejudice against this class of testimony, when we understand it and look at it fairly we can see how much depends upon this kind of evidence. A man enters the household of an innocent family and murders the wife and the children of the husband. No eyewitnesses except those eyes that are closed by the hand of death were eyewitnesses. What are you going to do? Are you going to let it stand unpunished? Shall we say, because there was no eyewitness of the crime, that the murderer shall go unpunished, because no one saw the shooting, the flash of the pistol, or the dagger used? That man who did it may be insane. He may be incapable of having intent. Under the law, in a crime of that character, even as in crimes of a high nature, the intent is the first element that goes to make up the crime. Under the law, until you prove the intent to commit the crime, no conspiracy can be charged. How are you going to prove it? You cannot prove it except by circumstances. There has not been an eyewitness who could see the mind of that man actually and really. It is only by circumstances, and acts connected with the circumstances, that we are able to form any opinion. Now, of all the crimes that have to be proven by circumstantial evidence, this is the chiefest, because of its secret character, because of its not being proclaimed or made public, so that men can see and know it by the positive evidence. You have to drag it to the light of day to see whether there was an intent or a purpose to commit a crime or a criminal design, for the intent or design is the very germ of the crime. I do not consider it improper to detain you a little longer to give you the opinion of one of our ablest jurists on this class of testimony, which is often resorted to by courts. In the case of *Com. v. Twitchell*, 1 Brewst. 571, a case tried in Philadelphia before Judge Brewster, the court in that case says, and I indorse every word of it:

"Mr. Bentham tells us that all evidence flows from persons and things. These are the only two sources from which we can expect testimony, and, unless we resolve to let all secret crimes go unpunished, all civil disputes to remain undecided, and to throw away our reason, we cannot act upon the statements of persons and things. I say statements of things, because if we consult the experience of every hour we will be taught that inanimate objects have voice as well as sentient things. It is in vain, then, for man to say that, because others have failed in their efforts to detect error, he will sit quietly down, and perversely refuse to

apply his intelligence to the problems of life, whether they encounter him in the counting room or in the jury box. He might just as well refuse to use his legs because others have fallen or been killed in walking. He might with equal propriety refuse to eat because others have been poisoned while partaking or nourishment. Some persons, admitting the force of the principle which actually compels us to act upon evidence, still insist nothing but positive testimony should produce conviction, and, adhering tenaciously to this favorite dogma,—those who are too timid or too weak to exercise the reasoning faculties with which kind Providence has endowed them,—they assail all circumstantial evidence. A moment's reflection, however, must satisfy all candid minds of the unsoundness of such a proposition. Suppose for a moment that this was the rule for our being, and that we had been so constituted that we could believe nothing unless it was demonstrated to us by our own senses or by the statement of an eyewitness, what would then be our condition? Of course, we could not punish any crime unless it were perpetrated in the presence of spectators. All secret murders, arson, burglaries, forgeries, and other offenses could be committed with impunity. Nor would the mischief stop there. Few civil controversies could be settled by juries, no book of original entries could be received in evidence, no note or obligation would avail unless there were a subscribing witness; indeed, this would not be sufficient, for, if he died before trial, the claim would expire with him, and insurance on the life of the witness would not even avoid the difficulty, for the policy would die with its attesting witness. For the same reason all receipts would perish with those who saw them signed, and all our deeds and muniments of title would be swept away by the death of the subscribing witness and the magistrates before whom they were acknowledged; all proof of handwriting by comparison be annihilated; infamy would be destroyed, or remitted to its infancy in barbarous ages. With the abolition of legal punishment for crime, mob laws and vigilance committees would supersede the use of courts and juries. The whole frameworks of society would be impaired, if not destroyed. The absurdity of the prejudice against circumstantial evidence may be still further illustrated by reflecting for a moment upon the use to which we constantly and properly apply it. Not only do business men answer letters, pay drafts, and credit others to the extent of millions daily upon the testimony of circumstances alone, but they commendably carry this faith, as the evidence of things unseen, into the reasoning which connects them with the world beyond our own. A trifling circumstance—the fall of an apple—has proved to the satisfaction of philosophers the great laws of gravitation which control the motion of the universe. The man who denies the existence of his Maker is properly regarded by many as thereby evincing his want of reason. Yet what proof have we of this important and accepted truth except from circumstances? The same kind of testimony is the prop of our belief in all the great truths of revelation. If we turn from the world to the great mechanism

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within us, we see again that no rational man pauses for one instant to doubt the force of circumstantial testimony. What evidence have we that it is a heart that beats or a brain that throbs within us, except from the fact that those organs exist in all similarly constituted beings? And we accept remedies for all the ills that flesh is heir to upon precisely the same faith as circumstantial evidence."

Chief Justice Gibson has given an excellent illustration of the force of this kind of testimony. He says (*Com. v. Harman*, 4 Pa. 272):

"You see a man discharge a gun at another. You see the flash, you hear the report, you see the person fall a lifeless corpse, and you infer from all these circumstances that there was a ball discharged from the gun, which entered his body and caused his death, because such is the usual and material and natural cause of such an effect. But you did not see the ball leave the gun, pass through the air, and enter the body, and your testimony to the fact of killing is thereby inferential; in other words, circumstantial."

The improvements of modern science furnish us with another illustration: You are in a telegraph office, and see the battery in motion. A message is received. The station at the other end of the line may be a thousand miles distant. No human eye ever saw the subtle fluid pass along the wire, and yet you would hardly listen with patience to the man or the argument undertaken to reason to you that the message might have come through the air or the earth without the agency at the wire, and that all your evidence to the contrary was circumstantial, and therefore unworthy of regard. In short, a skepticism like this would open wide the door for the perpetration of all secret crimes, would uproot our faith in man, and destroy even our belief in a Creator and in a future state. These are some of the evils which flow from the declaration of a principle, that we should reject all circumstantial evidence.

There is much more of that which I could occupy your time in reading, and it illustrates to you forcibly the great standing that that sort of evidence has in the courts of the country, and, I may say, in the estimation of intelligent men, because you act on it, and have to depend on this kind of evidence to satisfy your minds of the great problems of life. You may resort to evidence of this kind to establish a case of this character, for it is one which, above all other cases, must be proven by circumstances, in part, at least. You may have no positive evidence of it. You may take into consideration their association, their relation to each other, their intimacy with each other, their interest in the business transacted, and the results that would flow from the commission of the act. All of these circumstances and these facts may be taken into consideration. The test as to this character of evidence goes to its character and to its sufficiency. If it is equal in proving power to the testimony of one positive, uncontradicted, credible eyewitness, the law says it is sufficient to establish any proposition. Evidence of any kind, positive or circumstantial, establishing a proposition affecting a crime, is sufficient when it proves it to that extent.

Now, while we are upon this subject, it may be proper to call your attention to the fact, in addition to what I have said, that you may take into consideration the very overt act done, if apparently done in pursuance of the design, to show who was connected with that understanding. You may use that overt act to show the other circumstances. You may use it for that purpose as one item of evidence to show the existence of the conspiracy. As I have remarked, two of the witnesses who were on the stand are confessed accomplices in this alleged crime. They say that they did certain things. If they did, these things would make a conspiracy, and the doing of this particular act charged. If that proposition is true, then you are to inquire whether the other persons charged in the indictment were connected with it. After the first proposition is established, then you must see if the other parties were connected with it. From Pierce, the witness, you have certain facts with reference to George W. Howell that would make him a party to this conspiracy; and if it be true that Jewett was connected with that transaction, that he had knowledge of it, that he permitted it to go on with that knowledge of the offense, with benefits received directly or indirectly as a member of that firm, that would make him a party also. If the other state of the case was true,—that is, that S. R. Howell and Herbert N. Jewett were partners, and George W. Howell, with knowledge and as an agent, was connected with that transaction and assisted in it, that he furnished the means as the agent representing the business of S. R. Howell and Herbert N. Jewett of carrying on the purpose,—that would make him a party in the business also. But I have already adverted to the facts necessary to connect the other Howell with the transaction. Now, these witnesses, Pierce and Mott, occupied a relation to the case different from ordinary witnesses. They confessed they were guilty as charged in the indictment. That would make them responsible under the law. The law lays down a rule on that subject, as to how you should regard testimony of witnesses of that character, and the proposition that the court is asked to give you on that subject by counsel for the defendants is not the law, and the court refuses to give it. The law is different from that, and is contained in the rule which has been laid down by *Mr. Justice Dillon* in the trial of the case I have already referred you to. That is the case with this man Pierce. That is the case with Mott, and he stands here indicted in five or six cases; but as to whether he is indicted or not, that cuts no figure, except it may prove some one of the propositions that he is a party to the conspiracy. The rule of law is that accomplices are competent witnesses, and that when sworn you should consider their testimony, for you can convict on their testimony when all the facts and circumstances surrounding the case go to verify their statements. You are to consider their evidence. They are competent witnesses, but under the legislation of Congress they may not be compelled to testify. But the testimony of conspirators is always to be received with extreme caution, and weighed and scrutinized with great care, by the jury. It is just and

proper for the jury to seek for corroborating facts to bear out their statement. It is just and proper to do it, but it is not absolutely necessary, provided the testimony of the accomplice produces in the minds of the jury full and complete conviction of its truth. Now, there is one point that in my judgment needs elaboration. It is just and proper in such cases for the jury to seek corroborating facts in material respects. You will understand that it is always safest and best to look for corroborating facts. It is a rule you should always apply, not to take a man's testimony alone in any case, but to look through the whole evidence to see whether there are other facts in the case which corroborate that. And I may say right here, in this connection, that all truths in this world are in harmony; I mean all material or relevant truth. If one witness in a case is telling the truth, there are other propositions, if you can get at them, other truths, that will corroborate what he says; and it is by means of this fact, and of the recognition of the fact, that these other truths frequently consist of circumstances, that we can find the truth in a given case. I say that the testimony of the principal witness upon material facts may be corroborated alone by circumstances, if correctly produced.

Therefore it is prudent, it is safe, it is proper, in a case where a man testifies, to look to other facts corroborating what he says. The testimony of any witness is true if it produces a belief of that character,—if it is equal in proving power to the testimony of one eyewitness; but it is a prudential rule that all witnesses who are confessed accomplices should be corroborated in some material part. It is not necessary to corroborate in every part of the act, in every part of that which goes to make up a crime in every detail, but if he is corroborated in some material fact that is sufficient; that goes to show by the light of other evidence the truth of the statement, and that is what the law means by saying he must be corroborated in some material part. It must, in some particular, tend to show the guilt or innocence of the parties outside of his evidence. That corroboration may come from oral testimony or from documentary evidence, from letters, from writing. It may come from evidence, or letters admitted and found to be competent evidence, but you are to look to it to see that there are corroborating facts in some particular to go to make up the accusation against the parties charged. This is as to the testimony of accomplices. That same witness, Pierce, was sought to be impeached, and his testimony broken down. I give you a rule in this connection that bears upon the other proposition: If you should believe that he is an accomplice, and that you cannot believe him on that ground, if standing alone; if you believe his testimony is so supported by other facts and circumstances as to impart verity to it, and to make it worthy of belief,—you might believe it on that ground, and you are not at liberty to reject his evidence because he is an accomplice, and you are not to do so until you look through the case to see if his evidence is corroborated. It was sought to be impeached by a number of witnesses; and right here let me say to you that it is a dangerous method of impeachment to the witness and to the cause of justice, and it often

works very unjustly against the witness. You, therefore, in ascertaining whether he has been successfully impeached, are to ascertain, first, whether it has been proven in a credible way that the character of that witness as given to you was the character reflected by the opinion of the people generally in the neighborhood where he lives. It frequently happens that we make up our judgments by our own feelings towards the party. There are many men in this world who have such an opinion of themselves that they take their own judgment, and by it compare all other judgments. You say that his reputation is good or bad; but we must consider that reputation as only the reflex of character,—the reflex of the character,—and, in justice to men called into the courts of the country without any idea or intimation of who is going to swear against them, it is for you to see whether that impeachment has been successfully made against the party. There is not a man on earth, if you catch him under certain circumstances, that you cannot find some one to prove that his general character for truth and veracity was bad. Every man who is a man has his enemies, and it frequently happens that men mistake this thing for general reputation. And, again, it opens wide the door of personal prejudice, and it affords means by which men can concoct and do great damage to a witness. It is a means of attack that may be easily resorted to. Then, in ascertaining how far that attack has gone,—and, if made successfully, you have a right to look through all the evidence in this case; if you do not believe the statements of these witnesses reflect the opinions of the people in the community, there is a failure on that ground to impeach; if you do believe that, and they reflect it, then you are to look to other circumstances to see whether really that was the condition as created by the community generally,—you have a right to take into consideration the fact that he was the admitted trusted employé of the defendants; and their evidence fully sustains that fact to such an extent that large sums of money were paid to him, and not a question asked as to how he disposed of it and disbursed it. I say, if he was connected with the business of that company in that way, you have a right to take it into consideration in this case. If the impeachment has been successful, or the reflex of the opinion, the sentiments of the people generally have been placed before you as a jury in this case, and that the witness stands to you in that way, then you are to look to the other testimony to see whether he is corroborated. If you believe other facts so corroborate his statement as to give verity to it, you may believe him. In a case of that kind you are to say whether his statement is true, to look to all these facts in justice to the defendants and to the witnesses. There are other rules the law gives you for weighing the testimony of witnesses. In addition to the ones already given, you are to take his evidence, the evidence of the accomplice, and see whether there are other facts and circumstances outside of his statement coming from other witnesses corroborating his statement. The same rule applies to the testimony of Pierce and Mott. The rules of law given us say that we are to consider the testimony of each witness

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as to its consistency, its probability, its reasonableness. If the witness gives you a statement that by your judgment and observation of life seems to be probable, seems to be reasonable when comparing it with what you have observed, seems to be consistent, is not that witness entitled to belief? Then you consider the question as to whether it is borne out by other facts, in the light of the other testimony of the case. The law says that defendants may testify; they have a right to go on the stand and make their statements. You take them as you take the statements of all other witnesses,—for what they are worth. We are all pretty much alike in this matter of self-interest. We need not set ourselves up as standards. The best of men think they should be believed. It comes so near to us that it takes possession of us, this thing of self interest. The law says that any man can go on the stand and testify. When defendants go on the stand the fact is they have a motive, a consideration. It is a severe test. Some men can stand against it, and follow the line of truth as best they know it, but the law considers that they may not be able to do that; and yet they may be honest men, as the world goes, intentionally honest men, and, for the reason that they may not be able to do it, the law says to you, "You are to consider it in the light of their relation to the case."

You are to do, also, as you do with other witnesses, to see whether it is contradicted by other reliable facts; that, if it is, then it is weakened, as you may attach credit to the contradicting facts; and you are to see to it also whether it is corroborated by other reliable facts, and, if so, it is strengthened. That is the relation the testimony of the defendant witnesses bears to you. Look at its consistency, its reasonableness and probability, in the light of the surrounding circumstances. You may reject it upon the ground that he is a defendant witness, or that he is contradicted by other evidence. You are to take that view of the testimony of all the witnesses, and look for supporting facts. If you believe, when you apply all these rules, that it is entitled to belief, then you are to find it true. Now, to what degree of certainty must this be established? The same degree is required to be established as to other evidence. You cannot demonstrate propositions growing out of human conduct. You can prove them so there is no conjecture to be arrayed against them. It sometimes is said that nothing can be proven to a degree of certainty when it comes to that which grows out of human conduct connected with crime, and which is dragged to the light of day by taking the circumstances and actions connected with it. You cannot have it proven absolutely. The law does not ask you to accomplish the impossible. It asks you, as reasonable men, to do that which reasonable, ordinary men would do,—nothing more; nothing less. Where does this rule come from? This rule of law comes from what reasonable men ordinarily do in the everyday affairs of life. It is our own experience, based upon our observation of others and our actions. We observe the actions of men, and that the rule existing was ascertained as to the amount of proof necessary to

bring belief to the minds of the reasonable men of the country. Evidence was necessary to bring his mind to a conclusion that was reasonable, ascertained by looking at the actions of men in the light of facts proven. Upon that was formulated this rule that the proofs in a criminal case, before conviction can take place by a jury, must be sufficient to establish all the material allegations in the issue beyond a reasonable doubt; so that reasonable men upon a matter of importance or concern would be satisfied of its being true. When it is proven to that extent, it is proven beyond a reasonable doubt. This degree of certainty must exist in this case, and nothing more. The law contemplates it is your moral duty to find this. Now, the counsel for the defendants have called your attention to the question of reasonable doubt in reference to this case. That must be a real and substantial doubt, and not a mere conjecture or surmise as to the possibility of innocence. No other doubt is entitled to a moment's consideration; no other is entitled to occupy your minds for a single second.

Gentlemen, that is the degree of certainty to which this case is required to be established. I believe I have covered every proposition in this case necessary to be given. Gentlemen, in conclusion there is nobody connected with the government in this case who wants anything but simple justice, and I speak for myself and the district attorney when I say that we seek equal and exact justice. Notwithstanding this great cry about the railroad corporations, I ask you to vindicate the law. Railroads are entitled to the same rights as others, but it sometimes looks as if attorneys endeavor to take advantage of a jury. Intelligent men, under their oaths, will administer equal and exact justice in all cases, whether affecting railroads or affecting private citizens. The law ought to be administered, and should be administered, in this way, for the railroad companies have their interests which should be preserved; and it is the object of the law to enforce penalties when statutes or laws are violated, either by the railroad company or private shippers. Gentlemen, you will proceed to make up your verdict.

UNITED STATES CIRCUIT COURT SOUTHERN DISTRICT OF ALABAMA.

BIGBEE & WARRIOR RIVERS PACKET CO.

v.

MOBILE & OHIO R. CO.

(60 Fed. Rep. 545.)

1. No dissimilarity in circumstances or conditions justifying a discrimination in rates exists between a shipment of cotton from Mobile to New Orleans by a person who receives it by vessel from Demopolis, Ala., and a shipment by a person who receives his cotton from any other part of Alabama or by rail.
2. A person who receives cotton at Mobile from any particular point on the Alabama rivers whether it comes by boat or wagon or any other way and desires to ship it from Mobile to New Orleans by a railroad line is entitled to have it shipped at the Mobile rate as much as any person who receives his cotton from any other point or who may have bought it at Mobile, and it is

no objection to such right that it would give every town located on such rivers equal facilities and advantages with those of Mobile, as that is the purpose of the Interstate Commerce Act.

3. An agreement by a railroad company with other companies within a specified territory for the purpose of maintaining a uniform rate upon all shipments of cotton from certain points in Alabama in vessels plying the Alabama rivers and received at Mobile, to be rehipped and transported to New Orleans to charge a certain sum per bale in excess of its regular rate from Mobile is no justification of such discriminating charge and contravenes the Interstate Commerce Act.

Decided December 30, 1893.

ON DEMURRER to answer in an action brought to require defendant to transport freight delivered to it by plaintiff at the same rates at which it transports other freight. *Sustained.* The facts are stated in the opinion.

Messrs. Pillans, Torrey & Hanaw for relator, in support of the demurrer.
Mr. E. L. Russell for respondent, *contra.*

Toulmin, *District Judge*, delivered the following opinion:

The facts in this case, as stated and admitted

in the pleadings, are that the relator is a corporation of the state of Alabama, and is engaged in transporting cotton and other mer-

chandise upon its vessels plying on the Bigbee river in the state of Alabama; that the respondent is a common carrier of goods, engaged in interstate commerce, and over its line and connecting lines undertakes to carry, as such common carrier, goods, including compressed cotton bales, from Mobile, in the state of Alabama, to New Orleans, in the state of Louisiana; that respondent, as such carrier, has for a long time, and does yet carry and transport compressed cotton bales from Mobile to New Orleans at and for the price of 80 cents a bale to ship's side at New Orleans, and the 80 cents a bale is the usual and customary rate charged from Mobile to ship's side at New Orleans on compressed cotton. Relator, having in the city of Mobile 400 bales of compressed cotton which it had brought on one of its boats from Demopolis, Ala., for reshipment to New Orleans, delivered the same to respondent at its freight sheds in Mobile, the place provided for receiving such goods for carriage, and requested and demanded of respondent that said cotton be shipped as customary, and at said customary rate of 80 cents a bale, and tendered the freight money in advance to respondent. Respondent refused to transport the cotton, as it was requested to do, at the rate of 80 cents a bale, and demanded \$1.25 a bale. One dollar and a quarter a bale was and is a higher rate than is charged by respondent to others and the general public for transporting cotton of like kind and condition from Mobile to New Orleans. Respondent sets up in justification of its refusal to receive and transport said cotton at 80 cents a bale, and of its demand of \$1.25 a bale, substantial dissimilarity of circumstances and conditions from those under which other cotton is offered by other shippers at Mobile, and received by respondent to be transported to New Orleans. The substantial dissimilarity of circumstances and conditions as averred by respondent is the fact that the relator was engaged in transporting cotton and other merchandise upon its vessels on the Bigbee river, and that this cotton was received by the relator at Demopolis, Ala., and was transported upon its vessels to Mobile, for the purpose of reshipping the same over respondent's line, or some other line of railroad to New Orleans. And respondent further says, in justification, that it had agreed with the Louisville & Nashville Railroad Company, and certain other railroad companies within a specified or given territory, for the purpose of maintaining a uniform rate upon all shipments of cotton from Demopolis and some other points in Alabama, in vessels plying the Alabama rivers, and received at Mobile to be reshipped and transported to New Orleans, that it would charge \$1.25 a bale for such transportation, and that the 400 bales of cotton in question were so received from Demopolis. Respondent, in short, says that it refused to receive and transport said cotton, as stated by relator, (1) because it was not offered under like circumstances and conditions as an ordinary or usual shipment of cotton over its line and connecting lines from Mobile to New Orleans; and (2) because of the agreement referred to.

The interstate commerce law, among other things, provides that it shall be unlawful for any common carrier, subject to the provisions

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of the law, to charge, demand, collect, or receive from any person or persons a greater or less compensation for any services rendered or to be rendered in the transportation of property than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like contemporaneous service in the transportation of a like kind of traffic, under substantially like circumstances and conditions (section 2, "Act to Regulate Commerce," 24 Stat. at L. 379); and by section 3 of the Act it is provided that it shall be unlawful for any common carrier, subject to the provisions of the Act, to make or give any undue or unreasonable preference or advantage to any particular person or locality, in any respect whatsoever, or to subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

It is contended on part of respondent that the proposed shipment of the cotton in question was not as an original shipment from Mobile to New Orleans, but was shipment from Demopolis, Ala., through Mobile to New Orleans. The cotton was shipped from Demopolis to Mobile to be forwarded to New Orleans, but was not shipped by through bill of lading from Demopolis, *via* Mobile, to New Orleans, but was shipped from Demopolis to Mobile, consigned to relator at Mobile, to be reshipped at Mobile. It was tendered by relator to respondent, to be shipped over its line and connections to New Orleans, and a bill of lading therefor demanded of respondent. The fact is that all cotton shipped from Mobile to New Orleans by any person comes from some point outside of Mobile. What substantial dissimilarity in circumstances and conditions is there, then, between a shipment of cotton from Mobile to New Orleans by a person who has received the cotton from Tuscaloosa, or any other part of Alabama, for illustration, and a shipment of cotton from Mobile to New Orleans by a person who has received it from Demopolis, Ala.? There is a dissimilarity in the circumstance that one lot of cotton came from one point and the other lot from another point. But this is not a substantial dissimilarity, such as is contemplated by the law, and it is not every dissimilarity of circumstance or condition that justifies a dissimilarity of rates. "That some dissimilar conditions justify dissimilarity in rates is true. That remote dissimilarities of condition justify any dissimilarities which the carrier chooses to make is not true." *Interstate Commerce Com. v. Texas & P. R. Co.* 4 Inters. Com. Rep. 408, 57 Fed. Rep. 955. The circumstances and conditions to be considered are those which bear upon the transportation by the particular carrier, and under which such transportation is conducted. They must have direct bearing upon the traffic over the line on which the discrimination is made. The dissimilarity of circumstances and conditions set up by respondent in justification of its claim is not the outcome of competition by water routes or any other competitive railroad line not subject to the Interstate Commerce Act. Respondent's position on this point cannot be sustained. I am unable to see that the circumstance that the cotton in question came from Demopolis to Mobile, to be reshipped thence to New Orleans, has any direct bearing upon the

traffic over respondent's line to New Orleans. I am unable to see how the fact or circumstance that the cotton came from Demopolis can in any way affect transportation or traffic over respondent's line and connecting lines to New Orleans. The respondent has no line to Demopolis, Ala., and no connecting line or joint traffic arrangement with the relator, the Bigbee & Warrior Rivers Packet Company, and hence there is no question of a proportion of rates involved in the case.

It is further contended by the respondent that to grant to the relator the right to ship its cotton from Mobile to New Orleans at the same rate given to other shippers of cotton from the one point to the other at what the counsel calls "the Mobile rate of 80 cents on a bale," would give to every town located on the Alabama rivers equal facilities and advantages with those of Mobile. That is true, and that is what I understand the Interstate Commerce Act provides for and is designed to protect, when it says that it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or to subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. I consider that any person who receives cotton at Mobile from Demopolis, or any particular point on the Alabama rivers, whether it comes by boat, by wagon, or any other way, and desires to ship it from Mobile to New Orleans by respondent's railroad line, is as much entitled

to have it shipped at the Mobile rate of 80 cents a bale as any other person is who receives his cotton from any other point, or who may have bought it at Mobile. To deny the former this right while it is given to the latter would, in my judgment, be subjecting him and the locality from which he got his cotton to an undue and unreasonable disadvantage, and would be violative of the Act to Regulate Commerce. *Crews v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 708. The United States Supreme Court in the case of *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 896, says, in substance, that it was designed by the Act to Regulate Commerce "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities; that carriers are bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all their patrons upon an absolute equality." Relative to the agreement set up in the defense I will say that "if the respondent is acting, or claims to act, under the compulsion of circumstances and conditions of its own creation or connivance in the making of an exceptional rate, then these will not avail it" (*Business Mens Assn. v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Rep. 41); and, further, that, in my opinion, such an agreement contravenes the Act to Regulate Commerce. My conclusion is that no justification has been shown by the respondent for the discrimination complained of, and that relator's demurrers to respondent's answer should be sustained; and it is so ordered.

UNITED STATES CIRCUIT COURT.

UNITED STATES

v.

WORKINGMEN'S AMALGAMATED COUNCIL *et al.*

(26 L. R. A. 158, 54 Fed. Rep. 904.)

1. An injunction against an unlawful combination in restraint of trade, in violation of the Act of Congress, will not be denied because, after the filing of the bill, the unlawful interference with trade has ceased.
2. The interdiction by Act of Congress of contracts or combinations in restraint of trade or commerce among the several states or with foreign nations applies to combinations of labor as well as of capital, which are in restraint of such trade or commerce.
3. An answer under oath does not preclude an injunction in the Federal courts, where the oath of the respondent is waived in the bill according to Equity Rule 41.

4. An unlawful combination in restraint of interstate or foreign commerce may exist among labor organizations, although their original purpose and general character is lawful.
5. The stopping of transportation of goods and merchandise in transit from state to state and to and from foreign countries which is caused by a strike of all the members of labor organizations in a certain city in all kinds of business in an attempt to compel the employment of none but union men in a certain business, is an unlawful restraint of commerce in violation of the Act of Congress.

Decided March 25, 1893.

SUIT to enjoin defendants from violating the provisions of the United States statute which was passed to protect trade and com-

merce against unlawful restraint and monopolies. *Injunction granted.*

The facts are stated in the opinion.

NOTE.—For other cases touching the subject of a strike by employes as an unlawful conspiracy, see *Casey v. Cincinnati Typographical Union No. 3* (C. C. S. D. Ohio) 12 L. R. A. 183, and note; *Toledo*, 4 INTER S.

A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C. N. D. Ohio) 19 L. R. A. 387, and 395; *Waterhouse v. Comer* (C. C. S. D. Ga.) 19 L. R. A. 408; *Arthur v. Oakes* (C. C. App. 7th C.) 4 Inters. Com. Rep. 744, 26 L. R. A. 414.

Mr. F. B. Earhart, U. S. Atty., for complainant.

Messrs. M. Marks and A. H. Leonard, for defendants:

Preliminary injunctions should be allowed only when shown to be clearly necessary to afford immediate protection to some right or contract which would otherwise be seriously injured or impaired.

High, Inj. §§ 4, 22, 23.

A complainant is not entitled to a preliminary injunction to protect a right which depends on an unsettled or disputed question of law.

10 Am. & Eng. Enc. Law, p. 787, *Injunction*.

Chancery will not grant an injunction, pending a demurrer or plea which, if sustained, dismisses the bill.

Erving v. Blight, 3 Wall. Jr. 139; Thatcher, Pr. par. 14, p. 783.

Upon the filing of an injunction bill, the defendant may immediately put in his answer to prevent the issuing of the writ and the court is bound to consider such answer and give it due weight if filed before the application for the injunction is disposed of and if the equities of the bill are fairly met and negatived, the injunction will not be granted.

10 Am. & Eng. Enc. Law, *Injunction*, pp. 1008, 1014.

Defendants in common with all men have the right to do any and all things not prohibited by law.

They have a right to organize unions and to become members thereof.

They have a right individually and collectively through such unions to resist the encroachments of capital.

They have a right to refuse to work with non-union men.

They have a right to refuse employment, and to abstain from all labor, whenever they choose so to do.

Com. v. Hunt, 4 Met. 127, 38 Am. Dec. 346.

Billings, District Judge, delivered the following opinion:

This cause is submitted upon an application for an injunction on the bill of complaint, answer, and numerous affidavits and exhibits. The bill of complaint in this case is filed by the United States under the Act of Congress entitled "An act to protect trade and commerce against unlawful restraint and monopolies," (26 Stat. at L. p. 209). The substance of the bill is that there is a gigantic and widespread combination of the members of a multitude of separate organizations for the purpose of restraining the commerce among the several states and with foreign countries. It avers that a disagreement between the warehousemen and their employes and the principal draymen and their subordinates had been adopted by all the organizations named in the bill, until, by this vast combination of men and of organizations, it was threatened that, unless there was an acquiescence in the demands of the subordinate workmen and draymen, all the men in all of the defendant organizations would leave work, and would allow no work in any department of business; that violence was threatened and used in sup-

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port of this demand; and that this demand included the interstate and foreign commerce which flows through the city of New Orleans. The bill further states that the proceedings on the part of the defendants had taken such a vast and ramified proportion that, in consequence of the threats of the defendants, the whole business of the city of New Orleans was paralyzed, and the transit of goods and merchandise which was being conveyed through it from state to state, and to and from foreign countries, was totally interrupted. The elaborate argument and brief of the solicitors for the defendants presents six objections.

The defendants urge (1) that, the strike or cessation of labor being ended, and labor resumed throughout all branches of business, there is no need for an injunction. I know of no rule which is better settled than that the question as to the maintenance of a bill, and the granting of relief to a complainant, is to be determined by the status existing at the time of filing the bill. Rights do not ebb and flow. If they are invaded, and recourse to courts of justice is rendered necessary, it is no defense to the invasion of a right, either admitted or proved, that since the institution of the suit the invasion has ceased. With emphasis would this be true where, as here, the right to invade is not disclaimed. The question, then, is, What was the state of facts at the time of and prior to the filing of the bill? or whether, if the facts alleged in the bill were true at that time, there was need of an injunction.

The defendants urge (2) that the right of the complainants depends upon an unsettled question of law. The theory of the defense is that this case does not fall within the purview of the statute; that the statute prohibited monopolies and combinations which, using words in a general sense, were of capitalists, and not of laborers. I think the congressional debates show that the statute had its origin in the evils of massed capital; but, when the Congress came to formulating the prohibition which is the yardstick for measuring the complainant's right to the injunction, it expressed it in these words: "Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.

The defendants urge (3) that, the answer being under oath, and denying all the allegations of the bill, the injunction cannot issue. Before the adoption of the amendment to the forty-first rule in equity, it was a rule

in chancery practice that, where the answer was under oath, and denied all the equities of the bill, the injunction should be refused; but, since in this case the oath of the respondents is waived in the bill, their answer, under Rule 41, can be used at this hearing with the probative force of an affidavit alone, and no longer has necessarily the effect claimed for it by the defendants' solicitors.

The defendants urge (4) that the proofs in the case are vague, and insufficient to establish the allegations of the bill. When I consider the affidavits of individuals, and the proclamations of the governor of the state of Louisiana and the mayor of the city of New Orleans, and the statements in the public journals, supported by testimony, and the affidavits filed in this cause, I find the material allegations of the bill fully sustained. Not only was the flow of commerce through the city of New Orleans purposely arrested, but even the transportation of the goods and merchandise from the government warehouses to the landings was forcibly stopped. The following exhibits in the case, consisting of proclamations of the governor of Louisiana and the mayor of New Orleans, taken from the official journals, manifestoes, and the recitals of the sayings of the defendants, taken from the public newspapers, which have not been disproved by the respondents, show, as matter of history, the vast proportions of the interruption caused by the defendants to the prosecution of all the branches of business within the city of New Orleans, and the purpose with which it was done, to wit, that no business was to be transacted till the demands made by the employés of the warehousemen and the subordinate draymen were complied with:

"A General Strike Ordered by the Amalgamated Council for To-Morrow, Unless the Merchants Recognize the Union this Evening.

"President Leonard's Statement.

"When the people of New Orleans awake to-morrow morning, they will probably find that one of the largest strikes that has ever taken place in this city has been inaugurated. To-day, at 12:30 o'clock, President Leonard, of the Amalgamated Council, made his promised statement to the members of the press relative to last night's meeting of the council. Mr Leonard said that it had been decided at the meeting to order a general strike for to-morrow morning, unless the merchants ask for a conference this afternoon. The unions were determined to compel the employers to recognize them, and they took this step to force this recognition, if possible. Mr. Leonard further said that every trade and line over which the council has jurisdiction will go out, barring none. If at any time during the strike the merchants manifest a desire to recognize the unions, the men will be ordered to return to work, and a conference committee appointed to meet a similar committee from the merchants. The committee of fifteen of the Amalgamated Council will remain in session for some hours this evening, and the employers will thus be given their last chance to accede to the demands of the strikers."

"The Strike Ordered.

"Hall Amalgamated Council,
"New Orleans, November 4, 1892. }

"At a meeting of presidents of the labor unions and organizations, held on Friday, November 4, 1892, at the Screwmen's Hall, the following manifesto was adopted and ordered submitted to all the members of labor unions and organizations in the city of New Orleans:

"To all Union Men Wherever Found, Greeting: In view of the fact that in the difficulty existing between the board of trade, merchants, boss draymen, and weighers, and in view of the fact that they claim to represent the entire employing power in the city, and claim broadly and emphatically that they will not recognize unions or labor organizations in connection with their business, and endeavor by their acts to prevent other employers from either employing or recognizing union men, and believing it for the best interests of organized labor that we refrain from working for any employer until the board of trade and others recognize the rights of men to organize into labor unions throughout the city, calling them, as union men, to abstain from any work or assisting in any way in prolonging the existing difficulty. The gauntlet has been thrown down by the employers that the laboring men have no rights that they are bound to respect, and, in our opinion, the loss of this battle will affect each and every union man in the city; and, after trying every honorable means to attain an equitable and just settlement, we find no means left open but to issue this call to all union men to stop work, and assist with their presence and open support from and after Saturday noon, November 5, 1892, and show to the merchants and all others interested that the labor unions are united.

"James Leonard, Chairman.

"John Breen,

"A. M. Keir,

"James E. Porter,

"John M. Callaghan,

"Committee."

"Will the Strike be General?

"Meeting of the Amalgamated Council this Evening.

"To the representative of a morning paper, Assistant State Organizer Porter said the outlook for a successful strike was most excellent, and promised that every union in the city would stand by the locked-out workmen. He said it was possible a general strike would be ordered, and that labor is determined to win this struggle. A union man who was with Mr. Porter is represented to have said that the strike will be made a victory of the laboring classes of the city, and, unless the unions are recognized, there will be more bloodshed than imagined. Mr. Porter is reported to have added: 'We propose to win by peace, if we can; but if we are pushed to the wall, force will be employed.' There are ninety-seven unions in the city. The Amalgamated Council meets to-night to discuss the strike. The joint conference of the executive committees of the striking organizations met last night, and decided to pay no attention to the invitation of the merchants with respect to the proposed tribunal. Inasmuch as the merchants decline to

recognize the unions, the unions refuse to appoint any members of the tribunal, and will only do so when they are given to understand that the men they may appoint are to be regarded as official representatives of their unions."

"Answer to Proposition of the Governor.

"Nov. 8th, 1892.

"To His Excellency, Gov. M. J. Foster—
Dear Sir: According to agreement, we were to give you an answer this morning in regard to certain propositions that you have submitted; but, after consideration by the committees, we found that the propositions would have to be first submitted to the executive committee of the merchants' body, and we have not, up to the present time, heard what action was taken in regard to the matter. In consideration of these facts, we now have these propositions to submit, and will have to stand on them: First. We are willing to arbitrate on wages. Second. We are willing to arbitrate on hours. Third. We want the question of 'none but union men to be hired when available, from and after the final adoption of tariff and hours,' to be accepted without arbitration.

"James Leonard, Chairman.

"John Breen,

"A. M. Keir,

"John Callaghan,

"James Porter."

"Proclamation.

"Mayorality of New Orleans, }
City Hall, Nov. 9, 1892. }

"Citizens of New Orleans: The time has come when I, as your mayor, feel that the forces placed at my command are inadequate to further protect peaceable citizens and their property, owing to the many demands made on them. I am then compelled to call upon all good citizens desirous of the welfare and safety of the city. I, therefore, as your chief magistrate, do hereby issue this, my proclamation, commanding all law-abiding and law-loving citizens to attend at the city hall to-morrow (Thursday), Nov. 10, 1892, and then and there to be sworn in as special officers to aid and assist the organized police force of this city in their duties incumbent upon them.

"Given under my hand and seal of office, this ninth day of November, in the year of our Lord 1892. John Fitzpatrick.

"By the Mayor,

"Clark Steen, Secretary."

"Proclamation of the Governor.

"New Orleans, La. Nov. 10, 1892.

"To the People of New Orleans: The condition of affairs prevailing in your city during the past ten days; the danger to the peace and good order of this community arising from the paralysis of industry, trade, and commerce, and from the suspension of the usual means of transportation; the insecurity of life and property caused by the perturbed state of the public mind, aggravated by the closing of the gas and electric light works, thus holding out an incentive to criminals to ply their vocation in darkness,—have not escaped my attention, and have caused me the deepest solicitude. I therefore request all peaceable citizens not to congregate in crowds upon the streets and

thoroughfares, and I urge upon them to discountenance all undue excitement and acts of violence, and to make known to the officers intrusted with the administration of the law any breaches of the peace. I hereby declare that the people of this city must and shall be protected in the full enjoyment of all their constitutional rights and privileges. All the power vested in me by the constitution and laws of this state shall be devoted to the preservation of the peace, the maintenance of good order, and the protection of the lives and property of the citizens.

"Murphy J. Foster,

"Governor of Louisiana."

"The governor said there were no further orders to communicate at the moment. It is understood, however, that orders are being issued to the militia, and that, after the railroad presidents' meeting is over, an effort will be made to start the street cars. The companies are expected to furnish the drivers, and the entire military force of the state, with the bodies that are being organized as recruits, will be used to furnish them with the necessary protection. That will settle the question very soon whether the rioters or the legally constituted authorities of the state are to be masters of the situation."

The defendants urge (5) that the corporations of the various labor associations made defendants are in their origin and purposes innocent and lawful. I believe this to be true. But associations of men, like individuals, no matter how worthy their general character may be, when charged with unlawful combinations, and when the charge is fully established, cannot escape liability on the ground of their commendable general character. In determining the question of sufficiency of proof of an accusation of unlawful intent, worth in the accused is to be weighed; but when the proof of the charge is sufficient,—overwhelmingly sufficient,—the original purpose of an association has ceased to be available as a ground of defense.

The defendants urge (6) that the combination to secure or compel the employment of none but union men is not in the restraint of commerce. To determine whether the proposition urged as a defense can apply to this case, the case must first be stated as it is made out by the established facts. The case is this: The combination setting out to secure and compel the employment of none but union men in a given business, as a means to effect this compulsion, finally enforced a discontinuance of labor in all kinds of business, including the business of transportation of goods and merchandise which were in transit through the city of New Orleans, from state to state, and to and from foreign countries. When the case is thus stated,—and it must be so stated to embody the facts here proven,—I do not think there can be any question but that the combination of the defendants was in restraint of commerce.

I have thus endeavored to state and deal with the various grounds of defense urged before me. I shall now, as briefly as possible, state the case as it is established in the voluminous record.

A difference had sprung up between the

warehousemen and their employes and the principal draymen and their subordinates. With the view and purpose to compel an acquiescence on the part of the employers in the demands of the employed, it was finally brought about by the employed that all the union men—that is, all the members of the various labor associations—were made by their officers, clothed with authority under the various charters, to discontinue business, and one of these kinds of business was transporting goods which were being conveyed from state to state, and to and from foreign countries. In some branches of business the effort was made to replace the union men by other workmen. This was resisted by the intimidation springing from vast throngs of the union men assembling in the streets, and in some instances by violence; so that the result was that, by the intended effects of the doings of these defendants, not a bale of goods constituting the commerce of the country could be moved. The question simply is, Do these facts establish a case within the statute? It seems to me this question is tantamount to the question, Could there be a case under the statute? It is conceded that the labor organizations were at the outset lawful. But, when lawful forces are put into unlawful channels,—i. e. when lawful associations adopt and further unlawful purposes and do unlawful acts,—the associations themselves become unlawful. The evil, as well as the unlawfulness, of the act of the defendants, consists in this: that, until certain demands of theirs were complied with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country.

What is meant by "restraint of trade" is well defined by *Chief Justice Savage* in *People v. Fisher*, 14 Wend. 18, 28 Am. Dec. 501. He says: "The mechanic is not obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair; but he has no right to say that no other mechanic shall make them for less. Should the journeymen bakers refuse to work unless for enormous wages, which the master bakers could not afford to pay, and should they compel all journeymen in the city to stop work, the whole population must be without bread; so of journeymen tailors or mechanics of any description. Such combinations would be productive of derangement and confusion, which certainly must be injurious to trade."

It is the successful effort of the combination of the defendants to intimidate and overawe others who were at work in conducting or carrying on the commerce of the country, in which the court finds their error and their violation of the statute. One of the intended results of their combined action was the forced stagnation of all the commerce which flowed through New Orleans. This intent and combined action are none the less unlawful because they included in their scope the paralysis of all other business within the city as well.

For these reasons I think the injunction should issue.*

*This decision was affirmed by the circuit court of appeals on June 12, 1893, on the ground that the court will not reverse an interlocutory order granting a temporary injunction, unless it is already shown that it was improvidently granted. [Ed.]

UNITED STATES CIRCUIT COURT, DISTRICT OF NEBRASKA.

OLIVER AMES ET AL.,

v.

UNION PACIFIC R. CO. ET AL. (No. 8.)

GEORGE SMITH ET AL.,

v.

CHICAGO & N. W. R. CO. ET AL.

HENRY L. HIGGINSON ET AL.,

v.

CHICAGO, B. & Q. R. CO. ET AL.

1. A state statute duly authenticated will be regarded by the United States courts as having been enacted in full compliance with all the prescribed forms, unless the constitution or decisions of such state require a determination of the question of enactment upon different evidence.
2. In Nebraska a statute duly authenticated cannot be overturned by extrinsic evidence if the journals of the two houses show that every thing was done which the constitution requires should be done and recorded in the due passage of the act.
3. Parol testimony is not admissible to impeach the validity of an act which by the record is shown to have been duly and legally passed.
4. The clause in the charter of the Union Pacific Railroad Company giving Congress power over the rates of freight to be charged thereon, does not preclude the several states from interfering with such rates.
5. A classification of railroads as those which have been in operation for a certain length of time and those which have been recently built and limiting the rates which may be charged on the

- old roads is not an arbitrary classification denying such roads the equal protection of the laws, nor does it make the statute invalid as class legislation.
6. A state statute limiting the rates to be charged by freight carriers does not interfere with interstate commerce because it adopts a different classification for freight from that which has been established by the railroads for the section of country in which such state is located.
 7. Limiting local rates of freight does not necessarily interfere with interstate commerce because the carriers for their own convenience rearrange the interstate rates to make them conform to the local rates prescribed by the statute.
 8. There is no sufficient remedy at law to deprive a United States court of equity of jurisdiction over an alleged unlawful reduction by a state statute of freight rates, by reason of the fact that the statute provides for a petition to the state court which may, in its discretion, direct the board of transportation to permit the carrier to raise its rates to the former amount.
 9. A state legislature cannot deprive a United States equity court of jurisdiction over an alleged unlawful reduction of freight rates affecting citizens of other states by itself, prescribing them by direct act, instead of delegating the authority to a commission.
 10. The amount invested in a railroad cannot be ignored in determining the reasonableness of rates fixed by law to be charged thereon, although such amount is far in excess of present value of the property.
 11. There is no hard and fast test which can be laid down to determine whether or not the rates of railroad freight charges established by the legislature are just and reasonable.
 12. A reduction of 29½% by the legislature in the local freight rates of the railroad is unreasonable and void, where the new rates would result in a loss on local business to more than half of the roads affected by it, and as to the other roads the earnings from local business would not be enough to pay the proportion of the interest on the bonded debt which should be paid by such business in comparison with business of other kinds.
 13. The fact that the freight rates are higher in one state than in another is not of itself sufficient to justify an arbitrary reduction of them by the legislature in the former state for the purpose of equalizing rates.
 14. The enforcement of an unreasonable reduction by the legislature of freight rates may be enjoined.

Decided November 12, 1894.

SUITS by railway stockholders to enjoin the enforcement of a reduction of railroad freight rates. *Relief granted.*

The facts are stated in the opinion.

Before **Brewer**, *Circuit Justice* and **Dundy**, *District Judge*.

Brewer, *Circuit Justice*, delivered the opinion of the court:

In each of these three cases, respectively, the plaintiffs are stockholders in the corporation first named therein as party defendant. In the first the defendants are the Union Pacific Railway Company, a corporation created under the laws of Congress, and owning and operating a railroad partly within the limits of the state of Nebraska; the St. Joseph & Grand Island Railroad Company, the Omaha & Republican Valley Railroad Company, and the Kansas City & Omaha Railroad Company, corporations organized under the laws of the states of Kansas and Nebraska, whose stock is substantially owned and whose lines are controlled and operated by the Union Pacific Railway Company; and certain officers of the state of Nebraska, constituting its board of transportation, together with the secretaries thereof. In the second the defendants are the Chicago & Northwestern Railroad Company, a corporation organized and existing under the laws of the states of Illinois, Wisconsin, and Iowa; the Fremont, Elkhorn & Missouri Valley Railroad Company, a corporation organized under the laws of the state of Nebraska; and the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, a corporation organized under the laws of the states of Minnesota and Nebraska,—both of which companies are owned and their roads operated by the Chicago & Northwestern Railroad Company; and, in ad-

dition, the board of transportation of the state of Nebraska, and its secretaries. In the third case the defendants are the Chicago, Burlington & Quincy Railroad Company, a corporation organized and existing under the laws of the states of Illinois and Iowa, which owns, controls, and operates, in the name of the Burlington & Missouri River Railroad Company in Nebraska, certain lines within that state; and in addition the state board of transportation, and its secretaries.

On April 12, 1893, the legislature of the state of Nebraska passed an act (Laws 1893, chap. 24, p. 164; Neb. Consol. Stat. p. 211) spoken of in the records in these cases sometimes as the "Newberry Bill," and sometimes as "House Roll 33," which act prescribed the maximum rates for the transportation of freight by railroads within the state. The act, in terms, applies only to freight whose transit begins and ends within the state, and in no manner attempts to affect interstate freight. The bills in these cases were filed to restrain the state officials from putting that act in force, as against the railroads named. Pleadings were perfected, a large volume of testimony has been taken, and the cases are now before us, upon pleadings and proof, for determination.

At the threshold the question arises whether this, which purports to be an act of the legislature, is a law; in other words, whether the various steps prescribed by the constitution as

essential to the due passage of a bill through the two houses of the legislature were all regularly taken. The act is found duly filed in the office of the secretary of state; is attested by the signatures of the speaker of the house, and its chief clerk, also by the signatures of the president of the senate, and its secretary; is indorsed, "Approved, April 12, A. D. 1893. Lorenzo Crounse, Governor," and bears the following additional certificate, signed by the chief clerk of the house of representatives: "I hereby certify that the within act originated in the house of representatives, and passed the legislature, April 5, A. D. 1893." An Act of Congress thus authenticated would be conclusively presumed to have been duly and legally enacted. This precise question was before the Supreme Court of the United States, and fully considered in *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294. Following that decision, the courts of the United States will regard an act of any state legislature, thus authenticated, as having been enacted in full compliance with all the prescribed forms, unless there be some special provision in the constitution of that state, or some decision of its supreme court, which requires a looking beyond these evidences of authenticity, and determination of the question of due enactment by reference to other kinds of matters of evidence, or, to state the proposition in another form, the rule prescribed in that case will control unless the state has prescribed some other or further rule.

In the constitution of Nebraska (art. 3, §§ 8, 10, 11) are these provisions, which are all that are referred to by counsel, or that seem to have any bearing on this question:

Sec. 8. Each house shall keep a journal of its proceedings, and publish them (except such parts as may require secrecy) and the yeas and nays of the members on any question shall, at the desire of any two of them, be entered on the journal. All votes in either house shall be *via voce*.

Sec. 10. The enacting clause of a law shall be, "Be it enacted by the legislature of the state of Nebraska," and no law shall be enacted except by bill. No bill shall be passed unless by assent of a majority of all the members elected to each house of the legislature. And the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays shall be entered upon the journal.

Sec. 11. Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto shall be printed before the vote is taken upon its final passage. No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed. The presiding officer of each house shall sign, in the presence of the house over which he presides, while the same is in session and capable of transacting business all bills and concurrent resolutions passed by the legislature.

The utmost that can be inferred from these constitutional provisions is that, in respect to certain matters, evidence may be sought in the journals of the two houses, and evidence which

will prevail over that which appears on the enrolled bill as found in the office of the secretary of state; and this is as far as any decision of the supreme court of Nebraska has gone.

In *Hull v. Miller*, 4 Neb. 503, that court held that the office of the journal is to record the proceedings of the house, and that it must appear on the face of the journal that a bill was passed by a constitutional majority, but also held that an omission therefrom of other matters which the constitution does not, in terms, require to be entered upon the journal, would not invalidate the law, and that it would be presumed, in favor of its validity, that the legislature had done that which it ought to have done. In *State v. Liedtke*, 9 Neb. 462, it was claimed that an appropriation bill, as it passed both houses, named a larger sum than was found in the enrolled bill signed by the governor, and a mandamus was asked to compel the state auditor to draw his warrant on the treasurer for such excess; but the court denied the writ, and declined to look into the journals of the two houses to see whether the fact was as claimed, on the ground that, even if such sum was in the bill when before the houses, it had never received the approval of the governor, and had therefore never been legally appropriated. In *State v. McLelland*, 18 Neb. 236, 53 Am. Rep. 814, the matter was considered at some length, and it was held that the certificate of the presiding officers as to the passage of a bill through their respective houses is only prima facie evidence of that fact; that the journals may be examined, and, if they show that the bill did not pass, that evidence will be held conclusive, and the supposed law set aside. Similar is the case of *State v. Robinson*, 20 Neb. 96. The same proposition was again affirmed in *State v. Moore*, 37 Neb. 13, on the strength of the prior decisions; the court, however, saying that, were the question a new one, it would be inclined to follow the rule laid down by the Supreme Court of the United States in *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294.

In the case at bar the journals of the two houses, fairly construed, affirmatively show that everything was done which the constitution requires shall be done and recorded in the due passage of a bill. It will be sufficient to quote the recitals of the house journal, those of the senate journal being equally explicit.

"January 14, 1893.

"Introduction of Bills.

"The following bills were read the first time, and ordered to a second reading: House Roll No. 33. A bill for an act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the state of Nebraska."

"January 16, 1893.

"Bills on Second Reading.

"House Roll No. 33. A bill for an act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the state of Nebraska."

"March 10, 1893.

"House Roll 33. A bill for an act to regu-

late railroads, to classify rates, to fix reasonable maximum rates to be charged for the transportations of freights upon each of the railroads in the state of Nebraska.

"Was read third time.

"This bill having been read at large on three different days, and the same with all its amendments having been printed.

"The question being.

"Shall the bill pass?"

"Affirmative votes, 63.

"Negative votes, 30.

"A constitutional majority having voted in favor of the passage of the bill, the bill passed and the title as amended was agreed to."

"Mr. Speaker: I move to amend the title by adding the following and to provide penalties for violations of this act. Rhodes.

The motion prevailed.

"April 6, 1893.

"Mr. Speaker: Announced that he was about to sign house roll No. 85 while the house was in session and capable of doing business."

As for the parol testimony which was offered, tending to show some verbal alterations in the bill after it had passed the house of representatives, it is enough to say: First, that parol testimony is not admissible to impeach the validity of an act which, by the record, is shown to have been duly and legally passed, and, second, even if such testimony were competent, the supposed alterations were trifling, and not of a character to affect in any substantial manner the scope and reach of the bill. I am therefore clearly of the opinion that this act passed the legislature of the state, and received the approval of the governor, in due conformity to all substantial constitutional requirements in respect thereto.

From this preliminary matter I turn now to the consideration of various questions elaborately discussed by counsel, in respect both to the scope and validity of this law, and the jurisdiction of this court. Many of them I shall notice but briefly, for, while I have given a careful examination to all, to attempt anything like an elaborate discussion of each would unnecessarily prolong this opinion.

It is insisted that the Union Pacific Railway Company cannot be subjected to the provisions of this statute, because it is a corporation created by Congress, and as such, in the discharge of any of its functions, is subject only to the control of that body. The general question of the power of a state in respect to rates for local freight over a corporation organized under the laws of Congress was considered in *Reagan v. Mercantile Trust Co.* (No. 1), 154 U. S. 413, 38 L. ed. 1028, ante, 575, and it was there held that the mere fact that the corporation was so organized did not exempt it from state control in that respect. It was conceded in the opinion in that case that Congress could wholly remove such a corporation from state control; but it was held that, in the absence of something in the statute indicating an intention on the part of Congress to so remove it, the state had the power to prescribe the rates for all local business carried by it. Of course that decision is controlling. It is true, there is one provision in the Union Pacific Act which tends to show an intent on the part of Congress to retain to itself

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full control over all rates, and that is found in the eighteenth section of the Act (12 Stat. at L. 497) as follows:

"And be it further enacted, that whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running, and managing of said road, shall exceed ten per centum upon its costs, exclusive of the five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law."

There is in these words, it will be seen, a special reservation of the power to fix rates; and when this is taken in connection with the general provision in the same section, reserving the right to "add to, alter, amend, or repeal this Act," there is much force in the contention that Congress intended to reserve to itself, as it had the power to do, the sole and absolute control of all the rates to be charged by the company. But I am not fully satisfied that this language warrants such a conclusion. Of course, if the Union Pacific Railway Company is not exempt from the operation of this Act, no other company is.

Again, it is insisted, that the Act is obnoxious to the charge of denying to the railroads the equal protection of the laws, secured to them by the 14th Amendment to the Constitution of the United States, and this because all the roads in the state are not subject to its provisions. Section 4 is relied on to sustain this charge:

"All railroads, or parts thereof, which have been built in this state since the first day of January, 1889, or may be built before the thirty-first day of December, 1899, shall be exempt from the provisions of this act until the thirty-first day of December, 1899."

The right to classify is conceded, but it is said that this classification is arbitrary, and depends upon no fair and reasonable difference. Attention is called to the fact that since January 1, 1889, the Rock Island Company has built a road from Omaha to Lincoln, which is a part of its main line from Chicago to Denver; that in all of its business the Rock Island is in active competition with the several companies whose roads are subject to the provisions of this act; and that it is an unreasonable, unjust discrimination to exempt the Rock Island Company from like subjection. I cannot concur in these views. The principle of classification adopted by the legislature, whether wise or unwise, is within its power. To divide railroads into two classes, placing in the one all that have been constructed and in operation for a length of time, and whose business must therefore be presumed to have been thoroughly established, and in the other all only recently constructed, is clearly not a mere arbitrary distinction; and this notwithstanding it may be that one of the recently constructed roads is so fortunate as to have immediately secured a large business. The "protection of infant industries" is a term of frequent use in the political discussions and history of this country; and to rule that a classification based upon such principle is purely arbitrary, and

therefore unconstitutional, would certainly be a judicial novelty.

Again, it is insisted that this act interferes with interstate commerce, in two ways: First, it establishes a classification of freights different from that which prevails west of Chicago; and, in the second place, by reducing local rates, it necessarily reduces the rates on interstate business. Neither of these objections seems to me to be well taken. In the first place, the classification of freights by the railroads is a purely voluntary act, not compelled by any statute, and not uniform throughout the country. There is one system which prevails east of Chicago, and one west. It might be more convenient if the classification established by this act harmonized with that adopted by the railroad companies doing business west of Chicago; but surely the voluntary act of the railroad companies, in establishing a uniform classification for certain territory, can work no limitation on the power of the state to establish a different classification. To say, for instance, that because the railroad companies have voluntarily placed flour in a certain class, on which a specified rate is to be charged, such voluntary act of mere classification destroys the power of the state to establish a classification which puts flour in another class, and subject to another rate, is, to my mind, a most extravagant pretention. Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the state does not work a change in interstate rates, any more than an Act of Congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own inconvenience, or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state.

It is further insisted by defendants that this court has no jurisdiction over these actions—First, because, in the act itself, an adequate legal remedy is provided, by petition to the supreme court of the state, and courts of equity may not interfere when adequate legal remedies are provided; secondly, because the rates are prescribed by a direct act of the legislature, and not fixed by any commission. I am unable to assent to either of these contentions. The remedy referred to is found in section 5, which authorizes any railroad company, believing the rates prescribed to be unreasonable and unjust, to bring an action in the supreme court of the state, and if that court is satisfied that the rates are, as claimed, unjust and unreasonable to such company, it may make an order directing the board of transportation to permit the railroad to raise its rates to any sum, in the discretion of the board, provided that the rates so raised shall not be higher than were those charged by such railroad on the 1st day of January, 1893. But this comes very far short of being an adequate legal remedy. Suppose, in such an action, the opinion of the Supreme Court is that the rates are unjust and

unreasonable. There is no judgment of that court raising the rates, but only giving to the board of transportation a discretion. There is no final judgment relieving the company from the burden of the rates fixed by the act. It only opens the door to action by the board of transportation. Surely, a judgment or decree giving permission to do justice is not securing justice. It might as well be argued that giving to the executive power to pardon one convicted of crime is an adequate legal remedy for the correction of errors committed on the trial. An adequate legal remedy is one which secures, absolutely and of right, to the injured party, relief from the wrong done. But, even if it were a full and complete legal remedy, it is one which can be secured only in a single court, and that a court of the state. And, as was held in the case of *Reagan v. Farmers Loan & T. Co.* (No. 1) 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, it is not within the power of the state to tie up citizens of other states to the courts of that state for the redress of their rights, and for protection against wrong. The laws of Congress, passed under authority of the Constitution of the United States, open the doors of the Federal courts to citizens of other states to suits and actions for the prevention or redress of wrong, and the state cannot close those doors. Whatever effect such legislation may have upon the courts of the state, the courts of the United States are as open now as they were before to actions for the protection of citizens of other states in their property rights within the state of Nebraska; and the fact that the rates are absolutely prescribed by direct act of the legislature, instead of being created by the commission appointed by the state, is immaterial. The commission is but one agency of the state. The substantial question is whether the rates, as prescribed, work a wrong or injury to the property rights of the citizens of other states. I quote, in support of these propositions, these words from the case last cited:

"A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the Federal courts. *Mercer County Suprs. v. Coules*, 74 U. S. 7 Wall. 118, 19 L. ed. 86; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. ed. 766; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. ed. 546. . . . The equal protection of the laws, which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or de-

struction of any private property, legally acquired and legally held."

There can be no doubt of the jurisdiction of this court in actions like these, and its duty to protect the property rights of the plaintiffs against any wrongful invasion thereof by the state through legislation in any form.

But the grave question still remains, are the rates prescribed in this act, as the maximum over which the railroad companies may not go, unreasonable, and so unreasonable as to justify the courts in staying its operation? No more difficult problem can be presented than this. There are so many matters which enter into it, and which must be taken into consideration, before a satisfactory answer can be reached. I think it may assist to a true understanding of the scope of this question, and the various considerations which must enter into it, if we notice how, as a matter of history, the situation and the question have arisen. So far as the mere question of power is concerned, the transportation of persons and property is, equally with the carrying of letters and papers, a legitimate function of government. By reason of this, private corporations, acting as common carriers, are given the right to exercise the governmental power of eminent domain, and thus against the will of the owner, to take his property for their public or quasi public uses. But in the history of this country the carrying of papers and letters was assumed by the government, and the transportation of persons and property left to private persons. In other words, the people chose to manage the carrying of the correspondence of the country, and to leave the matter of transportation to individuals. With the wisdom of this the courts have no concern. I simply notice the fact. But in consequence of this the carrying of letters and papers by strictly governmental agencies became what may be fairly called a system, while the transportation of persons and property by private individuals and corporations became a business. In the one there was a simple classification and a uniform rate, and the system was extended wherever population went, and so far as possible to supply all the needs of all parts of the country in the way of transmission of news and letters. Whether in the carrying out of this system, at the end of each year, there was a profit or not, was immaterial. It was something which the people of the whole country were doing for the joint and equal benefit of all, and if the expenses exceeded the revenues the common treasury paid the deficiency. Gain, profit, revenue, are in no sense the object of the post-office. There is no effort to increase the number of letters or papers by special inducements, with a view of building up an increased business in one place or another, or in one direction or another. With uniform rates and equal facilities, all persons and places are served, and the system is improved, and the facilities for carrying and distribution are multiplied and bettered, as extensively and as rapidly as Congress, in its judgment, deems for the best interests of the whole people. No citizen in any town or city can get special rates for the carrying of his correspondence. No one can be favored in the promptness with which his correspondence is carried, or the

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kind of service which is rendered. The thought and purpose of the postoffice is equal service to all, and uniform rates. On the other hand, as the government did not undertake the matter of transportation, it became a business carried on by individuals and corporations, and carried on, as other business, with a view to private gain, according to the judgment of those engaged therein. No effort was made by the government, representing the public, to stay private investment in this business. On the contrary, the whole tenor of legislation was to encourage such investment, and thus to multiply the facilities and agencies of transportation, until now it is estimated that ten billions of dollars are invested in railroad transportation alone. It is unnecessary to stop here to inquire whether this investment was not largely in excess of the needs of the country, and unwisely made. It is enough to know that it has been made, with the acquiescence, if not with the active encouragement, of the public. Now, in the carrying on of any private enterprise, increase of business with increase of profits is a stimulating thought, and for this very variety of action is taken. Advertisement, solicitation, inducement, favors, are all freely resorted to, but with the single purpose of larger business and greater gain. It is not strange that in the carrying on of transportation all the characteristics of other kinds of business are found. Indeed, that is often given as one of the reasons for continuing the present methods in respect to transportation, and a matter in eulogy thereof. As evidence of this, I need do no more than quote this from the brief of counsel for the plaintiffs: "Take the case of the beet-sugar factory at Grand Island. Nebraska sugar must be sold in the Chicago market, for instance, in competition with Cuba, Louisiana, and Sandwich Island sugar. If a higher price be asked for Nebraska sugar than for sugar from other regions, it will not find a buyer. But the production costs about the same in Nebraska as in Cuba, Louisiana, and the Sandwich Islands. High railroad rates will shut it out of Chicago. Low rates must be given. Accordingly, the road is compelled, by the necessities of the situation, whether it will or not, to give them. Its own interests force it to do so. But that is not all. When the enterprise is in its infancy, cost of production is greater than elsewhere. Accordingly, the road must make rates so low as to cover this excess of the manufacturer's cost; sometimes so low as to wipe out all the road's profit: sometimes below what the transportation costs the road. Of course, the road cannot always do this, nor can it do it on all its business. It justifies the irregularity in the exceptional case by the promise of paying business in the future. If helped at first, the new industry, by and by, will give the road a large business, and make up all concessions. The present loss is borne in hope of future gains. This is the way all commercial enterprises are carried on. He is most successful who acts on this principle with the best judgment. It is a general law of business."

The beet-sugar factory referred to in the above quotation furnishes a clear illustration of the difference between the postoffice system

and the transportation business. When the proprietor thought of locating that factory, the cost of correspondence was not considered, in determining the question of location, while that of transportation was the principal factor. Not only that; it was an uncertain factor. There was no schedule—no tariff—by which he could, at a glance, determine what the rates of transportation would be from one place or another to the market which he must reach. It became, therefore, a matter of negotiation—of contract—with the transportation companies; and, as stated by counsel, the negotiations resulted in rates at first cheaper than the cost of transportation, with the expectation of rates enlarged in the future, or that the loss on that transportation would be made up by extra charges on other transportation. Now, it may be for the interest of Nebraska that the beet-sugar industry be developed in that state, and that transportation elsewhere shall be temporarily burdened in order to accomplish this development; or, it may be better for the country at large, and thus for Nebraska, as a part of that country, that the cost of transportation everywhere be as fixed and certain as the cost of correspondence. But whether the one system or the other be the better is not for judicial consideration, for it is a mere matter of policy, involving, necessarily, no question of the rights of person nor property.

It is obvious that, in the matter of transportation, we are in an experimental or transitional stage. At first, transportation was a mere private business, and managed as such. Now, there is a growing conviction that the best interests of the people will be subserved by changing it from a business to a system. I say "experimental or transitional," for experience may satisfy that the change is not wise, and that it is better to continue transportation as a business; leaving to the interest of those engaged therein to determine how it shall be managed, and giving to them the power to build up, as counsel has suggested, industries and towns here and there. In such case the present would be only an experimental stage. Or it may be that experience will only make more imperative the present demand that transportation shall be a system, with absolute certainty and uniformity of rates, in which case the change will be made, and this will be regarded as the transitional era. The transition may be accomplished by the government taking possession of transportation, and itself discharging that public duty. Certainly that would be the simplest, and—for the courts, at least—the easiest solution of the problem which now impends; for by purchase or condemnation, and in a single transaction, the state, paying simply the actual value of the property invested in transportation, would have the same control over it that the national government has over the post-office system, and could prescribe such rates as it saw fit, making good by general taxation any loss. But, as ten billions of dollars are invested in the business of railroad transportation, the public may be reluctant to incur such indebtedness, and seek to accomplish the same result of uniformity of rates by means of legislation similar to that before us. In

other words, leaving the property in the hands of the present owners, uniformity of rates is sought to be secured by compulsory legislation. Here comes in the embarrassment of present conditions. Property invested in railroads is as much protected from public appropriation as any other. If taken for public uses, its value must be paid for. Constitutional guaranties, to this extent, are explicit; and in such condemnation proceedings no inquiry is permitted as to how the owners have acquired the property, provided only it be legally held by them. If a farm belongs to an individual, and the public seeks to take it, it must pay its value, and is not permitted to diminish the price by proving the owner acquired the means of purchase by immoral or disreputable practices. He may have made his fortune dealing in slaves, as a lobbyist, or in any other way obnoxious to public condemnation; but, if he has acquired the legal title to the property, he is protected in its possession, and cannot be disturbed until the receipt of its actual cash value. The same rule controls if railroad property is sought to be appropriated. No inquiry is open as to whether the owner has received gifts from state or individuals, or whether he has, as owner, managed the property well or ill, or so as to acquire a large fortune therefrom. It is enough that he owns the property,—has the legal title; and, so owning, he must be paid the actual value of that property. If he has done any wrong in acquiring or using the property, that wrong must be redressed in a direct action therefor, and cannot be made a factor in condemnation proceedings. These propositions in respect to condemnation proceedings are so well settled that no one ever questions them. The same general ideas must enter into and control legislation of the kind before us. The value of the property cannot be destroyed by legislation depriving the owner of adequate compensation. The power which the legislature has is only to prescribe reasonable rates, not any rates. The language of the constitution of Nebraska in respect to the matter is (Const. 1875, art. 11, § 4) "And the legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state." But the foundation of the idea of reasonableness is justice. That which is unjust cannot be reasonable, and, when the strong arm of the legislature is laid upon property invested in railroad transportation, it must be so laid as to do justice to such investors. There can be no justice in that which works to such investors a practical destruction of their property thus invested. It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere, and put to use at other places, and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value. The

authorities on these general propositions are collected in the opinion in the recent case of *Reagan v. Farmers Loan & T. Co.*, 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, and I need not do more than refer to that case.

What is the test by which the reasonableness of rates is determined? This is not yet fully settled. Indeed, it is doubtful whether any single rule can be laid down, applicable to all cases. If it be said that the rates must be such as to secure to the owners a reasonable per cent on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property,—injurious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These and many other things, as is well known, are factors which have largely entered into the investments with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which would have to pay. In like manner, it may be argued that, when the legislature assumes the right to reduce rates, the rates so reduced cannot be adjudged unreasonable if, under them, there is earned by the railroad company a fair interest on the actual value of the property. It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts. In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond account, or the cost of construction, and that the present value of the property is not accurately represented by either the stocks and bonds, or the original construction account. Nevertheless, the amount of money that has gone into the railroad property—the actual investment, as expressed, theoretically, at least, by the amount of stock and bonds—is not to be ignored, even though such sum is far in excess of the present value. It was said in the case of *Reagan v. Farmers Loan & T. Co.* 154 U. S. 412, 38 L. ed. 1028, 4 Inters. Com. Rep. 574:

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible, without prejudice to the rights of others."

It is not always reasonable to cast the entire burden of the depreciation on those who have invested their money in railroads. Take the Union Pacific Railway, for illustration. At the time the government created the corporation, to induce the building of this transcontinental road through a largely unoccupied territory, it loaned to the company \$16,000 a mile; taking as security therefor a second

lien on the property, and granting to the corporation the right to create a prior lien to an equal amount, which was done. There is testimony tending to show that the road in Nebraska could be built to-day for \$20,000 a mile. Would it be full justice to the government, would it satisfy the common sense of right and wrong, would it be reasonable, for the state of Nebraska to so reduce the rates that the earnings of the road would only pay ordinary interest on \$20,000 a mile, and so, the holders of the first lien being paid their interest, the government be forced to be content with only interest on one fourth of its investment? Or, to put the case in a little stronger light, suppose the promoter of this enterprise had been some private citizen, who had advanced his \$16,000 a mile as a second lien, and that the road could be constructed to-day for only \$16,000 a mile. Would it be reasonable and just to so reduce rates as to simply pay to the holders of the first lien reasonable interest, and leave him without recompense for his investment? Is there not an element of equity which puts the reduction of rates in a different attitude from the absolute taking of the property by virtue of eminent domain? In the latter case, while only the value is paid, yet that value is actually paid, and the owners may reinvest, and take the chances of gain elsewhere, whereas, if the property is not taken, the owners have no other recourse than to receive the sum which the property they must continue to own will earn under the reduced rates. Considerations such as these compel me to say that I think there is no hard and fast test which can be laid down to determine in all cases whether the rates prescribed by the legislature are just and reasonable, and that often many factors enter into the determination of the problem. Obviously, however, the effect of the reduction upon the earnings is the first and principal matter to be considered. This is a matter of computation. The power of regulating railroads is often said to be a legislative power vested in the lawmaking body, to be exercised for the general welfare. Within the term "regulation" are embraced two ideas: One is the mere control of the operation of the roads, prescribing the rules for the management thereof,—matters which affect the convenience of the public in their use. Regulation, in this sense, may be considered as purely public in its character, and in no manner trespassing upon the rights of the owners of railroads. But within the scope of the word "regulation," as commonly used, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof; and when regulation in this sense, is attempted, it necessarily affects the property interests of the railroad owners; and it is "regulation," in this sense of the term, that we are to consider in the present cases.

There are certain matters which embarrass these cases, and render all computations more than ordinarily difficult. One is this: The various companies are doing an interstate as well as a local business. If these roads were wholly within the state, and only local business done by them, the computation would be much simplified, and the effect of the reduction in rates upon the property more easily disclosed.

But all of these roads are interstate roads, and a large portion of their business is interstate business. Some of it is local business in other states than Nebraska. Now, it will not do to look simply at the gross earnings, and, because the reduction therein made by the enforcement of this statute still leaves enough to pay reasonable compensation to the owners of the property, uphold the act, because, if the legislature of Nebraska can put in force this tariff for local business, the legislatures of other states through which these roads run, and the Congress of the United States, may make corresponding reductions in the rates on all other business, local and interstate, and the aggregate of such reductions might entirely destroy all earning capacity from the property.

Another matter to be noticed is this: There is in this act no interference with the passenger tariff, but only a maximum for freight rates. So we cannot place all the local expenses over against all the local receipts, and draw our conclusions therefrom. We have an attempt by the legislature to prescribe a maximum tariff for only the transportation of freight within the limits of Nebraska, and are called upon to determine whether the rates so fixed are unreasonable, and afford no fair compensation to those who have invested their means in

these railroad properties. In order to determine this, we must ascertain what it costs to carry this local freight, what the receipts have been therefrom, and what reduction will be made in such receipts by the application of this act, and then we must take such proportion of the gross investment in the roads as the present earnings from local freights bear to the total earnings of the road. From these computations, we may see whether the reduction made by this act in the local freights, if applied to all the company's business, would leave any compensation to the owners, and, if so, how much. Obviously, the problem thus presented is one of exceeding difficulty. Fortunately, we have in Mr. Dilworth, the secretary of the state board of transportation, one of the defendants' witnesses, a gentleman whose competency and credibility are unchallenged. In the computations which I have made, I have relied mainly on his figures. From the labyrinth of tables, figures, and estimates presented in the testimony, and discussed by counsel in their briefs and arguments, let me take these two tables, presented by Mr. Dilworth, which seem to lay the basis for some fair calculations as to the effect of this act upon the business of the various companies:

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EXHIBIT 20.

Tons Carried, Tonnage per Mile and Percentage of Expenses for Years ending June 30, 1891, 1892, 1893. (Nebraska.)

1891.

	No. of Tons Carried Locally.	No. Tons of Interstate Freight Carried.	No. Tons of local Freight Carried 1 Mile.	No. of Tons of Interstate Freight Carried 1 Mile.	Total No. of Tons, local and Interstate, Carried 1 Mile.	No. of Passengers, Local and Interstate, Carried 1 Mile.	Percentage of Expenses to Earnings.
Burlington & Missouri R. R. in Neb.	598,824	1,448,239	73,075,310	196,415,992	269,491,272	69,594,747	66.24
Chicago, St. Paul, Minn. & Omaha.	64,496	228,671	10,267,118	38,897,629	46,664,747	7,403,268	70.78
Fremont, Elkhorn & Missouri Valley.	141,056	654,400	21,863,680	101,644,999	123,508,679	24,898,739	49.37
Union Pacific Railway.	152,028	1,908,845	28,906,124	362,966,694	391,874,818	66,072,597	63.94
Omaha & Republican Valley.	61,448	409,270	4,507,104	30,499,041	35,078,145	10,295,187	120.26
St. Joseph & Grand Island.	25,078	178,169	1,497,658	10,640,979	12,188,637	2,308,918	96.44
Kansas City & Omaha.	8,743	78,694	403,751	3,634,082	4,037,833	912,210	98.54

1892.

Burlington & Missouri R. R. in Neb.	574,658	1,996,437	91,139,965	316,552,193	407,692,158	70,088,243	64.23
Chicago, St. Paul, Minn. & Omaha.	65,762	264,408	11,038,287	44,321,884	55,360,171	8,838,405	65.98
Fremont, Elkhorn & Missouri Valley.	158,350	846,312	24,639,200	128,425,903	152,495,103	21,874,987	70.71
Union Pacific Railway.	192,865	1,882,112	42,970,322	419,300,773	462,271,095	56,926,269	56.44
Omaha & Republican Valley.	63,999	628,351	4,659,127	45,745,647	50,404,774	10,058,442	98.12
St. Joseph & Grand Island.	39,657	303,550	2,005,851	15,355,015	17,360,866	2,472,588	74.28
Kansas City & Omaha.	10,823	194,089	431,515	8,685,016	9,116,531	1,664,080	75.19

1893.

Burlington & Missouri R. R. in Neb.	538,294	2,221,005	93,798,675	337,131,758	450,925,428	83,091,418	65.51
Chicago, St. Paul, Minn. & Omaha.	78,753	279,218	12,848,551	45,554,417	58,402,968	9,074,098	64.58
Fremont, Elkhorn & Missouri Valley.	197,804	800,158	26,855,972	114,511,328	141,367,300	23,209,212	55.66
Union Pacific Railway.	220,061	2,068,568	45,948,786	431,949,561	477,898,297	68,422,117	58.51
Omaha & Republican Valley.	68,287	688,668	4,257,988	42,706,297	46,964,285	11,028,191	94.14
St. Joseph & Grand Island.	60,452	337,647	2,774,860	18,576,845	21,351,705	2,834,169	62.05
Kansas City & Omaha.	15,484	205,725	656,584	8,750,196	9,406,660	875,415	76.50

DEFENDANTS' EXHIBIT 4.

Estimate of Local Business and the Effect of House Roll 83 on the Following Named Railroads.

	Number of Tons Hauled Locally.	Average Amount Re- ceived for Each Ton Hauled.	Total Amount Received for Tons Hauled Lo- cally.	Total Amount of Reduc- tion Caused by H. R. 33.	Amount Re- ceived from Passenger Business.	Amount Re- ceived for Freight Hauled in Nebraska, Including Through and Local.	Total Amount Realized on All Business Done in the State.	Per Cent of Reduction on all Busi- ness Done in the State by H. R. 33.
Burlington & Missouri R. R. in Neb.	574,653	\$2,154.16	\$1,237,884	\$365,175	\$2,380,714	\$5,538,766	\$7,908,242	.044
Chicago, St. Paul, Minn. & Omaha	65,762	1,870.89	123,033	36,294	263,458	472,051	763,509	.047
Freemont, Elkhorn & Missouri Valley	158,350	2,125.33	336,714	99,310	598,219	1,493,468	2,063,687	.047
Union Pacific Railway Valley	192,865	2,064.98	398,262	117,487	977,264	4,284,793	5,262,057	.022
Omaha & Republican Valley	63,960	1,380.95	88,335	26,043	305,668	953,623	1,261,294	.022
St. Joseph & Grand Island	39,657	.690.51	31,004	8,836	71,083	216,395	287,478	.030
Kansas City & Omaha	10,823	.612.01	6,630	1,889	41,123	125,530	166,653	.011

receipts which would have resulted if the rates prescribed by the House Roll 83 had been in force during that year. In Exhibit 20 is found the percentage of expenses to earnings upon the business of those companies. Obviously, the cost of transportation would be the same whether the companies received the prices which they did in fact receive, or the reduced rates prescribed by House Roll 83. If the cost of hauling local freight was the same as that of the other business done by the roads, in order to ascertain what amount the companies earned from local freight, it would be necessary to multiply the gross receipts by the percentage of expenses to earnings. This would show the amount that it cost to carry that freight, and the difference between that cost and the receipts would be the amount of the net earnings. From such net earnings subtract the amount of reduction caused by House Roll 83, and the result will show whether, under such rates, the companies would have earned anything from local freight, and, if so, how much. Making this computation, and placing the results in a table, and we have the following:

Exhibit 4 shows the amount actually received for business within the state during the year ending June 30, 1892, by the various roads whose interests are in controversy in these cases; also, the amount of reduction in those

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	Gross Receipts, or Total Amount Received for Tons Hauled Locally.	Percentage of Expenses to Earnings.	Cost of Hauling Local Freight.	Net Earnings from Local Freight.	Total Amount of Reduction caused by H. R. 83.	Net Earnings, if Rates Prescribed by H. R. 83 had been in Force.	Deficiency by Same Cause.
Burlington & Missouri R. R. in Neb.	\$1,257,884	64.23	\$759,082	\$442,762	\$385,175	\$77,617	—
Chicago, St. Paul, Minn. & Omaha.	123,063	65.96	81,152	41,881	36,204	6,587	—
Fremont, Elkhorn & Missouri Valley.	336,714	70.71	238,090	98,624	99,310	—	\$686
Union Pacific Railway.	398,363	56.44	224,779	173,486	117,487	55,998	—
Omaha & Republican Valley.	83,385	93.12	82,257	6,078	23,043	—	\$19,865
St. Joseph & Grand Island.	31,004	74.23	23,014	7,990	8,886	—	846
Kansas City & Omaha.	6,680	75.19	4,965	1,645	1,890	—	244

From this table it will be seen that if, during that year, these companies had been limited in their charges to the rates prescribed by this act, four of them, to wit, the Fremont, Elkhorn & Missouri Valley, the Omaha & Republican Valley, the St. Joseph & Grand Island, and the Kansas City & Omaha, would not

only have received nothing by way of earnings, but would actually have been carrying the freight at a loss. The three other roads would have made, respectively, net earnings of \$77,617, \$5587, and \$55,998. This is upon the assumption that the cost of carrying local freight is the same as that of carrying through freight, and hence that, applying the general per cent of expenses, enables us to determine accurately the earnings from local freight. But the testimony shows that the cost of carrying the local freight is largely in excess of the cost of other business. The exact per cent of such excess is not disclosed. It may, perhaps, be difficult to determine it accurately. Mr. Fink, a witness for the plaintiffs,—a gentleman of large experience in railroad transportation, and of national reputation as an authority in such matters,—says that the cost of carrying local freight is four times that of carrying through freight; Mr. Utt, another witness for the plaintiffs, who is the commissioner employed by the Commercial Club, of Omaha, to look after railroad transportation matters affecting the business of the city, testifies that the one costs six times as much as the other; while Mr. Dilworth, the secretary of the defendant board, and their principal witness on matters of this kind, also says that it cost more to do local than through business; that the percentage of operating expenses on the local business would exceed the percentage on all business probably 10 per cent and might run up to 20 per cent,—possibly might be higher than that. Of course this testimony is not like that which we have heretofore been examining, where the figures and per cents are accurate and certain, but is largely in the way of estimate. And yet it is clear from the testimony that the per cent of expenses for carrying local freight is considerably above the total per cent of operating expenses. Now turning to the last table, it will be seen that, if the cost of carrying local freight was 7 per cent more than the general per cent of expenses, the Burlington & Missouri River Company would, under the reduction caused by House Roll 83, have earned nothing from the transportation of local freight; if only 5 per cent, the Chicago, St. Paul, Minneapolis & Omaha road would likewise have earned nothing from that source; and, similarly, the Union Pacific Railway, if the per cent was 14.1 per cent. It is difficult to resist the conviction that if the rates prescribed by House Roll 83 had been in force during the year ending June 30, 1892, not a single one of these roads would have earned a dollar from the transportation of local freight. It is true that Exhibit 4 shows the effect of the reduction caused by House Roll 83 only for the business of a single year,—that ending June 30, 1892; but a comparison of the business in 1891 and 1893 with that for 1892, as found in the Exhibit 20, shows an average per cent of expenses less in 1892 than in either of the other years. So that evidently the year 1892 was selected by the board of transportation for the making of its table. Exhibit 4, as the most favorable. But light upon this legislation is further thrown by another table prepared by defendant, as follows:

DEFENDANTS' EXHIBIT 23.

Statement Showing Mileage, Capital Stock, and Funded Debt of the Following Named Railroads for the Year Ending June 30, 1892.

	Entire Mileage.	Capital Stock.	Funded Debt.	Total.	Capital Stock per Mile.	Funded Debt per Mile.	Total per Mile.
C. R. & O.	5290	\$75,297,400	\$116,590,980	\$192,978,380	\$14.09	\$22.024	\$36.473
C. St. P. M. & O.	1356	34,060,128	23,742,800	57,802,928	55.103	17.504	72.608
F. E. & M. V.	1300	30,370,000	21,110,000	51,480,000	23.352	16.238	39.590
L. P. R. V.	1896	60,868,500	123,734,397	184,602,897	93.316	70.468	163.786
O. & N. W.	482	2,430,550	8,391,550	10,822,100	17.343	17.343	34.686
St. J. & G. L.	251	4,600,000	8,721,408	13,321,408	18.332	34.763	53.090
K. C. & O.	193	4,410,000	2,715,000	7,125,000	22.760	14.007	36.767

Take the Union Pacific Railway, whose net earnings for local freight seem greater than those of any other company, and by this last table it appears to be bonded for \$70,468 per mile. The total mileage of that road within the state is 467 miles; so that, if the bonded incumbrance were distributed according to mileage, the burden resting upon the part of the road within the state of Nebraska would be \$32,908,556. Six per cent interest on this (the amount allowed by Act of Congress incorporating the company, and which is the rate on the original mortgages, at least) is \$1,974,513,

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or the amount to be paid out of the earnings of the road before the stockholders are entitled to any dividends. From Exhibit 4 it appears that the receipts for all business done in the state was \$5,262,057; for hauling local freight, \$398,262, or about $7\frac{1}{2}$ per cent of the gross receipts. Local freight, therefore, should earn $7\frac{1}{2}$ per cent of the amount necessary to pay the interest on the bonded indebtedness resting on the lines in the state. Seven and one half per cent on \$1,974,513 is \$148,088. But the net earnings for local freight that year were \$173,483, showing that there was only about \$25,000 earned from local freight, to be distributed among the stockholders; and this upon the assumption, in the face of the testimony to the contrary, that the cost of carrying local freight is exactly determined by the general per cent of expenses to earnings. By the same table it appears that if the rates prescribed by House Roll 33 had been in force the earnings from local freight, upon like assumption, would have been \$55,996, or but little more than one third of the amount necessary to pay the portion of the interest on the bonds properly chargeable to local freight. If it be said that it is not a fair apportionment of the bonded indebtedness, to distribute it by the mileage, because the cost of construction in the mountainous part of the road, west of Nebraska, was much greater than such cost within the limits of the state, and if it be said that the cost of material and labor at the time of construction was far in excess of the present cost, and that there was extravagance, if not corruption, in carrying on the work of construction (all of which is undoubtedly true) it is also true that the Act of Congress under which the company was chartered and the road constructed provided for the issue by government to the company of bonds to the amount of \$16,000 a mile within the limits of the state of Nebraska, to be a second lien, and with power in the company to execute a prior mortgage for a like amount. Congress, therefore, in the inception of the work, made specific provision for an indebtedness of \$32,000 per mile on the road within the limits of the state. In order to meet its share of the interest on such indebtedness, the local freight should have earned \$67,248, or about \$12,000 more than would have been earned under House Roll 33. Again, there is a volume of testimony as to what it would cost to reproduce these various roads; such amount, being, as claimed, a fair test of the present value. I shall not—now, at least—attempt to make any comparison of this testimony, but, for present purposes, content myself with taking this concession from the brief of the defendants' counsel:

"There is sufficient testimony in this record to justify the conclusion that the average cost of reproduction or value of the roads in the state of Nebraska does not exceed \$20,000 per mile, including right of way, railway tracks, equipment, station houses, telegraph lines, and terminal properties."

The present value of the Union Pacific Railway property in the state, at the sum named in this concession, would be \$9,840,000. To pay 6 per cent on this conceded value would require, as its contribution to the earnings from the local freight, \$42,080. Or, in other

words, upon the conceded value, the local freight earnings, as reduced by House Roll 33, would have paid but their proportionate share of 8 per cent interest. If a proportionate reduction in rates was made by other states and by Congress (and, of course, such a reduction would be equally within their power) so that the total net earnings of the road would be but 8 per cent on this conceded value, obviously only the holders of the first lien would receive full interest on their indebtedness, while the holders of subordinate liens would receive but a fraction thereof. All the stockholders would go without compensation, and soon their investment would be swept away by foreclosure proceedings. Take the same process of computation, and apply it to the only other company which would have any amount of earnings under the reduction caused by House Roll 33, to wit, the Burlington & Missouri River Railroad in Nebraska. Beyond the statement in Exhibit 23 of the capital stock and funded debt per mile of the Chicago, Burlington & Quincy Company, which owns and operates the Burlington & Missouri River Railroad, we have, from the testimony of its auditor, the exact amount of mortgage indebtedness resting upon the road within the limits of the state, and the amount of interest charges due therefrom, to wit, an indebtedness of \$45,268,992.80, and interest charges for the year 1892, \$2,224,171.17. The amount received for local freight was about 16 per cent of the total amount realized on all business done in the state, as appears from Exhibit 4. Sixteen per cent, therefore, of this interest, should have been earned by the local freight. Sixteen per cent is \$355,867. But the table shows that the net earnings therefrom, under the rates prescribed by House Roll 33, for that year, would have been only \$77,617,—not a fourth of the amount which it should contribute to the payment of such interest. But, again, as Mr. Dilworth testified, the average reduction on local rates caused by House Roll 33 is 29½ per cent. The tariff which was in force at the time of the passage of this act had been for some three or more years fixed by the voluntary action of the railroad companies, and the reduction of 29½ per cent was from its rates. It must be remembered that these roads are competing roads; that competition tends to a reduction of rates, sometimes, as the history of the country has shown, below that which affords any remuneration to those who own the property. Can it be possible that any business so carried on can suffer a reduction of 29½ per cent in its receipts without ruin? What would any business man, engaged in any business of a private character, think of a compulsory reduction of his receipts to the amount of 29½ per cent? The effect of this testimony is not destroyed by the table offered of the percentage of reduction on the total amount of business done by these companies in the state, as follows:

B. & M. R.	4.2%
C. St. P. M. & O.	4.5%
F., E. & M. V.	4.1%
U. P.	2.0%
O. & R. V.	1.9%
St. J. & G. I.	2.7%
K. C. & O.	1.5%

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For such a table indicates, as is further shown by defendant's Exhibit 4, how small a proportion of the total amount of business done in the state comes from purely local freight. Nor is it weakened by any comparison between the amount of reduction and the total receipts from all business. It may be, as stated by counsel, that the annual earnings of the Chicago, Burlington & Quincy Company are \$27,916,128, and that the total amount of reduction caused by this House Roll 33 is only \$365,175. It may be that the capital stock of the company is \$76,407,500, and that \$365,175, distributed among the stockholders may not be, for any of them, a great sum; but the entire earnings of the Chicago, Burlington and Quincy are more than 20 times the receipts from local freight in Nebraska, and to reduce such earnings by 20 times \$365,175 would make a startling difference in their amount. The fact that the state of Nebraska can reach only one-twentieth of the total earnings gives it no greater right to make a reduction in respect to that one twentieth than it would have, had it the power over the total earnings, and attempted in them a like per cent reduction. If it would be unreasonable to reduce the total earnings of these roads 29½ per cent, it is *prima facie*, at least, equally unreasonable to so reduce any single fractional part of such earnings.

It is, however, urged by the defendants that, in the general tariffs of these companies, there is an inequality; that the rates in Nebraska are higher than those in adjoining states; and that the reduction by House Roll 33 simply establishes an equality between Nebraska and the other states through which the roads run. The question is asked, are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively, they are. That is, the roads may not discriminate against the people of any one state. But not necessarily absolutely as cheap, for the kind and amount of business, and the cost thereof, are factors which determine largely the question of rates, and these vary in the several states. The volume of business in one state may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both states might result in one in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states, are of little value, unless all of the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 per cent higher than similar rates in the state of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 280 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two states is of comparatively little significance.

Another matter must be noticed. As heretofore stated, the year 1892, upon which the estimates given by Mr. Dilworth are made, seems to have been the most favorable of the three years in respect to which figures are

given. In addition to the inference drawn from these tables, the testimony of witnesses shows that that year was one of the most prosperous years for railroad business in quite a length of time. Now, it is one of the difficulties of this case that no provision is made for the varying conditions of business in different years and parts of years. Maximum rates are prescribed, above which the roads may not go, no matter what unforeseen events may affect the amount of business which they are doing. Indeed, since the argument of these cases, the railroad business in the West suffered a most serious prostration, growing out of the fearful strikes in the month of July. A statutory and fixed tariff, like the one before us, has no provisions for such contingencies as that. The loss is cast absolutely and wholly upon those who have invested their money in railroad business. In short, it deprives these property owners of all chances to make profit which result from private control of business, and compels them to pay out of their pockets all the losses which result from the enforcement of an absolute system.

I might prolong this opinion, and notice many other matters which have been referred to by counsel. I have done a great deal of work in computations,—work which is properly the duty of a special master, but which I have done in order to satisfy myself as to the effect of this reduction of rates on the business of these railroads. I have not attempted to introduce all of these computations into this

opinion. It is long enough as it is. The computations and tables which I have placed indicate the lines of inquiry which have seemed to me most satisfactory. The conclusion to which I have come is that, having regard to the present condition of affairs in the state, the present volume of business done over these roads, and any probabilities of an early change in that volume, a reduction of 29½ per cent in the rates of local freight is unjust and unreasonable to those who have invested their money in these railroad properties. I appreciate fully the embarrassments and difficulties attending an investigation of this kind. I am reluctant, as every judge should be, to interfere with the deliberate judgment of the legislature. I have taken much time to study this case in all its relations, and have come, though reluctantly, to the conclusion I have stated, and am therefore constrained to order decrees in behalf of the plaintiffs, staying the enforcement of this tariff upon the companies named in the bills. It may be said that, even if furnishing no reasonable remuneration to-day, the result might be different under an increase of business. That, of course, is possible; and it may be that, as the volume of business increases, the time will come when the rates fixed by this House Roll 33 will be reasonable and just. So there should be entered, as a proviso to the decrees, that leave is reserved to the defendants, at any time that they are so advised, to move the court for a reinvestigation of the question of the reasonableness of these rates.

UNITED STATES CIRCUIT COURT, DISTRICT OF MINNESOTA.

Re C. H. SCHECHTER.

(Minn.)

1. A state statute requiring every person who sells nursery stock grown without the state, to file an affidavit with the secretary of state and a bond of \$2000, and exhibit to every purchaser a certificate of compliance from the secretary of state, is invalid as imposing an obstruction to, and regulating Interstate commerce.
2. A state statute requiring every person selling nursery stock grown in another state to file with

the secretary of state an affidavit and bond of \$2000, and exhibit to every purchaser a certificate from the secretary, is unconstitutional as depriving citizens of other states dealing in a sound article of commerce produced therein of the valuable privilege and immunity enjoyed by the citizens of the state that every person shall be presumed to be honest and innocent of wrong.

Decided October 13, 1894.

PETITION for a writ of habeas corpus to procure the release of petitioner from custody to which he had been committed for alleged violation of a state statute prescribing certain conditions for the sale of fruit trees. *Petitioner discharged.*

The facts are stated in the opinion.

Messrs. N. Kingsley and W. E. Todd for petitioner.

Messrs. Henry A. Morgan and A. L. Hoppaugh for the state.

Sanborn, Circuit Judge, delivered the following opinion:

The prisoner, a citizen of the state of Iowa, is

deprived of his liberty under the commitment of a justice of the peace of the state of Minnesota, on the sole ground that, as the agent of

citizens of the state of Illinois, he sold fruit trees that were grown in the state of Illinois in the state of Minnesota, without complying with the provisions of sections 1-3 of chapter 196 of the Laws of Minnesota for the year of 1887. There is no claim that any false representations were made or any fraud committed in this sale. Section 1 of this chapter provides that it shall be unlawful for any person to sell or offer for sale any tree, plant, shrub, or vine, not grown in the state of Minnesota, without first filing with the secretary of state an affidavit setting forth his name, age, occupation, and residence, and, if an agent, the name, occupation, and residence of his principals, and a statement as to where the nursery stock to be sold is grown, together with a bond to the state of Minnesota, in the penal sum of \$2000, conditioned to save harmless any citizen of this state who shall be defrauded by any false or fraudulent representations as to the place where such stock sold by such person was grown, or as to its hardiness for climate. Section 2 provides that the secretary of state, on compliance with the provisions of section 1, shall give to the applicant a certificate setting forth the facts that show a full compliance by the applicant with the provisions of the act, and that said applicant shall exhibit this certificate, or a copy of it, to any person to whom stock is offered for sale. Section 3 provides that any person, whether as principal or agent, who shall sell or offer for sale any foreign grown nursery stock within this state, shall furnish to the purchaser a duplicate order, with a contract specifying that such stock is true to name, and as represented. Section 4 imposes a penalty of not less than \$25 nor exceeding \$100, or of imprisonment in the county jail for a term not less than 10 nor more than 60 days, in the discretion of the court, for the sale by any person of any foreign grown nursery stock within this state without complying with the first three sections of the act. There is no law of the state of Minnesota which imposes any such restrictions upon the sale of any tree, plant, or vine grown in this state.

The third clause of section 8 of article 1 of the Constitution of the United States provides that "the Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The effect of this provision of the Constitution has been so frequently and forcibly declared by the Supreme Court of the United States that it is sufficient for the purposes of this case to state a few of the propositions that the decisions of that court have established. The power to regulate commerce among the states was carved out of the general sovereign power held by each state, and granted by the Constitution to the Congress of the United States. This power was thus vested in Congress exclusively, and no state, by virtue of any power not thus granted, whether under the name of the "police power," or under any other name, can lawfully infringe upon this grant. This power to regulate commerce, thus granted to Congress, is not subordinate to any of the powers not granted, but paramount to all the powers of the state, and any act of the state which inter-

feres with interstate commerce in a well-known and sound article of commerce is unconstitutional and void. Now, while there are certain subjects in their nature local, such as harbor pilotage, beacons, bridges, etc., regarding which a state may legislate when Congress has not, yet when the subject-matter is the sale of a well recognized article of commerce, such as vines, trees, or shrubs, or any other well-known article of commerce, the product of another state, the subject is in its nature national, susceptible of regulation by rules uniform throughout the nation, and obviously susceptible of wise regulation by such uniform national rules only; and in such a case there can, of necessity, be only one system or plan of regulation, and that Congress alone can prescribe. In all cases where Congress has passed no law regulating interstate commerce in any well recognized article of commerce, that fact is conclusive evidence that it intends such commerce to be free, and any law of the state which prohibits or restricts it must be held to be in violation of the Constitution. I do not intend to hold that valid quarantine and sanitary laws may not be passed by the legislature of the state. There is no such question presented in this case. It is not claimed that these trees that were grown in the state of Illinois were deleterious to the health or the comfort, or dangerous to the lives or property, of the citizens of this state. Nor do I intend to hold that a proper inspection law may not be passed by the legislature of this state to prevent the introduction here of any diseased or dangerous article which might interfere with the health, comfort, well-being, or happiness of the people of this state. No questions of that kind are presented in this case. This law imposes a restriction upon the sale of foreign grown trees by its very terms; and any law which imposes any vexatious or annoying restriction upon the sale of articles that are themselves sound articles of commerce must be held to be an interference with commerce, and thus in violation of the clause of the Constitution to which I have referred. To provide that every man who sells a foreign product shall be required to file an affidavit with the secretary of state, and a bond of \$2000, and to exhibit to every man who purchases the article a certificate of the secretary of state that he has complied with these provisions, certainly imposes a vexatious and annoying obstruction to commerce in the article mentioned. For that reason I think that this law is in violation of this clause of the Constitution.

Moreover, article 4, § 2, of the Constitution of the United States, provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This provision of the Constitution, in my opinion, gives to the citizens of other states the right to introduce and sell the products of those states in Minnesota on the same terms that her own citizens sell like products of this state. The Illinois tree, the Wisconsin vine, the Iowa shrub, that is sound, and is of the same character as that grown in the state of Minnesota, seeking sale in this state, is entitled to be sold by those who deal in it on the same terms and with no greater restrictions

than the like article produced in the state of Minnesota; and any restriction which imposes upon the dealers in foreign articles that are themselves sound, burdens that are not imposed on the dealers in like articles produced in the state of Minnesota, in my opinion, violates that provision of the Constitution to which I have last referred.

It is said that the bond required here is to prevent the dealers in foreign trees from perpetrating fraud in their sale, and that it is competent for the state to protect its citizens against the fraudulent representations of such dealers. The answer is that when a state un-

dertakes, by statutory regulation, to deprive citizens of other states, who deal in sound articles of commerce produced in other states, of that presumption of honesty and innocence of wrong which it indulges in favor of the dealers in its own products, and which the law raises in favor of every man, it very effectually deprives the citizens of other states of the most valuable privileges and immunities its own citizens enjoy.

For these reasons, I think the prisoner must be discharged.

Let an order be entered to that effect.

TENNESSEE SUPREME COURT.

MILAN MILLING & MANUFACTURING CO.

v.
W. E. GORTON *et al.*

(.....Tenn.....)

1. A foreign corporation which simply contracts to furnish milling machinery and place it in a mill, without having any office or agency in the state, is not carrying on business in the state within the meaning of a statutory prohibition of carrying on business.

2. It is an act of interstate commerce for a foreign corporation to sell and set up machinery in a state where it has no agency or office.

Decided Oct. 7, 1894.

CCROSS APPEALS from a decree of the Chancery Court for Gibson County refusing to foreclose a mortgage on property given by the Milan Milling & Manufacturing Company, but entering a personal judgment against it for the amount of the debt secured by the mortgage. *Reversed.*

The facts are stated in the opinion.

Messrs. S. F. Rankin, Edward H. Smith, and Joseph R. Hawkins, for complainant:

The contract being in violation of law, the notes executed therefor are void and cannot be collected; even in the hands of an innocent purchaser.

Acts 1891, chap. 122; *Snoddy v. American Nat. Bank*, 7 L. R. A. 705, 88 Tenn. 574; 2 Am. & Eng. Enc. Law, 368; 1 Parsons, Notes & Bills, 213; *Sugars v. Brinkworth*, 4 Campb. 46; *Reynolds v. Nichols*, 12 Iowa 399; *Brown v. Tarkington*, 70 U. S. 3 Wall. 377, 18 L. ed. 255; *Utica Ins. Co. v. Cadwell*, 3 Wend. 296; Story, Prom. Notes, § 198; *Cunningham v. National Bank of Augusta*, 71 Ga. 400; *Mays v. Williams*, 27 Ala. 267.

The chancellor properly decided that the Maish & Gorton Manufacturing Company were doing business in Tennessee, in violation of the statute requiring that foreign corpora-

tions file copy of charter with the secretary of state, and an abstract in county doing business.

State v. Phenix Ins. Co., 92 Tenn. 420; *Cary-Lombard Lumber Co. v. Thomas*, Id. 587.

Messrs. John R. Walker and Albert W. Biggs, for defendant:

The true and only meaning of the act is that foreign corporations of the character mentioned wishing to locate in this state must perform the conditions precedent of filing and registering their charters.

The contention that the contract is void in Tennessee is manifestly wrong. The presumption in law is that the contract was made with reference to the state where the contract was legal.

If a contract is partly good and partly bad, the courts will, if possible, separate the good from the bad and allow a recovery for the good.

Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587.

This transaction was an act of interstate commerce.

Being such the legislature of Tennessee cannot impose any burdens, lay any restrictions or regulations upon it.

U. S. Const. art. 1, § 8.

Whenever state legislation is in its essence and of necessity a regulation of interstate commerce, and therefore of national importance, it is an encroachment upon the powers

NOTE.—As to how far the exclusion of foreign corporations is an interference with interstate commerce, see note to *Kindel v. Beck & P. Lithographing Co.* (Colo.) 24 L. R. A. 311.

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of Congress over this subject and is therefore void, even though Congress may never have legislated upon the subject.

Cooley, Const. Law, p. 68; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 28 L. ed. 158; *Pennacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 15, 24 L. ed. 718.

The legislature of our state requires every foreign corporation to register their charters, etc., and this court in *Cary-Lombard Lumber Co. v. Thomas*, *supra*, held said act to be constitutional and correctly so; they also held that the Cary-Lombard Lumber Company, which we understand had a lumber yard in the city of Memphis, and was actually carrying on its business there in violation and defiance of the statutes of the state, could not recover on its contracts made while thus defying the laws of Tennessee.

Cooper Mfg. Co. v. Ferguson, 118 U. S. 727, 28 L. ed. 1137, held that these statutes are to be strictly construed.

A state cannot levy a tax or impose any other restriction upon inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein.

Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 30 L. ed. 694; *Asher v. Texas*, 128 U. S. 131, 32 L. ed. 369, 2 Inters. Com. Rep. 241; *Reno*, Non-Residents, § 4; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700; *Horn Silver Min. Co. v. New York*, 148 U. S. 305, 36 L. ed. 164; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158; *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36.

A Georgia corporation supplied brick to build an Alabama house. Being compelled to file a lien against the house in order to recover its pay, the defendants plead that the foreign corporation had not complied with Alabama statutes regulating the admission of foreign corporations. The court held, the sale of brick in another state or the filling of an order sent from this state is an act of interstate commerce which is not affected by our laws which require foreign corporations to have a place of business and an agent here as a condition precedent to their capacity to do business in Alabama. Nor is the institution and prosecution of suits in our courts the doing business within the requirement of our laws.

Cook v. Rome Brick Co. 98 Ala. 409.

It has been held by the supreme court of Wisconsin that a foreign insurance company which has not complied with the statute prescribing conditions upon which it may do business in the state may still take a mortgage security for a debt due there, and foreclose it in the courts of that state.

Charter Oak L. Ins. Co. v. Sawyer, 44 Wis. 387. See also *Beard v. Union & American Pub. Co.* 71 Ala. 60; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649.

The notes sued on in the cross-bill were purchased by the complainants in the cross bill in due course of trade for value, before due and without notice of any claims for damages or offsets.

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In fact there being innocent purchasers of the notes cannot be questioned by any kind of judicial argument.

This Milan Milling Company had the power to execute notes and to select the place of payment, just as much so as an individual.

Notes given in settlement of transactions merely prohibited by statute are good in the hands of an innocent purchaser and pass to him by assignment denuded of their void qualities.

1 Dan. Neg. Inst. §§ 198, 808; *Bozeman v. Allen*, 48 Ala. 512; Byles, Bills, 7th ed. pp. 141, 142; *Norris v. Langley*, 19 N. H. 423; Chitty, Bills, 11th ed. p. 69; *Coring v. Atman*, 71 N. Y. 435, 27 Am. Rep. 70; *Aurora v. West*, 22 Ind. 88, 85 Am. Dec. 413.

It is frankly conceded that had the Tennessee legislature made this contract absolutely void, and that this was a Tennessee contract, we could not maintain this suit.

See 4 Lawson, Rights, Rem. & Pr. § 1600; *Lennig v. Rabston*, 23 Pa. 137; *Buchanan v. Drovers Nat. Bank*, 55 Fed. Rep. 223.

Any valid operative assignment of the debt whether evidenced by note, bond, or otherwise, is also an efficient assignment of the mortgage and vests the assignee with all the equitable rights, interest, and remedies of the mortgage.

3 Pom. Eq. Jur. 1210; *Jones*, Mortg. § 1176; *Richards v. Holmes*, 59 U. S. 18 How. 143, 15 L. ed. 304.

McAllister, J., delivered the opinion of the court:

The original bill in this cause was filed in the chancery court of Gibson county by the Milan Milling & Manufacturing Company against W. E. Gorton *et al.* for the purpose of enjoining the collection of four notes and the foreclosure of a deed of trust made to secure them. In the year 1892 the Milan Milling & Manufacturing Company entered into a written contract with the Maish & Gorton Manufacturing Company, a foreign corporation, having its office and principal place of business at Warsaw, in the state of Indiana, whereby the latter company stipulated to manufacture, deliver, and put in position for the former company at Milan, in the state of Tennessee, certain milling machinery. The price agreed to be paid by the Milan Milling Company was \$5384, viz: \$1897 in cash upon the arrival of the machinery at the mill, \$486 in sixty days, \$750 in six months, \$750 in twelve months, and \$750 in eighteen months, from April 15, 1892, all evidenced by promissory notes. The Milan Milling Company further agreed to execute a first mortgage upon the milling property and lot to secure said deferred payments. In compliance with their agreement, the Maish & Gorton Manufacturing Company furnished said machinery, and adjusted it in the mill building at Milan, and the same was accepted by the Milan Milling Company. The cash payment was made, and notes executed for the deferred payments, which were secured by a first mortgage on the milling property. Shortly after the execution of the notes, they were indorsed by the Maish & Gorton Manufactur-

ing Company to the State Bank of Warsaw, Ind. Default having been made by the Milan Milling Company in the payment of the first note, the trustee advertised the property to be sold in accordance with the provisions of the deed of trust. Thereupon the Milan Milling Company filed their original bill to enjoin the sale, alleging that the Maish & Gorton Manufacturing Company had breached their contract in the manufacture and delivery of said machinery, in consequence whereof the Milan Milling Company had been greatly damaged; and in accordance with the prayer of the bill an injunction issued restraining the trustee from selling the property. The State Bank of Warsaw, in its answer, denied all the material allegations of the bill, claiming to be an innocent purchaser of said notes for value before maturity in due course of trade, and by cross-bill prayed a foreclosure of the deed of trust. It appeared in proof that the Maish & Gorton Manufacturing Company and the State Bank of Warsaw are both foreign corporations, chartered under the laws of the state of Indiana, and that neither company has ever complied with the laws of the state of Tennessee requiring foreign corporations, before doing business in this state, to register their charters. Upon final hearing the chancellor was of opinion, and so decreed, that both the State Bank of Warsaw and the Maish & Gorton Manufacturing Company, being foreign corporations, and not having complied with the laws of Tennessee, the said contract to furnish machinery was nonenforceable, and that, the deed of trust having been executed in violation of said statutes, complainant in the cross-bill, the said State Bank of Warsaw, was not entitled to have same foreclosed. The chancellor, however, was of opinion that the State Bank of Warsaw was a bona fide purchaser for value before maturity of the notes in question, and as such was entitled to a decree against the Milan Milling & Manufacturing Company on the two notes which had matured at the date of filing the cross-bill. The chancellor further decreed that the complainant in the original bill, to wit, the Milan Milling & Manufacturing Company acquired no such jurisdiction over the Maish & Gorton Manufacturing Company as would entitle them to a decree against the latter for a breach of the contract, but the court decreed that the injunction be made perpetual, so far as it sought to enjoin the sale of said milling property by the trustee. The Milan Milling & Manufacturing Company appealed from so much of said decree as adjudged it liable upon said notes. The State Bank of Warsaw appealed from so much of said decree as refused a foreclosure of the deed of trust on the milling property for the satisfaction of said notes.

The assignment most earnestly pressed and elaborately argued by counsel for the State Bank of Warsaw is that the chancellor erred in finding that the Maish & Gorton Manufacturing Company was doing business as a foreign corporation in violation of the statutes of this state. It is insisted that the said Maish & Gorton Manufacturing Company do not come within the purview of these laws,

for the reason that this company has no office or agency in the state and is not engaged in carrying on business in the state of Tennessee. It is not insisted on behalf of appellants that this corporation is engaged in interstate commerce,—that is, manufacturing mills and milling machinery in the state of Indiana, and in selling the same by their agents, or upon orders in the different states of the Union; that all its transactions with the Milan Milling & Manufacturing Company were acts of interstate commerce, the regulation of which belongs exclusively to the domain of the Congress of the United States; and that the construction of the statute contended for would render it void, because it would thereby involve an interference with interstate commerce. In the case of *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, it appeared that the constitution of Colorado provided that no foreign corporation should do any business within the state without having one or more known places of business, and an authorized agent or agents in the same, upon whom process might be served. The legislature of the state enacted that foreign corporations, before being authorized to do business in the state, should file a certificate with the secretary of state and the recorder of the county in which the principal business was carried on, designating the principal place of business, and the agent there on whom process might be served. These provisions of the constitution and statute laws of the state of Colorado being in force, the Cooper Manufacturing Company, a corporation organized and existing under the laws of the state of Ohio, and having its principal place of business at Mt. Vernon, Ohio, sent an agent into the state of Colorado, and entered into a contract in writing with the defendants, who were citizens of Colorado, by which it was agreed that the Ohio corporation should sell and deliver to the defendants, citizens of Colorado, a steam engine and other machinery. Default having been made by the defendants in payment, the plaintiff brought suit to recover of the defendants damages for their breach of the contract. It was held by the state court of Colorado that plaintiff could not recover, because it appeared that said foreign corporation had not complied with the law of the state in respect to filing a certificate with secretary of state and the recorder of the county in which the principal business was carried on. On appeal to the United States Supreme Court it was held that the facts of the case did not constitute a carrying on of business in Colorado, and was not forbidden by its constitution and law. *Mr. Justice Matthews*, in delivering a concurring opinion, stated, we think, the correct basis of the judgment of the court. He said, viz: "Whatever power may be conceded to a state to prescribe conditions on which foreign corporations may transact business within its limits, it cannot be admitted to extend so far as to prohibit or regulate commerce among the states; for that would be to invade the jurisdiction which by the terms of the Constitution of the United States is conferred exclusively upon Congress. In the present case,"

he continued, "the construction claimed for the constitution of Colorado and the statute of that state cannot be extended to prevent the plaintiff in error, a corporation of another state, from transacting any business in Colorado, which of itself is commerce. The transaction in question was clearly of that character. It was the making of a contract in Colorado to manufacture certain machinery in Ohio to be there delivered for transportation to the purchasers in Colorado. That was commerce, and to prohibit it, except on conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress." The judge continues: "It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that state, and to prohibit it from carrying on within that state its business of manufacturing machinery; but it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the states." It has been suggested that the case of *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, is in conflict with this view.

Such supposition is erroneous, and is based upon an entire misconception of that case. The court in the *Cary-Lombard Case* was not dealing with interstate commerce. No such question was presented by the record in that case. On the contrary, it distinctly appeared in evidence that the Cary-Lombard Lumber Company had an office and lumber yards in the city of Memphis, and was actually engaged in carrying on business in this state. It had acquired a situs and domicile in the state, and was, of course, subject to the regulations of our statute. In the case at bar the Malsh & Gorton Manufacturing Company, a foreign corporation, had simply contracted with citizens of Tennessee to furnish certain milling machinery, and to adjust it in position in the mill. This company was in no sense engaged in carrying on its business in this state, but was engaged in an act of interstate commerce.

In this respect the decree of the chancellor is reversed, and a decree will be entered in favor of the State Bank of Warsaw on all of the notes which in the meantime have matured, and for a foreclosure of the deed of trust made to secure them.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

LITTLE ROCK & MEMPHIS R. CO., *Appt. and Plff. in Err.*,

v.

ST. LOUIS & SOUTHWESTERN R. CO.

SAME

v.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO.

SAME

v.

LITTLE ROCK & FT. SMITH R. CO.

(63 Fed. Rep. 775.)

1. Requiring prepayment of freight charges by a by a connecting carrier without requiring it of other shippers or carriers at the same place does not constitute an unreasonable or undue disadvantage within the meaning of the interstate commerce act.
2. Other connecting carriers are not entitled to through billing and rating and to the use of tracks and terminals of a carrier which has voluntarily made an arrangement giving these advantages to one connecting carrier.

Decided Sept. 24, 1893.

A PPEALS from, and writs of error to, the Circuit Court of the United States for the Eastern District of Arkansas to review a judgment in favor of defendants to proceedings brought to compel defendants to enter into through shipping relations with the complainant and to recover damages for their refusal to do so. *Affirmed.*

Argued before Caldwell, Sanborn, and Thayer, *Circuit Judges.*

NOTE.—For other cases as to equal rights of connecting carriers under interstate commerce act, see *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.) 2 L. R. A. 289; *Burlington, C. R. & N. R. Co. v. Dev* (Iowa) 12 L. R. A. 436, and note.

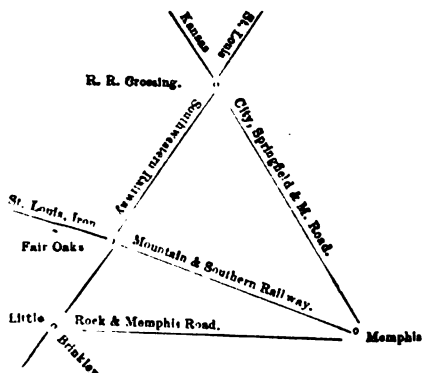
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Statement by Thayer, Circuit Judge:

These were six suits which were brought by the Little Rock & Memphis Railroad Company against the St. Louis Southwestern Railway Company, the St. Louis, Iron Mountain & Southern Railway Company, and the Little Rock & Ft. Smith Railway Company, for alleged violations of the third section of the interstate commerce law. 24 Stat. at L. 379, §80. A suit at law and a bill in equity were filed against each of the defendant companies above named, in which the Little Rock & Memphis Railroad Company counted upon the same violation of the law; asking in the one case for an injunction, and in the other for damages.

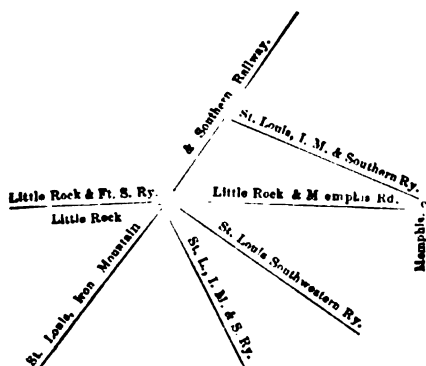
The six suits against the three companies involved similar questions. They have been argued as one case, and it is found most convenient to dispose of them in a single opinion. Subjoined diagrams will serve to illustrate the relations which the several railroads concerned occupy to each other. It will be seen by a glance at diagram No. 1 that the Little Rock

DIAGRAM NO. 1.



& Memphis Railroad runs east and west from Little Rock, Ark., to Memphis, Tenn. Its total length is about 135 miles. Coming down from the north, the St. Louis Southwestern Railway crosses the Little Rock & Memphis Railroad at Brinkley, a point intermediate between Little Rock and Memphis. It also crosses a branch of the St. Louis, Iron Mountain & Southern Railway, leading from the main line of that road into Memphis at Fair Oaks, which is a point about twenty miles north of Brinkley. Diagram No. 2 illustrates the situation further west, in and about Little Rock. It will be seen that the main line of the St. Louis, Iron Mountain & Southern Railway Company enters Little Rock from the north, and thence runs southwest through Arkansas into Texas, with a branch leading from Little Rock to the southeast. The Little Rock & Ft. Smith Railway runs west from Little Rock to Ft. Smith on the western border of the state of Arkansas, and to Ft. Gibson in the Indian territory. Its length is said to be about 165 miles. Diagram No. 2 does not

DIAGRAM NO. 2.



show the main line of the St. Louis Southwestern Railway, which is disclosed by the

first diagram; but it is sufficient to say that, after passing through Brinkley, it runs in a southwesterly direction through Arkansas, and far into Texas. As against the St. Louis Southwestern Railway Company, complaint was made that it refused to receive freight or passengers coming over the Little Rock & Memphis Railroad except at local rates, and that it refused to honor through tickets or through bills of lading issued by the latter road, and that it required all freight to be re-billed and reloaded, and all passengers to purchase new tickets, at the town of Brinkley, while at the same time it accepted through tickets and through bills of lading, and cars loaded in car-load lots, that came over the line of the St. Louis, Iron Mountain & Southern Railway Company, and that it did this although the facilities for an interchange of freight and passengers at Brinkley were in every respect equal to those existing at Fair Oaks. As against the Little Rock & Ft. Smith Railway Company complaint was made that it refused to accept interstate freight at Little Rock under through bills of lading issued by the Little Rock & Memphis Railroad Company, while it accepted freight under through bills of lading issued by all other lines of railroad terminating at the city of Little Rock, Ark., and that it likewise refused to accept freight from the Little Rock & Memphis Railroad Company except upon prepayment of all freight charges, while at the same time it accepted freight at Little Rock from all other individuals and corporations without the prepayment of freight charges. Complaint was also made against the Little Rock & Ft. Smith Railway Company that it accepted from the St. Louis, Iron Mountain & Southern Railway Company passengers on through tickets, and with through checking of baggage, while it refused to accept passengers coming over the Little Rock & Memphis Railroad on through tickets issued by that road, and that it charged passengers coming from that road local rates from Little Rock westward, and required them to recheck their baggage at Little Rock. Complaint was also made against the Little Rock & Ft. Smith Railway Company that it exchanged freight with the St. Louis, Iron Mountain & Southern Railway upon an arrangement for through billing, and in the cars in which it was shipped, when shipped in car-load lots, and that it refused at the same time to exchange freight with the Little Rock & Memphis Railroad Company, except upon local rates, and that it refused to accept from or deliver to the latter road any loaded cars. As against the St. Louis, Iron Mountain & Southern Railway Company, complaint was made that it refused to receive any freight from the Little Rock & Memphis Railroad Company at Little Rock, except upon the prepayment of all charges thereon, while it received freight at that point from all other persons and corporations without demanding the prepayment of freight charges. It was further alleged, as against that company, that the discrimination in question was made, not because the defendant company was unwilling to extend credit to the Little Rock & Memphis Railroad Company, but from a desire to oppress that company and destroy its business. A demurrer having been

filed to the several bills in equity and complaints at law, the same were sustained by the circuit court, whereupon the complainant company declined to plead further, and a final judgment dismissing the action was entered in each case. The opinion of the circuit court is reported in 59 Fed. Rep. 400, 4 Inters. Com. Rep. 537.

Messrs. U. M. Rose, W. E. Hemingway and G. B. Rose, for appellant, and plaintiff in error:

Every statute made against an injury, mischief, or grievance impliedly gives a remedy, for the party injured may, if no remedy be expressly given, have an action upon the statute.

Broom, *Legal Maxims*, p. 149.

There are two railroads, coming both from the same place, joining the Fort Smith Railroad at the same point, having each every facility for the interchange of traffic. With one the Fort Smith road makes all the customary traffic arrangements, transports its freight in the cars in which it is received, and upon greatly reduced through rates, while denying all this to the other. The statute prescribes that "every common carrier subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines."

The Fort Smith road discriminates between two roads joining it at the same point. The St. Louis Southwestern discriminates between two joining it at different points, but in favor of the one which is twenty miles further away, thus compelling passengers and freight to follow a route which is twenty miles longer to the manifest injury of the public.

New York & N. R. Co. v. New York & N. E. R. Co. 3 Inters. Com. Rep. 542; *Samuels v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 420, 31 Fed. Rep. 57; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 261, 47 Fed. Rep. 771.

Messrs. George E. Dodge and B. S. Johnson, for appellees and defendants in error:

A United States circuit court, in the exercise of its equity powers, cannot require a railroad company engaged in interstate commerce traffic, to enter into an agreement with another railroad company, engaged in like traffic, for a joint through routing and joint through rates, and, upon the refusal of the company to comply with such requirement, may the court itself make such a contract for the parties?

Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 2 Inters. Com. Rep. 763, 41 Fed. Rep. 559; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co. and St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 460; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 261, 47 Fed. Rep. 771; *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. Rep. 465; *Kentucky & I. Bridge Co. v. Louis-*

ville & N. R. Co. 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. Rep. 567; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 679, 28 L. ed. 296; *Dubuque & S. C. R. Co. v. Richmond*, 86 U. S. 19 Wall. 589, 22 L. ed. 176; *Pullman's Palace Car Co. v. Missouri Pac. R. Co.* 115 U. S. 597, 29 L. ed. 502; *Express Cases*, 117 U. S. 1, 29 L. ed. 791; *Capehart v. Louisville & N. R. Co.* 3 Inters. Com. Rep. 278.

The fact that one common carrier receives freight from another, outside of the fact that they are compelled, both by federal and state laws so to do, does not make them partners, so as to become liable or obligated for each other's bills of lading.

Hot Springs Railroad v. Trippe, 42 Ark. 471, 48 Am. Rep. 65; *St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co.* 104 U. S. 156, 26 L. ed. 685.

There is no law that will compel one carrier to receive freight from another carrier and advance charges thereon, should it desire not to do so.

St. Louis, I. M. & S. R. Co. v. Lear, 54 Ark. 402; *Fordyce v. Johnson*, 56 Ark. 430; *Loewenberg v. Arkansas & L. R. Co.* Id. 439; *Little Rock & Ft. S. R. Co. v. Daniels*, 49 Ark. 352; *Burlington, C. R. & N. R. Co. v. Dey*, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 82 Iowa, 312; *Chicago & A. R. Co. v. Pennsylvania Co.* 1 Inters. Com. Rep. 357; *Scofield v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 76; *Re Joint Water & Rail Lines*, 2 Inters. Com. Rep. 496; *United States v. Delaware, L. & W. R. Co.* 2 Inters. Com. Rep. 617, 40 Fed. Rep. 101; *Randall v. Richmond & D. R. Co.* 108 N. C. 612; *Allen v. Cape Fear & Y. F. R. Co.* 100 N. C. 397; *Hutchinson, Carr.* § 116; *Pickford v. Grand Junction R. Co.* 10 Mees. & W. 399; *Barnes v. Marshall*, L. R. 18 Q. B. 785; *Wylde v. Pickford*, 8 Mees. & W. 443; *Botsen v. Donovan*, 4 Barn. & Ald. 28; *Bastard v. Bastard*, 2 Show. 81.

No power existed at common law, and none is given by the Act, to court or Commission, to compel connecting companies to contract with each other, to abandon full control of their separate roads, or to unite in a joint tariff.

Chicago & N. W. R. Co. v. Osborne, 4 Inters. Com. Rep. 257, 10 U. S. App. 430, 52 Fed. Rep. 915; *Express Cases*, 117 U. S. 1, 29 L. ed. 791; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. Rep. 567; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 763, 41 Fed. Rep. 559; *Iluaco R. & Nar Co. v. Oregon Short Line & U. N. R. Co.* 57 Fed. Rep. 673.

Messrs. Samuel H. West, John M. Taylor and J. G. Taylor also for appellees and defendants in error.

Thayer, Circuit Judge, delivered the opinion of the court:

It will be observed that the sole question in the cases filed against the St. Louis, Iron Mountain & Southern Railway Company concerns the right of that company to require the prepayment of freight charges on all property tendered to it for transportation at Little Rock by the Little Rock & Memphis Railroad Company, while it pursues a different practice with

respect to freight received from other shippers at that station. At common law a railroad corporation has an undoubted right to require the prepayment of freight charges by all its customers, or some of them, as it may think best. It has the same right as any other individual or corporation to exact payment for a service before it is rendered, or to extend credit. *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.* 51 Fed. Rep. 465, 472, 4 Inters. Com. Rep. 249. Usually, no doubt, railroad companies find it to their interest, and most convenient, to collect charges from the consignee; but we cannot doubt their right to demand a reasonable compensation in advance for a proposed service, if they see fit to demand it. This common law right of requiring payment in advance of some customers, and of extending credit to others, has not been taken away by the interstate commerce law, unless it is taken away indirectly by the inhibition contained in the third section of the act, which declares that an interstate carrier shall not "subject any particular person, company, corporation or locality . . . to any undue or unreasonable . . . disadvantage in any respect whatever." This prohibition is very broad, it is true, but it is materially qualified and restricted by the words "undue or unreasonable." One person or corporation may be lawfully subjected to some disadvantage in comparison with others, provided it is not an undue or unreasonable disadvantage. In view of the fact that all persons and corporations are entitled at common law to determine for themselves, and on considerations that are satisfactory to themselves, for whom they will render services on credit, we are not prepared to hold that an interstate carrier subjects another carrier to an unreasonable or undue disadvantage because it exacts of that carrier the prepayment of freight on all property received from it at a given station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such station. So far as we are aware, no complaint had been made of abuses of this character at the time the interstate commerce law was enacted, and it may be inferred that the particular wrong complained of was not within the special contemplation of Congress. This being so, the general words of the statute ought not to be given a scope which will deprive the defendant company of an undoubted common law right, which all other individuals and corporations are still privileged to exercise, and ordinarily do exercise. It is most probable that self-interest—the natural desire of all carriers to secure as much patronage as possible—will prevent this species of discrimination from becoming a public grievance so far as individual shippers are concerned; and it is desirable that the courts should interfere as little as possible with those business rivalries existing between railroad corporations themselves, which are not productive of any serious inconvenience to shippers. We think, therefore, that no error was committed in entering the judgment and decree in favor of the St. Louis, Iron Mountain & Southern Railway Company.

The complaint preferred against the other companies, to wit, the St. Louis Southwestern
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and the Little Rock & Ft. Smith Railway Companies, is somewhat different. It consists in the alleged refusal of those companies—First, to honor through tickets and through bills of lading issued by the complainant company, or to enter into arrangements with it for through billing or through rating; and, secondly, in the alleged refusal of these companies to accept loaded cars coming from the Little Rock & Memphis Railroad, and in their action in requiring freight to be rebilled and reloaded at the two connecting points, to wit, Brinkley and Little Rock.

Before discussing the precise issue which arises upon this record, it will be well to restate one or two propositions that are supported by high authority as well as persuasive reasons, and which do not seem to be seriously controverted even by the complainant's counsel. In the first place, the Interstate Commerce Law does not require an interstate carrier to treat all other connecting carriers in precisely the same manner, without reference to its own interests. Some play is given by the Act to self-interest. The inhibitions of the third section of the law, against giving preferences or advantages, are aimed at those which are "undue or unreasonable;" and even that clause which requires carriers "to afford all reasonable, proper, and equal facilities for the interchange of traffic" does not require that such "equal facilities" shall be afforded under dissimilar circumstances and conditions. Moreover, the direction "to afford equal facilities for an interchange of traffic" is controlled and limited by the proviso that this clause "shall not be construed as requiring a carrier to give the use of its tracks or terminal facilities to another carrier." *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 37 Fed. Rep. 571, 2 L. R. A. 289, 9 Inters. Com. Rep. 351; *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co. supra*. In the second place, it has been held that neither by the common law nor by the interstate commerce law have the national courts been vested with jurisdiction to compel interstate carriers to enter into arrangements or agreements with each other for the through billing of freight, and for joint through rates. Agreements of this nature, it is said, under existing laws, depend upon the voluntary action of the parties, and cannot be enforced by judicial proceedings without additional legislation. *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 261, 47 Fed. Rep. 771; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 559, 2 Inters. Com. Rep. 763, and cases there cited by Judge Caldwell. Furthermore, it has been ruled by Mr. Justice Field in the case of the *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.*, 51 Fed. Rep. 465, 474, 4 Inters. Com. Rep. 249, that the third section of the Interstate Commerce Act does not require an interstate carrier to receive freight in the cars in which it is tendered by a connecting carrier, and to transport it in such cars, paying a mileage rate thereon, when it has cars of its own that are available for the service, and the freight will not be injured by transfer. It should be remarked in this connection that the bills on file in the present cases, as well as

the petitions in the law cases, fail to disclose whether the offending companies have refused to receive freight in the cars in which it was tendered to them, even when it would injure the freight to transfer it, or when they had no cars of their own that were immediately available to forward it to its destination. Neither do the bills or the petitions disclose whether, in tendering freight in cars to be forwarded, the complainant company demanded the payment of the usual wheelage on the cars, or tendered the use of the same free, for the purpose of forwarding the freight to its destination. The allegations of a refusal to receive freight in cars are exceedingly general, and convey no information on either of the points last mentioned.

As we have before remarked, the several propositions above stated do not seem to be seriously questioned. It is urged, however, in substance, that although the court may be powerless to make and enforce agreements between carriers for through billing and through rating, and for the use of each other's cars, tracks, and terminal facilities, yet that when a carrier, of its own volition, enters into an agreement of that nature with another connecting carrier, the law commands it to extend "equal facilities" to all other connecting carriers, if the physical connection is made at or about the same place, and the physical facilities for an interchange of traffic are the same, and that this latter duty the courts may and should enforce. It will be observed that the proposition contended for, if sound, will enable the courts to do indirectly what it is conceded they cannot do directly. It authorizes them to put in force between two carriers an arrangement for an interchange of traffic that may be of great financial importance to both, which could neither be established nor enforced by judicial decree, except for the fact that one of the parties had previously seen fit to make a similar arrangement with some other connecting carrier. It may be, also, that the arrangement thus forced upon the carrier would be one in which the public at large have no particular concern, because the equal facilities demanded by the complainant carrier would be of no material advantage to the general public, and would only be a benefit to the complainant.

Another necessary result of the doctrine contended for is that it deprives railway carriers, in a great measure, of the management and control of their own property, by destroying their right to determine for themselves what contracts and traffic arrangements with connecting carriers are desirable and what are undesirable. There ought to be a clear authority found in the statute for depriving a carrier of this important right, before the authority is exercised, for, when questions of that nature have to be solved, a great variety of complex considerations will present themselves, some of which can neither be foreseen nor stated. A railroad having equal facilities at a given point for forming a physical connection with a number of connecting carriers might find it exceedingly beneficial to enter into an arrangement with one of them, having a long line and important connections, for through billing and rating, and for the use of

each other's cars and terminal facilities, while it would find it exceedingly undesirable and unprofitable to enter into a similar arrangement with a shorter road, which could offer nothing in return. Or the case might be exactly the reverse. The shorter, and at the time the less important, road, might be able to present sound business reasons which would make an arrangement with it, of the kind above indicated, more desirable than with the longer line. Furthermore, if it be the law that an arrangement for through billing and rating with one carrier necessitates a like arrangement with others, this might be a controlling influence in determining a railway company to refuse to enter into such an arrangement with any connecting carrier. In view of these considerations, we are unable to adopt a construction of the interstate commerce act which will practically compel a carrier, when it enters into an arrangement with one carrier for through billing and rating and for the use of its tracks and terminals, to make the same arrangement with all other connecting carriers, if the physical facilities for an interchange of traffic are the same, and to do this without reference to the question whether the enforced arrangement is or is not of any material advantage to the public.

In two of the cases heretofore cited (*Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, and *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.*) it was held that the charge of undue or unreasonable discrimination cannot be predicated on the fact that a railroad company allows one connecting carrier to make a certain use of its tracks or terminals, which it does not concede to another. This conclusion was reached as the necessary result of the final clause of the third section of the interstate commerce law, above quoted, to the effect that the second paragraph of the third section shall not be so construed as to require a carrier to give the use of its tracks or terminals to another company. Railroads are thus left by the commerce Act to exercise practically as full control over their tracks and terminals with reference to other carriers as they exercised at common law. The language of *Mr. Justice Field* in that behalf was as follows: "It follows from this . . . that a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities, with one or more connecting lines, without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The Act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated." 51 Fed. Rep. 474, 475, 4 Inters. Com. Rep. 249.

Furthermore, it is the settled construction of the Act, as we have before remarked, that it does not make it obligatory upon connecting carriers to enter into traffic arrangements for through billing and rating either as to passenger or freight traffic. This conclusion has been reached by all of the tribunals who have

had occasion to consider the subject, and it is based on the fact that, in enacting the commerce act, congress did not see fit to adopt that provision of the English railway and canal traffic act, passed in 1873, which expressly empowered the English commissioners to compel connecting carriers to put in force arrangements for through billing and through rating when they deemed it to the interest of the public that such arrangements should be made. *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 261, 47 Fed. Rep. 771; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 87 Fed. Rep. 567, 630, 631, 2 L. R. A. 289, 2 Inters. Com. Rep. 351. See, also, the second annual report of the Interstate Commerce Commission (2 Inters. Com. Rep. 249). In the light of these adjudications, we are compelled to conclude that if the charge of an unreasonable discrimination cannot be successfully predicated on the ground that a railway company makes an arrangement with one connecting carrier for the use of its tracks and terminals, which it refuses to make with another, although the physical facilities for an interchange of traffic are the same, then the charge of discrimination cannot be predicated on the ground that it makes an arrangement for through billing and rating with one carrier, and does not make it with another. The Interstate Commerce Act does not, it seems, at present, make it obligatory on carriers to make arrangements of either sort, and does not give the commission power to compel such arrangements, but leaves connecting carriers, as at common law, to determine for themselves when such arrangements are desirable, and when undesirable. Moreover, arrangements for through billing and rating will, as a general rule, necessarily involve an agreement for the use, to some extent, of each other's terminals and tracks; and, by the express language of

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the statute, such use cannot be enforced without the consent of the owner. We are unwilling, therefore, as the law now stands, to compel the defendant companies to afford the facilities which the complainant demands. As was said by *Mr. Justice Jackson*, then circuit judge, in the case to which we have already referred: "The law should be as liberally construed in favor of commerce among the states as its language will permit; but, when complaint is made or relief is sought solely or mainly in the interest of the common carriers engaged in the transportation of such commerce, the act complained of or the right asserted should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred."

We are also forced to conclude that if the public interest requires that interstate carriers shall be compelled to put in force arrangements for through billing and rating, and for the establishment of joint through lines, the statute should be made more explicit, and that the commission should be empowered to prescribe the terms of such arrangements upon a comprehensive view of the circumstances of each particular case.

Some allusion was made in the argument to a provision found in the constitution of the state of Arkansas (art. 7, § 1) as having some bearing on the questions discussed in these cases; but as the bills and petitions filed are plainly founded on the Interstate Commerce Law, and thus involve a Federal question arising under that Act, and as there is no jurisdiction arising from diverse citizenship, we have not felt called upon to consider or decide the proposition founded upon the constitution of the state.

In view of what has been said, the several decrees and judgments are hereby affirmed

APPENDIX.

EIGHTH ANNUAL REPORT

OF THE

INTERSTATE COMMERCE COMMISSION.

Hon. WILLIAM R. MORRISON, Chairman, of Illinois.

Hon. WHEELOCK G. VEAZEY, of Vermont.

Hon. MARTIN A. KNAPP, of New York.

Hon. JUDSON C. CLEMENS, of Georgia.

Hon. JAMES D. YEOMANS, of Iowa.

EDWARD A. MOSELEY, Secretary.

LETTER OF TRANSMITTAL.

INTERSTATE COMMERCE COMMISSION,

Washington, December 5, 1894.

SIR: In accordance with the provisions of the Act to Regulate Commerce, I have the honor to transmit herewith the eighth annual report of the Interstate Commerce Commission.

Respectfully yours,

W. R. MORRISON, *Chairman.*

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

EIGHTH ANNUAL REPORT

OF THE

INTERSTATE COMMERCE COMMISSION.

Washington, D. C., December 8, 1894.

To the Senate and House of Representatives:

The Interstate Commerce Commission respectfully submits for the consideration of Congress this, its eighth annual report.

The meaning and application of various provisions of the Act to Regulate Commerce have been discussed at considerable length in previous reports of the Commission, both for the instruction of carriers and the information of the public. It may fairly be assumed that the purposes and requirements of the law are now generally understood. The operation of the statute for nearly eight years, the numerous cases in which its provisions have been applied by the Commission, the adjudication of the Federal courts, and the wide publicity resulting from newspaper and other publications have made railway managers, and the great body of shippers as well, reasonably familiar with the aims and obligations of this enactment. Further exposition of its principles seems less important at this time than a statement of efforts to secure its observance and recommendations of such added legislation as will aid its proper enforcement. While containing such information upon transportation subjects as, in the light of the year's experience, should be set forth, the present report will be mainly devoted to stating what has been done toward securing observance of the law through exercise of the Commission's powers and by proceedings in the courts, and what amendments are necessary to remedy discovered defects in the statute and specifically regulate such transportation methods as may operate to embarrass the working of the law.

COURT DECISIONS.

A number of judicial decisions construing important provisions of the statute have been rendered during the year.

The power of Congress to authorize the Commission to "invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents," was the particular subject of controversy in the case entitled the *Interstate Commerce Commission v. W. G. Brimson et al.* The United States Supreme Court held in this case that Congress may employ any appropriate means, not forbidden by the Constitution, to carry into effect and accomplish the objects of a power granted to it by the Constitution, and that the judiciary can only inquire whether the means devised by Congress are forbidden by the Constitution; that Congress has plenary power, subject only to the limitation imposed by the fundamental law, to prescribe the rules by which commerce among the states is to be regulated; that the provision of the twelfth section of the Act to

Regulate Commerce, requiring the courts to use their process in aid of inquiries before this Commission, is constitutional and valid, and that a proceeding to compel the attendance and testimony of witnesses before the Commission, or to compel the production of books, documents, or papers, in a case of which, under the Constitution, a Federal court may take cognizance; that failure to obey an order of the court requiring the giving of such testimony, or the production of documents before the Commission, is properly punishable by the court as for contempt thereof.

The plenary power of the legislature in this respect is further illustrated by the decision of the Supreme Court in *New York & New England Railroad Company v. Town of Bristol*, which declares that railroad corporations are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression, and that the state has power to exercise this control through boards of commissioners.

So, too, in *Reagan v. Farmers Loan & Trust Company*, the Texas Railroad Commission case, the settled right of the state to regulate carriers through the medium of a railroad commission is again fully recognized by the Supreme Court. In that case it is distinctly stated that judicial interference with schedule rates prescribed by the legislature, or the Commission under its granted authority, is confined to restraining a regulation of rates which operates to deny to owners of property invested in the business of transportation that equal protection which is the constitutional right of owners of other property. Prescribing charges for carriers is held to be a legislative or ministerial duty rather than a judicial function, the province of the courts being to decide whether such rates are unjust and unreasonable to the carrier and such as to work practical destruction to rights of property, and if so found to restrain their operation.

The appeal taken by the Commission to the circuit court of appeals for the fifth judicial circuit from the decision of the United States Circuit Court for the Northern District of Georgia in a case generally known as the Social Circle Long and Short Haul case, has been decided in favor of the Commission. The decree of the circuit court of appeals reverses the decision of the circuit court and directs that the order of the Commission, requiring the defendant carriers to make no greater charge on first class freight for the shorter distance from Cincinnati to Social Circle than from the longer distance from Cincinnati to Augusta, shall be enforced. The defendants have appealed to the United States Supreme Court, where it is expected that the case will be disposed of during the present term of the court. The decision

ion of the court of appeals in this proceeding amounts to a complete denial of the theories contended for in behalf of the carriers. It is to be hoped that the court of last resort will, in this case, fully and finally construe the meaning and application of the fourth section.

The same circuit court of appeals has directed the enforcement of the Commission's order prescribing maximum rates on oranges from Florida points to northern cities. This case is also in the Supreme Court on appeal by the defendant carriers, and will probably come up for argument at an early day.

A recent decision rendered by Judge Williams in the United States Circuit Court for the Western District of Kansas will prove of special value in many cases. Upon statements made to, and informal investigation by the Commission, in relation to transportation rates in force to and from Wichita, Kans., the Commission decided in 1893 to avail itself of that provision in the amended twelfth section of the Act which requires district attorneys to institute proceedings upon request of the Commission and prosecute the same under the direction of the Attorney General, and so determined to advance this Wichita case by having it brought directly before the court in the first instance. By this course, formal investigation and report by this Commission was avoided. The defendant demurred to the petition filed by the district attorney on behalf of the United States upon the ground that the United States had no standing in court as a party complainant in a proceeding under the Act to Regulate Commerce. In other words, that the case would be brought into court only by the Wichita people themselves, or by this Commission for the purpose of enforcing its previously issued order.

The opinion of the court, overruling the demurrer and sending the case to trial on the merits, declares that this method of procedure is not only proper, but was clearly intended by Congress as an aid to the Commission in promptly discharging its statutory duty to "execute and enforce the provisions of this Act." Many cases arise where, under principles previously laid down but disputed by defendant carriers, violations of law are apparent to the Commission; and there are other cases also where peculiar circumstances call for the earliest final adjudication possible. These are matters which may well be brought to trial in the courts in the first instance, and such direct procedure in the courts by the government, which relieves shippers and communities from the burdens of instituting and conducting litigation in such cases, will doubtless prove of great utility.

In the case of the Interstate Commerce Commission against the Detroit, Grand Haven & Milwaukee Railway Company, known as the Grand Rapids Free Cartage case, in which, as stated in our last report, the order of the Commission was sustained, the court directed, on application by the defendant for rehearing, that the decree be entered so as to prohibit free cartage at Grand Rapids unless a like service, or its equivalent in value by reduced rates, be at the same time afforded at Ionia, the place from whence the complaint to the Commission originated; and unless the fact that such free

cartage or such equivalent reduced rate is afforded at both points shall be noted in the defendant's established tariffs of freights and charges published as required by law. This was a modification by the court of the order issued by the Commission. The defendant appealed, and the case is now in the circuit court of appeals.

In the case brought by the Commission against the New York Central & Hudson River Railroad Company *et al.*, in the United States Circuit Court for the Northern District of New York, to enforce its order issued in the case of Page and others against the same carriers, the court filed a memorandum opinion declining to enforce the order of the Commission, upon the single ground that no distinction was made between window shades decorated by hand and the much less valuable article manufactured by machinery. The order of the Commission required the carriers to reduce rates on window shades from first to third class, and the omission to specify machine made shades was due to the facts that the carriers had hitherto made no distinction in classifying hand and machine decorated shades; that no question was raised during the proceeding before the Commission as to the impropriety of a single classification for both, and that comparatively very few hand made or hand decorated shades are the subject of shipment. The Commission certified these facts to the court, and stated that the order was not intended to prohibit the carriers from charging higher rates on the hand made article, and the court was requested to review its decision. This case is further considered in this report under the head of "Unjust Classification."

Whether a state court can take cognizance of suits brought to recover for extortionate or discriminating charges for the carriage of interstate commerce is a question of much consequence to shippers and in regard to which the decisions are conflicting. Cases of this nature relate, of course, to the contract relations of the parties in the state where the controversy arises, and are not brought to regulate the charges of interstate carriers. Upon removal from the state to Federal courts of proceedings of this character the contention has taken on an additional phase, namely, that not only have the state courts no jurisdiction of the legality of interstate carrying charges contracted for with carriers or collected by them from shippers, but that, outside of the Act to Regulate Commerce, there is no common or statute law applicable to such cases in any court, state or Federal. In the case of *Swift v. Philadelphia & Reading Railroad Company et al.*, Judge Grosscup held that "the United States as a distinct sovereignty imposes no laws upon its subjects except such as are expressly or impliedly enacted by Congress;" in other words, that there is no Federal common law, and that the common law rule of the several states which requires common carriers to charge only what is reasonable and just does not apply to carriers of interstate commerce, the only restrictions upon the latter being such as are contained in the Act to Regulate Commerce and its amendments. Judge Shiras, of the

Iowa Federal bench, states directly opposite in the case of *Murray v. Chicago & Northwestern Railway Company*. He holds that there a common law of the United States as well as a law of equity and a law maritime. As above stated, these questions are full of interest to shippers, because it is important for them to know whether they can attack contracts, or bring damage suits growing out of interstate carriage in their state courts, and also whether, as matter of fact, the Act to Regulate Commerce constitutes the only legal restraint upon carriers engaged in traffic between the states.

A recent decision in the United States Circuit Court for the Southern District of Illinois seems to rest upon the existence of a common law applicable throughout the United States. This was the case of *Thomas v. Railroads*, in which a statute of Illinois providing that a carrier cannot, by stipulation, limit his common law liability for safe delivery, was held not to effect a shipment from Tennessee and passing through Illinois to Massachusetts, although the charter of the contracting carrier was granted in Illinois. The court did hold, however, that the carrier could not limit his common law liability for loss or injury resulting through its own negligence.

The case of *Bigbee & Warrior Rivers Packet Company v. Mobile & Ohio Railroad Company* decided under the Act to Regulate Commerce, by the United States Circuit Court for the Southern District of Alabama, shows an instance of rather extreme discrimination. The roads had an established rate on cotton from Mobile to New Orleans, which they charge on local shipments; but on cotton offered to them at Mobile by the plaintiff packet company for carriage to New Orleans they demanded a rate much higher than that in force on local shipments between the same points. This was done to discourage shipments by the packet line from the original shipping point, which in this case was Demopolis, Ala., and thus throw the whole carriage to the railroads. The carriers set up the plea of "dissimilar circumstances and conditions," but the court held that all goods offered for shipment at a given point must be carried at the established rate for such goods from that point, regardless of the place where they originate. The following extract from the opinion sets forth a principle which has been frequently announced by the Commission:

There is a dissimilarity in the circumstance that one lot of cotton came from one point and the other lot from another point. But this is not a substantial dissimilarity, such as is contemplated by the law, and it is not every dissimilarity of circumstance or condition that justify a dissimilarity of rates. "That some dissimilar conditions justify dissimilarity in rates is true. That remote dissimilarities of condition justify any dissimilarities which the carrier chooses to make, is not true." *Interstate Commerce Com. v. Texas & Pacific R. Co. ante*, 408. The circumstances and conditions to be considered are those which bear upon the transportation by the particular carrier, and under which such transportation is conducted. They must have direct bearing upon the

traffic over the line on which the discrimination is made. The dissimilarity of circumstances and conditions set up by respondent in justification of its claim is not the outcome of competition by water routes or another competitive railroad line, not subject to the Interstate Commerce Act. Respondent's position on this point cannot be sustained. *Bigbee & Warrior R. Packet Co. v. Mobile & O. R. Co. ante*, 829.

The case of *Union Pacific Railway Company v. Goodrich*, decided last year by the United States Supreme Court, was not reported in time for mention in our last report to Congress. It was a proceeding based upon a section of the Colorado statute of 1885, forbidding discriminations in railroad charges, and the controversy arose over rates charged for carrying coal from different places to Denver. The section of the Colorado act contains language which is strikingly like the provisions in the second and fourth sections of the Act to Regulate Commerce. This is shown by the presence in the Colorado law of the phrase, "upon like conditions and under similar circumstances," which is very similar to the phrase, "under substantially similar circumstances and conditions," in the second and fourth sections of the Federal statute, and by a power vested in the Colorado railroad commissioners under the Colorado law which is like the relieving authority given to this Commission by the fourth section, or long and short haul clause, of the Act to Regulate Commerce. The following extract from the opinion shows that similarity in language, the strict construction given to the circumstances and conditions phrase, and the recognition of the Supreme Court of the relieving power vested in the Colorado commissioner:

This Act was intended to apply to intrastate traffic the same wholesome rules and regulations which Congress two years thereafter applied to commerce between the states, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality, saving only a power, not in the railroad company itself, but in the railroad commissioner, to except "special cases designed to promote the development of the resources of this state," and not to prevent the commissioner "from making a lower rate per ton per mile, in carload lots, than shall govern shipments in less quantities than carload lots, and from making lower rates for lots of less than five carloads than for single carload lots." The statute recognizes the fact that it is no proper business of a common carrier to foster particular enterprises or to build up new industries, but deriving its franchise from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality.

The Act approved February 11, 1893, was intended to afford protection to witnesses required to testify under the Act to Regulate Commerce, which would be as broad as the immunity from self-incrimination provided

for in the Constitution. Its passage was a direct result of the decision of the United States Supreme Court in the Counselman case, in which it was clearly intimated that Congress has a power to make a law under which unwilling witnesses could, through provision therein for protection from the legal consequences of their testimony, be compelled to give evidence concerning their knowledge of criminal transactions. It was doubtless presumed by Congress, when this Act was passed, that the Supreme Court had considered all the conditions surrounding a witness who should refuse to testify on the ground that his testimony might tend to incriminate himself, especially the effect of enforced disclosures upon his character. But during an investigation held by the Federal grand jury at Chicago, some months since, Judge Grosscup decided in the case of James, who had pleaded his privilege and refused to testify, that it is beyond the power of Congress to pass a law which would afford protection to a witness as broad as the immunity provided in the Constitution, and the chief basis of the decision was that while a witness might be freed by such a law from the legal consequences of his testimony, the Government could not by any enactment save him from the disgrace and taint upon his character which a disclosure of his connection with crime might entail. As no appeal could be taken from this ruling, it will not be possible to obtain the decision of the Supreme Court upon this point until the question can be raised in another jurisdiction, an order obtained directing the witness to answer, and an appeal be taken by the witness to the proper appellate court. A law providing for appeals by the government from decisions of this character and from rulings sustaining demurrers to indictments would remove many of the embarrassments which now surround prosecutions for criminal offenses.

The distinction between the Counselman and Brimson cases above discussed is not generally understood. They both relate to the compulsory giving of testimony, but here the similarity ceases. The Counselman case did not arise under the Act to Regulate Commerce. That proceeding involved section 860 of the Revised Statutes and the 5th Amendment of the Constitution. The Brimson case related to the constitutionality of the twelfth section of the Act to Regulate Commerce. The Counselman case referred solely to a matter of personal privilege under the Constitution, while the question in the Brimson case was whether under the Constitution a provision in a law passed by Congress was valid. Concisely, the difference between the two cases is this:

Under the Brimson decision it is a constitutional exercise of judicial power for a court to compel a witness to give proper testimony before this Commission. Under the Counselman decision a witness cannot be compelled to give testimony before any tribunal, civil or criminal, which may tend to incriminate himself, unless he is protected by statutory enactment from the legal consequences of his testimony, and that section 860 of the Revised Statutes did not afford such protection. As above shown, the decision of Judge Grosscup in the James case goes beyond this and holds

that the Amendment of 1893 does not secure the immunity guaranteed by the Constitution, and that no statute can.

The foregoing are the principal decisions in which the law has been construed or referred to by the courts during the year. In addition to these, attention should be called to orders, injunctions, and opinions arising out of railway labor troubles, which have been partially based upon sections of the Act to Regulate Commerce. That provision intended to bring about general interchange of traffic with connecting lines on equal terms, and to compel the prompt forwarding of passengers and goods at reasonable rates, have been found so weak as to be incapable of forcing a railroad company to haul the loaded car of a connecting carrier at established local rates, and yet can be successfully invoked by a railroad company to restrain its employes from obstructing or in any way interfering with the prompt forwarding of interstate traffic over its own and connecting lines, is a condition of affairs which not plain people alone, but those supposed to be versed in the law, find it extremely difficult to understand. Using clauses of the law to regulate certain phases of railway labor may be entirely proper upon the ground that such statutory provisions impose duties of a public nature upon the employing carriers, the performance of which the employes have no right to prevent. This may or may not be so; but if it is, then difficulties should not be found in the way of using the same clauses to compel connecting carriers to interchange and forward traffic according to the intent of those who framed the statute. Aside from the vital interest of the public in the compulsory extension of through routing facilities, we can think of no more forcible argument in favor of an amendment which will bring the carriers into unquestioned subjection to this part of the law than the situation above set forth. The subject of through routes and through rates is discussed at length in another portion of this report.

CRIMINAL AND CIVIL PROCEDURE UNDER THE LAW.

Considerable public discontent has been manifested on account of nonenforcement of the penal provisions of the Act to Regulate Commerce, and the expression of this feeling has included some thoughtless criticism of the Commission.

The statute makes it the duty of the Commission to keep itself informed of the methods of carriers in conducting their business, and to execute and enforce the provisions of the Act, and district attorneys are required, upon the request of the Commission, to institute and prosecute all necessary proceedings for the enforcement of such provisions and for the punishment of all violations thereof. This clause in the twelfth section of the law undoubtedly refers to criminal as well as civil proceedings, and the Commission has always considered reports to the Department of Justice of facts concerning alleged violations of the penal provisions of the Act to be one of its duties.

But it should be borne in mind that this does not impose upon the Commission the duties of

a detective bureau. It means that the Commission shall keep itself generally informed of the business practices of common carriers, and whenever facts come to its knowledge which appear to warrant action, that it shall recommend the institution of criminal proceedings by the Department of Justice to that end. This is neither a detective nor a prosecuting function—it is rather a result of that continuous investigation into the transportation business of the country which the Act to Regulate Commerce specifically requires of this Commission. To accomplish the purposes of such general inquiry Congress has endeavored to open up to the Commission certain avenues of information, including the power to summon witnesses and obtain their testimony and the production by them of books, papers, and documents, the making and filing of special statements and annual reports, the filing of tariffs and contracts, and information on special subjects from time to time as may be required; and to facilitate the acquirement of information it was deemed necessary to add to the twelfth section of the law a provision that the testimony given by persons before the Commission should not be used against such persons in any criminal proceedings.

These powers, apparently sufficient, but in reality extremely difficult to successfully exercise, are to be exerted and information thereby obtained used in the continuous inquiry prescribed in the statute. That the exercise of authority by the Commission by several of the means just mentioned has been resisted by carriers and unwilling witnesses in various ways, and that they have often succeeded in embarrassing and greatly delaying the progress of regulation under the law, is too well known to require further mention at this time. We believe, however, that the declarations of the Supreme Court in the Brimson matter, and decisions in other recent cases, indicate a trend of judicial construction which will eventually remove these embarrassments and greatly aid the administration of the statute.

If, then, in the course of such general and continuing investigation the Commission shall become apprised of facts which appear to warrant their presentation to the officers of the Government charged with the prosecution of criminal offenses, it is clearly required to further the execution and enforcement of the law by reporting such facts to the Department of Justice and requesting the institution of proper proceedings. Here the Commission's connection with the criminal side of the statute necessarily ends. The report to the Department of Justice of criminal matters coming to its knowledge from day to day is all that this Commission, or any other bureau or tribunal not having the power to prosecute or condemn, can do.

Upon this subject we desire to add that we not only think it our duty to request these prosecutions, but that every citizen, shipper, merchant, railroad official or employé, should, in the interests of law-abiding shippers, fair commercial dealing, and honest and successful railroad operation, openly and heartily assist the Government in running down and punishing these violations of a statute designed to protect them and the interests they represent.

4 INTER S.

It is time to obliterate the impression that such aid will cause the person giving it to take on the character of an informer, using the term in a reproachful sense. We do not apply that term to a man seeking the arrest of one who has defrauded or robbed him, injured his property, or betrayed his confidence. Yet the giving and taking of less than lawfully established transportation charges is nothing more or less than fraud, robbery of other shippers, injury to their business, and a betrayal of trust in a common public servant. Why should the giving of information of these offenses under the Act to Regulate Commerce be deemed a reproach either to the shipper or the railroad official, or subject them to the enmity of any person or the antagonism of any commercial interest?

Importers loudly complain when tariff duties have been secretly cut in favor of business rivals, and actively assist in prosecuting the officers. What proper considerations exist to deter shippers from seeking the punishment of railroad officials and shippers who have put upon them the kind of injury for which importers do not fail to demand punishment of the perpetrators? The carrier and the customhouse each renders a public service and each collects a charge upon commerce. One is a tax upon its carriage, the other a tax upon its admission into the country; and the regulation and equal application of either is a governmental function in which the whole public is vitally concerned. Both the law and public sentiment condemn fraud in the collection or payment of customs as a crime meriting prompt and severe punishment, and when public opinion shall regard transportation frauds in the same light the serious difficulties now met with at every hand in endeavoring to convict those who willfully violate the Act to Regulate Commerce will have mainly disappeared.

The shipper who secretly secures an advantage in transportation rates over his competitor in business has hitherto been looked upon more in the light of the smartest party to a horse trade than as the participant in a criminal offense for which he should be fined and imprisoned. This is because transportation has been regarded in the popular mind as a part of private business instead of a reliable and impartially conducted agency provided under Government sanction, by which very many industries can only be carried on. When this distinction becomes thoroughly understood the punishment of penal offenses under the statute will be comparatively easy and the necessity therefor correspondingly rare; and difficulties in the way of conviction will be no more formidable than those which beset the Government in prosecuting other crimes and misdemeanors. Success in enforcing the penal provisions of this Act depends almost solely upon whether those interested in transportation, or having knowledge of particular transactions, will give their aid and assistance in that behalf, and regard such action on their part as a duty which they owe to themselves, the community, and the state.

In this connection we may properly allude to certain modifications of the penal provisions of the Act, which are advocated by many railroad managers. It is proposed by them to

exempt the officers and employes of carrying corporations from criminal liability for rate cutting and similar offenses, and to impose such liability solely upon the corporations themselves. In brief, the argument is that the extreme severity of the present law operates to prevent its enforcement; that railway managers will not give information against their rivals when the consequence might be the imprisonment of individuals with whom their personal relations are friendly and familiar, but that such disclosures would be freely made if they resulted only in the imposition of a fine upon the offending corporation. We are not prepared to indorse this view. Corporations can act only through their officers and agents, and necessarily an offense against business rectitude and public morality must be committed by some individual who has knowledge of the law and consciously transgresses its provisions.

The wrongdoing now referred to involves, in our judgment, a high degree of moral turpitude which should rightfully subject to exposure and punishment the persons who are guilty of it. We believe that the corporations should themselves be indictable, and regard it a mistake of the present statute that they are not; but we also believe that their officers and agents should remain amenable, as they are now, to the penal obligations of the law. This view includes retention of the imprisonment feature in the tenth section. Undoubtedly the scheme which will practically result in preventing these misdemeanors is the useful one to adopt, even if a different plan would seem more consonant with abstract justice. For this reason we question the wisdom of making both shipper and carrier criminally liable for the same transaction, and believe that the amendment of 1889, which extended to shippers the penal liability theretofore imposed upon carriers only, has proved a constant and serious obstacle to the prosecution of these offenses.

In our opinion, the best distribution of criminal liability, having regard to the means most likely to secure the punishment of offenders, is to make the shipper alone liable for such offenses as false billing, false weighing, false description of the contents of packages, and other wrongful manipulations of property, for these matters are peculiarly within the control of the shipper; while the carrier alone should be liable for such offenses as rate cutting, rebates, and other wrongful manipulations of the published schedules, for these matters are peculiarly within the control of the carrier. In the latter class of offenses liability should attach to the carrying corporation and also to its officers and agents, for the mere imposition of a fine upon the corporation would not, in our estimation, prove an adequate penalty.

It might, nevertheless, be well to provide specifically in this proposed amendment that whenever a shipper falsely bills or misrepresents the contents of a shipment with the knowledge of any officer, agent, or employé of the carrier, then such officer, agent, or employé shall also be liable to the penalties provided in the tenth section.

The civil side of the law presents a wholly

different aspect. Under the requirements of the statute the Commission is continually engaged in a general investigation, as above described, and such continuous inquiry results in many special investigations instituted by the Commission upon its own motion, as well as upon formal complaints brought by shippers and others under various provisions of the statute.

These special investigations, made on complaint or the Commission's own motion, are conducted with the regard to form and process of law. The Commission, in proceedings of this character, files a statement of its findings and conclusions and thereupon issues an order which either dismisses the proceedings or requires the carrier to conform to the law in the particulars set forth. If such order against a carrier is disobeyed, the Commission may apply to the proper court for its enforcement and appear in the case as petitioner on behalf of the public. The Commission may also in certain cases, as held in the *Wichita* case, before cited, request the Department of Justice to institute civil proceedings in the name of the United States, and this without any special investigation by the Commission or the issuance by it of an order against a carrier.

These statements are made for the purpose of setting out as clearly as possible the difference between criminal and civil procedure under the Act, and to describe generally the functions of the Commission in civil matters as distinguished from its duty or power in relation to criminal violations of the statute.

WORK OF THE COMMISSION.

Hearings and Investigations.

In addition to the general sessions held at Washington during the year, hearings have also been held and investigations made by the Commission or one or more of its members at Providence, R. I.; Frankfort and Louisville, Ky.; Coldwater and Meridian, Miss.; Birmingham, Ala.; Memphis, Tenn.; Titusville, Pa.; Syracuse, Buffalo, and New York, N. Y.; Philadelphia, Pa.; Boston, Mass.; Chicago, Ill.; St. Louis and Kansas City, Mo.; Keosauqua, Iowa; Topeka, Kans.; Indianapolis, Ind. Several visits were paid to some of these places.

Detail Work.

The routine work of the Commission, consisting of correspondence, preparation and mailing of reports, opinions, orders, and conclusions, and the filing, examination, and treatment of railway reports, tariffs, contracts, and other documents, has been fully as great as in former years and of the same general character.

Expenditures.

The names and compensation of persons employed by the Commission, with the appropriations and expenditures for the past year, will be found in Appendix A.

Decisions.

The principal points decided by the Com-

mission since the date of its organization are set forth in Appendix B.

Civil Cases Pending in the Courts.

Following is a statement of cases now pending in the courts to enforce orders of the Commission:

Interstate Commerce Commission v. Lehigh Valley Railroad Company. Rates on coal. Pending in United States Circuit Court, Eastern District of Pennsylvania.

Interstate Commerce Commission v. Louisville & Nashville Railroad Company. Rates on coal. Pending in United States Circuit Court, Middle District of Tennessee.

Texas & Pacific Railway Company v. Interstate Commerce Commission. Inland rates on domestic and import traffic. Pending in United States Supreme Court.

Detroit, Grand Haven & Milwaukee Railway Company v. Interstate Commerce Commission. Free cartage. Pending in United States Circuit Court of Appeals, Sixth Judicial Circuit.

Cincinnati, New Orleans & Texas Pacific Railway Company et al. v. Interstate Commerce Commission. Social Circle long and short haul case. Pending in United States Supreme Court.

Interstate Commerce Commission v. Atchison, Topeka & Santa Fe Railroad Company et al. San Bernardino long and short haul case. Pending in United States Circuit Court of Appeals, Ninth Judicial Circuit.

Interstate Commerce Commission v. Louisville & Nashville Railroad Company. Middletown, Ky., long and short haul case. Pending in United States Circuit Court, Southern District of Ohio.

Interstate Commerce Commission v. Clyde Steamship Company et al. and four other cases. Georgia Railroad Commission long and short haul cases. Three cases pending in United States Circuit Court, Northern District of Georgia, and two cases pending in United States Circuit Court, Southern District of Georgia.

Interstate Commerce Commission v. East Tennessee, Virginia & Georgia Railway Company. Chattanooga, Tenn., long and short haul case. Pending in United States Circuit Court, Eastern District of Tennessee.

Savannah, Florida & Western Railway Company et al. v. The Florida Fruit Exchange. Rates on oranges from Florida points. Pending in United States Supreme Court.

Interstate Commerce Commission v. Northern Pacific Railroad Company et al. Fargo, N. Dak., long and short haul case. Pending in United States Circuit Court, District of North Dakota.

United States, ex. rel. W. R. Morrison and others, v. New York & Texas Steamship Company. Refusal to file tariffs. Pending in United States Circuit Court, Southern District of New York.

Interstate Commerce Commission v. Alabama Midland Railway Company et al. Troy, Ala., rate discrimination case. Pending in United States Circuit Court, Middle District of Alabama.

Interstate Commerce Commission v. Delaware,
: INTER S.

Lackawanna & Western Railroad Company et al. Window shade classification case. Pending in United States Circuit Court, Northern District of New York.

The Shinkle, Wilson & Kreis Company et al. v. Louisville & Nashville Railroad Company et al. Unreasonable rates from Cincinnati to Southern points. Pending in United States Circuit Court, Southern District of Ohio.

Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railway Company et al. Unreasonable rates from Chicago, Cincinnati, and other points to Southern territory. Pending in United States Circuit Court, Southern District of Ohio.

H. W. Behlmer v. South Carolina Railway Company et al. Summerville long and short haul case. Pending in United States Circuit Court, District of South Carolina.

Long and Short Haul Clause.

The case of a hay dealer at Summerville, S. C., which was decided in September last, presents with singular clearness the principal difficulties which have been encountered in the operation and administration of this clause.

The defendants carried hay in carloads from Memphis, Tenn., through Summerville to Charleston, S. C., for 19 cents a hundred, while they charged the complainant 28 cents a hundred on carload shipments from Memphis to Summerville, the 9 cents difference being equal to the local rate in force for carrying hay from Charleston back to Summerville. It was evident that this difference of \$1.80 per ton was sufficient to preclude the complainant, engaged in business at Summerville, from buying hay and selling and reshipping it to other points in that section in competition with Charleston dealers. The Charleston competitor could usually afford to sell to the same customer for what the hay cost the complainant. The Summerville dealer was thus practically confined to Summerville for a market, and even there had to compete on even terms with dealers doing business at Charleston, 19 miles away. The defendants sought to justify their departure from the general rule of the fourth section by showing the existence of railroad competition between Memphis and Charleston, and of competition by rail or water, or part rail and part water, from such markets as New York, Boston, Philadelphia, Baltimore, and Chicago.

The case was decided in accordance with rulings previously made by the Commission in the case of James & Mayer Buggy Company, Chattanooga Board of Trade, Georgia Railroad Commission, and Gerke Brewing Company, and supported by the decision of the court of appeals for the fifth judicial circuit in the proceeding brought by the Commission to enforce its order in the James & Mayer Buggy Company's case, commonly known as the Social Circle Long and Short Haul Case.

The Commission held that the competition of markets or the competition of carrying lines subject to regulation under the Act does not justify carriers in making greater short haul or lower long haul charges over the same line in the same direction (the shorter being included within the longer distance) in the ab-

sence of an order of relief issued by this Commission upon application therefor and after investigation. The carriers were therefore ordered not to charge more for the transportation from Memphis to Summerville than from Memphis to Charleston. This order has not been obeyed. It was our view that the defendants ought not to engage in competition for traffic from Memphis to Charleston if the rates obtainable are not remunerative, and if they are remunerative the defendants cannot lawfully assume to say that such rates, though profitable on Charleston traffic, are greatly unprofitable for a similar service to a shorter distance point on the same line in the same direction.

If \$3.80 per ton is profitable to the carriers for bringing hay in carloads from Memphis to Charleston, then \$5.60 per ton, nearly 50 per cent more, on a carload of hay hauled from Memphis to Summerville, which is nearer than Charleston is to Memphis, represents an extra profit of \$1.80 per ton which the defendants did not, and they plainly could not, show to be equalled by extra cost for transporting a car of hay to and delivering the same at Summerville. The carriers may be able to show reasons before this Commission for an order of relief under the fourth section, which will entitle them to accept less on this traffic to Charleston than to Summerville, and such showing may be based on hardships arising from the competition of carriers from the same or different points of shipment which ought to be removed by such an order in justice to the carriers and in the interests of commerce; but until they do this, they are properly directed to refrain from charging rates which, in contravention of the general rule of the fourth section, fetter the business of a person or place and thereby expand the trade of another person or place. Correction of methods of rate making which tend to encourage business monopoly is a leading object of the Act; and the Commission, by its construction and application of the law, and especially the fourth section, endeavors to accomplish that object. We believe, moreover, that the true interests of the carriers would be materially advanced if they should heartily endeavor to promote this purpose of the statute.

The policy, generally adopted by southern carriers, of fixing rates to so-called competitive stations, and making rates to intermediate or local points by adding local or arbitrary rates to rates in force to such competitive points, an illustration of which is furnished in this Summerville case, generally results in preventing the development of business enterprises at the intermediate or local points, and greatly retards their growth. The carriers assert that they are forced into this policy by the competition of other carriers, and rely for their justification upon this alleged necessity.

We hold that the competition of carriers cannot justify relative rates which prevent or destroy the natural competition of communities or unduly discriminate between persons; that this policy of the southern carriers inflicts these injuries in marked degree, and is therefore unwise and unlawful. In so far as the competition of carriers promotes the welfare

of persons and places without undue injury to other persons and places, it should be encouraged; but when such competition plainly operates to destroy or prevent the growth of one town and build up another, it should be justly regulated. Due observance of the fourth section will largely accomplish both purposes; it will encourage legitimate and restrain illegitimate competition in the carrying trade.

As stated in the first part of this report, the proper construction of the fourth section is involved in a case now pending and soon to be argued in the Supreme Court of the United States.

The Southern Freight War.

At no time since the Act to Regulate Commerce went into effect has there been greater disorganization of rates in any section of the country than that which prevailed in southern territory during June and July of the present year.

The trouble is stated to have been precipitated by the cutting of rates by a steamship line running from eastern cities to southern ports and engaged largely in through transportation subject to the statute. The active causes of the war are understood, however, to have been unlawful secret reductions by several lines during a considerable period. The southern railroad carriers, acting through the head of their association, instead of calling for and aiding the enforcement of the law against those responsible for such violations of its provisions, disregarded their own obligations under the statute and ruthlessly reduced all freight rates from eastern points to so-called basing or competitive stations in southern territory. It appears that these reductions were suggested by and had the approval of the southern Railway & Steamship Association, an organization which has for one of its professed objects the maintenance of just rates.

These reductions were so hastily ordered and put in force that in many cases the three days' previous filing and public notice of the reduced rates was not given; in some instances there was only partial compliance with this requirement, and in others it was wholly omitted. At an investigation subsequently held by the Commission these omissions of duty were chiefly laid to the neglect or inadvertence of subordinate officials. This disregard of legal duty, grave as it might appear, was nevertheless comparatively unimportant beside the greater offenses against the statute which were effected by the reductions themselves. The rates to competitive points were cut considerably more than one half, some nearly or quite two thirds. For illustration, class rates from New York to Atlanta before and after June 2, 1894, were as follows:

RATES FROM NEW YORK TO ATLANTA.

	Classes.					
	1	2	3	4	5	6
Before June 2, 1894....	114	98	86	73	60	49
After June 2, 1894....	40	34	30	26	21	17

On or about June 10 these reductions, which were *via* eastern lines, were followed by similar changes *via* Ohio river points. But although

these reductions of the 2d and 10th of June were put in force to competitive or basing stations, a number of days elapsed before rates to the great majority of points were lowered at all; and when as a result of the immense cut at basing points the rates to some noncompetitive stations were changed, the reductions did not always equal those made at the basing points, nor was there any observable general attempt to preserve or re-establish the old relation of rates between basing and local stations. The entire rate situation in the south, antagonistic to the statute as it had been before, was thrown into such confusion by reductions made on and after the 2d of June, that it was rarely possible to determine with certainty what rates were actually in force to many points.

The impropriety of the method generally adopted in southern territory of determining rates to noncompetitive stations by adding a local or arbitrary rate to a through basing point rate, so as to make the lowest combination, was forcibly illustrated during this reduction period. Not unfrequently the short distance local or arbitrary, exceeded the long distance through rate to the nearest basing point; but this combination was not, on account of failure to rearrange all tariffs, always charged, as in many cases old tariffs to local points remained in effect, so that, while the reduced or new rate to Birmingham, for instance, would be applied on business to that point, rates to a local station taking combination rates, as above described, might be the old and higher Birmingham rate plus the usual local or arbitrary. Sometimes agents would disregard the old combination tariffs applying to local stations and make a new combination based on the new rate without any tariff authority whatever; while at other stations the old combination rates would be followed. At some places agents were apparently instructed to make the new combination for themselves; and sometimes shippers who kept informed would demand it. Again, on some roads changes in noncompetitive rates to suit or partially suit the new condition were made more promptly than on others in the immediate vicinity.

On the face of many tariffs, and very frequently in actual practice, it was much cheaper for a merchant at a town not favored with the designation of basing point to have his goods shipped to the nearest basing point and order them reshipped locally from such point to his place of business than to have them routed direct. About the middle of June the first class rate from Atlanta, Ga., to Columbus, Miss., was 91 cents, while the rate to Birmingham, Ala., east of Columbus, was 22 cents and that to Meridian, Miss., south of Columbus, 28 cents; and the rate from both of these places to Columbus was 60 cents. Prior to June 1, first class rates from Atlanta to Birmingham were 64 cents, to Columbus 70 cents, to Meridian 80 cents. On that date the Columbus rate was increased 21 cents, and later in the month the Birmingham and Meridian rates were reduced, as shown by filed tariffs, 42 and 52 cents respectively. If these rates were actually charged during June and July, the discriminations were manifestly arbitrary and

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unjust; and if the tariff rates were not adhered to, equally grave violations of the law took place.

We think it within bounds to say that during this period rates in southeastern territory were fixed according to no coherent plan, and that grossly discriminating and relatively unreasonable charges were collected at noncompetitive points on almost every road.

One of the grave results of these sweeping reductions was the opportunity afforded to dealers in favored localities to load up their warehouses with stocks of goods at excessively low transportation charges. Competing dealers at less favored points were denied this extraordinary advantage and their business suffered accordingly. Indeed, it was frankly stated at the investigation held by the Commission that a controlling reason for the continuance of the inordinately low rates from the beginning of June until the 1st day of August was the fact that a carrier operating an important system had entered into contracts with a large number of its customers by which, as a consideration for routing goods wholly by its line, it agreed to keep these low rates in effect until the last mentioned date.

A merchant so situated as to take advantage of the reduced rates, by getting in a large stock while these rates continued, was able to compel a competitor located at a less favored point to refrain from his usual competition, or else reduce the selling price of his goods to the extent of seriously impairing if not actually destroying his profits. Such monopolizing advantage amounted to the difference between the old and the new rates. This was particularly damaging to dealers in places just outside of southern classification territory, the reductions being generally confined to roads in that section.

Considering the amount of southern traffic, it is not improbable that the reduced rates brought little or no profit to the carriers, and that their continuance in force would have been ruinous to very many of the carrying corporations. This destructive warfare between the carriers, which produced so much injury to a large number of shippers and communities, was an ill-considered and costly effort to punish one or two competing carriers; it changed nothing, taught no lessons which had not been learned before, brought about no guarantee of future observance of rates by the parties whom the sweeping cut was designed to injure—merely resulted in restoring the old rate situation and old opportunities for the secret or open cutting of rates. The carriers had an extremely costly and innocent shipper's a very disastrous experience, with no permanent or practical advantage to either. On the contrary, this substantial cutting in half of competitive point charges, and the keeping of the reduced rates in force for two months, has led the public to believe more firmly than ever that these lines are now able, to say nothing of what might be done under thoroughly impartial and economical methods, to perform transportation services for very much less than the rates in force before and since the reduction period.

The carriers can not dispel this widespread

belief by saying that the war was waged for the purpose of insuring the future maintenance of rates by competing carriers, for, first, it will not have that effect; second, the people demand lower rates if they can be afforded, and the acceptance of greatly reduced rates for a protracted period furnishes a convincing argument to shippers that lower charges are practicable. The public cannot well understand why carriers, having the general freedom to fix their own charges, should be willing or able to carry on their business for weeks and months at such great loss as must have been entailed by these great reductions, if the old rates were only reasonable.

We find in the statute no effectual means by which to prevent a recurrence of rate war conditions. There exists, it is true, the power to punish for violation of the penal provisions of the law, and we are morally certain that such violations did take place; but sufficient evidence concerning such transactions to warrant recommendation for criminal proceedings has been, as usual, extremely difficult to secure. Though it was clearly for the interest of the southern managers to fully expose, at the investigation held by the Commission, their knowledge of secret as well as open reductions, not a single representative of the carriers did more than state his general belief.

We know that when the cuts were made rate sheets were not filed with the Commission in the manner prescribed by law, and as to this failure some action might be taken; but even here the situation is beclouded with assertions that orders for such filing were duly issued and with excuses based upon the general tariff confusion which prevailed when the reductions were declared. The discriminations and prejudices resulting from the wholesale open reductions of rates to competitive points and general neglect of noncompetitive rates, as before described, might form the basis of criminal proceedings, but the greatest difficulty would be encountered in establishing the necessary fact that such discriminations and prejudices were willfully inflicted. The long and short haul clause properly applied would largely protect the prejudiced communities, but the carriers refuse to accept the Commission's construction of that provision or to obey its orders under that clause pending final determination in the courts.

One course of action which might have a deterring effect upon reckless demoralization of rates in the future would be suits for damages by injured parties. The Commission entertains such cases when the complainants also seek to regulate present rates or prevent unlawful charges in the future. But the present authority of the Commission does not extend to prohibiting carriers from reducing rates. They may, for anything contained in the statute, carry traffic to some localities for as low a sum as they please, and other places or dealers therein must seek relief in more or less tortuous legal proceedings.

The situation calls for a statutory remedy. The interests of railway stockholders, of places and dealers, of the entire public, demand protection from Congress against the damaging exercise of rate making powers by railway managers in their mad fights for temporary

carrying advantages and ruinous endeavors to punish rival carrying interests. The evils of unlimited power in the carriers to reduce their rates were fully set forth in the last report of the Commission under the head of "Limitation of Rate Reduction to Competitive Points," and the recommendation then made for such amendment of the law as will empower the Commission to limit these reductions is earnestly renewed.

Unreasonable freight rates from Chicago and Cincinnati to Southern points.

On the 29th of May last the Commission filed its report and decision in certain cases brought by the Chicago and Cincinnati freight bureaus, two mercantile associations, against carrying lines to Knoxville, Chattanooga, Rome, Atlanta, Memphis, Birmingham, Anniston, Selma, and other points in the southern states.

The complainants contended that rates from Chicago and Cincinnati to Southern points, on commodities embraced in classes 1 to 6, inclusive, of the Southern Railway & Steamship Association classification, were unreasonable in themselves, and also that, under the adjustment of rates from the east and west to the south, the eastern cities were unduly favored by the carriers as to rates on these numbered classes.

The cases presented questions of the greatest importance and involved traffic from Chicago, Cincinnati, and other western points to the south, amounting to millions of dollars annually. After due hearing and examination of voluminous evidence the Commission decided that the rates complained of were unreasonable, and directed their reduction.

The defendant carriers relied greatly upon the competition of water lines between eastern and southern seaboard points, but it was shown that the influence of such competition was not sufficient to account for the difference in rates per ton per mile from the eastern and western points of shipment to southern destinations, and that these rates per ton per mile on Chicago and Cincinnati shipments were unnecessarily high for the transportation service south of the Ohio river, or, in other words, in Southern Railway & Steamship Association territory. In addition to this it clearly appeared that the relatively higher rates from Chicago and Cincinnati and other western points to the south, on the numbered classes of freight than those in effect from the east, were the result of an agreement between eastern and western carriers, which had been brought about through the medium of the above named association, and that it was one of the avowed objects of such association to secure, by adjustments of rates, the transportation by eastern lines, from the territory set apart as theirs, of merchandise or manufactured goods covered by the numbered classes in the southern classification, and to assure to the western lines the transportation of traffic covered by the lettered or lower classes in that classification from the territory apportioned to them.

The Commission held that this division of traffic through the maintenance of unreasonable rates from Chicago, Cincinnati, and other points was unlawful. The agreement of the

Southern Association was also held to be in some respects similar to an agreement for the pooling of freights or division of earnings, which is forbidden in the fifth section of the law. It was plainly established that these adjustments of freight rates to the south were arbitrary, and not justified by considerations which properly enter into the determination of reasonable or relatively reasonable transportation charges. Therefore, and in accordance with the conclusions set forth in its report on these cases, the Commission ordered the defendant carriers engaged in transportation from Chicago or Cincinnati to the southern points mentioned not to charge more for such transportation of freight in the numbered classes than certain rates per hundred pounds which were set forth in the order.

After the Commission's opinion was filed, but before its order was issued in these cases, rates to southern territory from Chicago and Cincinnati were so greatly lowered, by the extensive rate reductions made through the Southern Railway & Steamship Association in June, as to be far below the maximum rates prescribed by the Commission.

These great reductions of southern rates, which lasted until the end of July, are discussed at length in the preceding article. During this reduction period the defendant carriers not only complied with the Commission's order in these cases, but went far beyond its requirements. The reduced or war rates in force from Chicago and Cincinnati to the south were in most instances more than 40 per cent below the maximum rates prescribed by the Commission, and more than 50 per cent less than those complained of and kept in force by the carriers up to the early part of June.

When it appeared in July, from a notice filed with the Commission by the Louisville & Nashville Railroad Company, that it intended, notwithstanding the order of the Commission, to restore the old rates, several Cincinnati firms applied to the United States Circuit Court for the Southern District of Ohio for a decree directing the Louisville & Nashville Railroad Company and the receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company to obey the order of the Commission. An order was granted setting the case for hearing on October 1, and enjoining the Louisville & Nashville Railroad Company in the meantime from disobeying the order of the Commission, but with leave to move before Circuit Judge Lurton or District Judge Barr, within a specified time, for a dissolution of the injunction.

The receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company, having been appointed by the circuit court, was not joined. The Louisville & Nashville applied to have the injunction dissolved, and a hearing was had before Judge Lurton, who granted the motion. The principal reasons for dissolving this injunction appear to have been that the decision of the Commission did not amount to a judicial determination, that the right of the petitioners was yet to be established, and that therefore this was not a proper case for a preliminary injunction. The opinion granting the motion for dissolution states that: "If it be assumed that upon an application for a preliminary

injunction the report of the Commission is to be regarded as making out a prima facie case of illegal rates, that effect, on such an issue, is lost when an issue is made by a sworn answer upon the principal conclusions of the report." It is also stated in that decision that no court has yet granted a preliminary injunction in cases brought to enforce the Commission's orders. We have inserted in the prayer of the petition in every such case a request for the preliminary injunction, but the point has not, on account of the adverse position taken by a court in one of the early cases, since been pressed until this petition was brought. There seemed in this case to be a difference of situation, which warranted the granting of an injunction in the first instance, and justified the expectation that it would be continued pending the trial.

The exceptional character of this case arose from the fact that the defendant roads had practically conceded the justice of the petition by having voluntarily reduced rates in effect for about two months after the Commission's order was made, which were in most instances more than 40 per cent below the rates which the Commission had ordered them not to exceed. This was deemed sufficient ground upon which to apply for the preliminary order, and it was thought that an injunction which merely restrained the carriers from increasing their rates above the much higher charges allowed by the Commission would not foreclose them of any just rights during the pendency of the case in the circuit court.

After the dissolution of the preliminary injunction, the defendants proceeded to take testimony at New York, Manhattan Beach, Chicago, Nashville, Atlanta, and other places, and the petitioners were also given the right to take rebutting testimony.

The Chicago complainants not having taken formal part in the proceedings, and only two of the defendants having been made parties thereto, it was deemed advisable that the Commission should prepare and file a petition against all of the defendants engaged in carrying south from the two places. Upon presenting this petition before Judge Sage, sitting in the same court in Cincinnati, an order was issued, upon motion of the United States attorney, requiring the defendants to answer on or before October 22 and to appear before the court on November 19 and show cause from the record made before the Commission why its order should not be enforced; and the Commission was also required to produce such record before the court. In the event of failure on the part of defendants to make such showing from the record before the Commission, they were allowed, if they should so desire, to produce additional material evidence to justify their disobedience of the Commission's order. It was further set forth in this preliminary order of the court that, in accordance with the provisions of section 16 of the Act, the proceeding should be conducted without the formal pleadings and proceedings applicable to ordinary suits in equity, and in such summary manner as to expedite the hearing and determination of the cause.

Whatever the outcome of this proceeding may be, it is clear to us that the practice, which

this order of Judge Sage was intended to modify, of permitting defendant carriers to take unlimited testimony, including so-called expert testimony of interested railroad officials, to ignore entirely the evidence which was submitted to the Commission, and disregard the primary question as to whether there was such material error in the Commission's findings of fact from such evidence, or in its conclusions based upon such findings, as would make its order thereon unlawful, was full of embarrassments and delays, and plainly at variance with the requirements of the sixteenth section.

The formal prayer used in this petition of the Commission for the enforcement of its order, together with the motion filed by the district attorney and the preliminary order issued by Judge Sage, are published in Appendix — for convenient future reference.

The following statement of rates in force when the Cincinnati and Chicago complaints were filed with the Commission, of reduced rates kept in effect by the carriers from early in June to August 1, 1894, of maximum rates prescribed by the Commission, and of rates in force since August 1, using rates to Atlanta for illustration, will show the slight regard which the carriers paid to "obtaining necessary revenue" when they determined to cut the rates, the great margin between such reduced rates and the maximum rates prescribed by the Commission, and the moderate reductions from present rates which compliance with our order would require:

CINCINNATI TO ATLANTA.

	Classes.				
	1.	2.	3.	4.	5. 6.
Rates complained of.....	107	92	81	68	56 46
Carriers cut rates.....	38	32	28	24	20 16
Commissioners' maximum rates.	86	73	60	45	35 27
Carriers' present rates.....	107	92	81	68	56 46

Since the suit to enforce our order in these cases was instituted all-rail rates from New York and other eastern cities to southern points have been advanced 4 cents per hundred pounds, on classes 1, 2, 3, 4, and H, and 3 cents per hundred pounds on the other classes, of the Southern Railway & Steamship Association. This advance makes some change in the relation of all rail rates from the east to the south, as compared with those from Chicago, Cincinnati, and other western points to southern territory. The former rates had been in effect for a number of years, and this action of the carriers may have been taken with a view to its effect upon the proceeding to enforce our order in these Chicago and Cincinnati cases, although our decision was based mainly upon facts showing that the rates complained of are unreasonable in themselves.

Unreasonable rates on wheat.

Two cases which involved the reasonableness of transportation charges on wheat from shipping points in the state of Washington to Portland, Or., were decided during the year. 4 INTER S.

Correspondingly lower rates for the carriage of food products from Kansas and Nebraska points to Chicago were used by the complainant in one of the cases to establish his claim of unreasonable charges from Pullman, Wash., to Portland, but this was held not to be a safe criterion by which to measure the reasonableness of charges in sections of the country where the expenses of transportation and other conditions of operation are widely different. Comparison was also made by this complainant with the existing rate of charges in force over a rival line from Pendleton, Or., to Seattle, Wash., and this was held to be proper; transportation rates in force on lines of rival companies or on different branches or lines of the same company have a bearing upon and are entitled to consideration in connection with the question of reasonable charges for transportation services rendered under like conditions.

Substantial reductions in the rate complained of having been made since this case was heard, and which justified the expectation of further reasonable modifications, an order directing additional reductions was not deemed justifiable; but the complainant was held entitled to a refund of charges paid on a carload of wheat between Pullman and Portland, equal to the difference between the rate complained of and the rate in effect when the case was decided.

The other case involved rates on wheat from Ritzville, Wash., to Portland, Or., over two lines, one much longer and much more expensive than the other, the longer and more expensive being operated by one carrier, while the more direct and less expensive route was over continuous lines operated by more than one carrier.

The nature of the questions in this case are shown by the Commission's rulings that it is the right of shippers to have their goods carried, and the duty of carriers to forward freights, by the least expensive routes at reasonable through rates; that the rate in question must be reasonable for the transportation by the shorter and less expensive route; that that making a uniform rate on the same product from all points in a large producing district is only justifiable under special and exceptional circumstances, and is not to be encouraged where the difference in the transportation expenses from the various parts of such district is considerable and substantial; that the same rate over a district so extensive as the one shown in this case denies to the producer nearer the market the advantages of his location, for which he receives no compensation in the fact that such rate was established to enable a railroad company to sell its lands more distant from markets at better prices; that to make railroad investments as secure as other property, reasonable rates should be liberal until earnings are sufficiently large for a fair return on actual expenditure, but where the market price of a commodity yields but scant return for labor and expense of production, the cost of transportation needs to be as moderate as may be consistent with justice to the carrier; that where a carrier leased and made the road of another company a part of its system, the agreed rental cannot be accepted as the amount which the leased prop-

erty must earn, and the lessee may retain, before any reduction can be made in rates over the leased line; that where two carriers stipulated for a division of traffic and agreed that when one carried traffic belonging to the other out one-half of the charges should be retained for the transportation service, some reduction in the rate was warranted in the light of this arrangement in connection with the other facts in the case.

UNJUST CLASSIFICATION.

In a case involving the justice of classifying window shades in class 1 of the official classification and charging first-class rates for the transportation of that commodity, it appeared that the complainants had been wrongfully billing this freight as "Window hollands," and had thereby secured a third instead of first class rating; that although this practice was known to the carriers, they failed to correct such billing by the shippers on reception of the freight at the point of shipment, or to invoke the protection of the law by reporting such wrongful billing for prosecution; that, through the agency of the carriers' inspection bureau in the west, a good deal of this improper billing by complainants had been corrected and the proper rates charged at destination; that the complainants had meanwhile been endeavoring, without success, to obtain

reduction of the window shade classification by application to the classification committee, and finally determined to seek relief before the Commission. When the case was heard, the defendants set up these apparent violations of the law by complainants as a bar to a decision in the merits. The following statement and ruling on this question is taken from the Commission's report in this case:

It is not within our province to adjudicate whether any person has or has not so demeaned himself as to violate the penal provisions of the Act to Regulate Commerce; that is matter for termination by a court of competent jurisdiction in a proceeding where the accused may avail himself of his constitutional right of trial by jury, and nothing said herein should be construed as assuming to decide any such question; but this Commission has authority to determine what effect the admitted or proven acts of parties shall have upon the standing of such parties in cases before it. We took this view in the case of *Ottinger*, a ticket broker (*Ottinger v. Southern Pac. R. Co.* 1 Inters. Com. Rep. 607) and in the case of *Slater*, a disappointed applicant for an annual pass. (*Slater v. Northern Pac. R. Co.* 2 Inters. Com. Rep. 43). The Commission refused to entertain the complainant of the ticket broker, and declined to assist complainant Slater in retaliating upon the carrier for revoking his annual pass; but the Commission did, nevertheless, for the guidance of the carrier and in the interest of the general traveling public, consider and rule upon the question presented by the acts in that case. We think this indicates the rule which should be followed in this case: Where it appears that a complainant has invoked the aid of the law for the purpose of securing what he, with the acquiescence of the carrier, had previously obtained in appar-

ent contravention of the law, such acquiescing carrier will not be held entitled to plead violations of the law by complainant in bar of a decision on the merits, nor will the individual interests of the complainant be taken into consideration; but the Commission will examine the evidence and make such report thereon as, under the provisions of the law, the rights of other shippers and the public generally may require. If, independently of any action or interest of complainants, the conduct of defendants with reference to the transportation which is the subject of the proceeding is shown by the evidence to be unlawful, it is our duty to execute and enforce the statutory provisions applicable thereto.

Upon consideration of these facts in this case, and independently of any action or interest of the complainants, it seemed clear that window shades should not be charged higher rates than the more valuable article known as window holland or shade cloth, which the carriers had placed in class 3, and defendants were ordered to reduce their rating of window shades accordingly.

The defendants did not fully comply with the order, but restricted the new rating to west bound traffic, and upon the refusal of the official classification committee to reduce window shades to class 3 in that classification, the defendant carriers rescinded the action taken by them in the direction of obedience to the order. Whereupon the Commission filed a petition for enforcement of its ruling in the United States Circuit Court for the Northern District of New York, and the case has been argued and submitted for decision.

The Form, Contents, and Publication of Rate Schedules, and the Authority for Making and Filing Joint Tariffs.

The various difficulties connected with the form and contents of tariff schedules, the importance of uniformity in their arrangement and simplicity in their statements, and the duty of bringing them into conformity with the requirements of the statute, have been matters of concern to the Commission from the time of its organization. The amending Act of March 2, 1889, empowered the Commission to "determine and prescribe the form in which the schedules required by this section (8) to be kept open to public inspection shall be prepared and arranged," and to "change the form from time to time as shall be found expedient." It was thought preferable to bring about reforms in the arrangement and contents of tariffs through the voluntary action of railroad managers rather than by issuing explicit and compulsory orders; and in pursuance of this policy, and to obviate the necessity of voluminous correspondence concerning matters of detail, the Commission published in December, 1891, a pamphlet, prepared by its auditor, which contained a statement of its views regarding the form and manner of making and filing tariff rate sheets and schedules. The pamphlet was widely distributed among railroad officials and was also set forth in appendix to our fifth annual report to Congress. The directions contained in the pamphlet were not generally followed,

however, and it became evident that something more than suggestions for improvement would be required.

The publication of tariffs in convenient form, adequate in statement and properly authenticated, is essential to the enforcement of reasonable rates and impartial treatment. So far as possible the schedules should be simple in arrangement, ample in their disclosures, and free from ambiguity. Otherwise, the opportunity is afforded for evading the law by discriminating practices and unjust exactions. This is peculiarly true of joint tariffs issued by two or more carriers whose connected roads are operated as a single and continuous line. The increased and often enormous mileage which is thus covered by joint action as to rates, the great volume of traffic which thereby receives speedy and uninterrupted movement, and the temptations to favoritism arising from competition between rival systems render it specially necessary that the public schedules under which business of this character is conducted should answer all the requirements of the statute.

That many of the joint tariffs now employed are not in accord with these provisions is practically admitted by railway managers. They are often faulty in form, imperfect or ambiguous in disclosures, and generally lacking in proper evidence of their authenticity. When such a tariff is filed by one of the associated lines only, as is usually the case, if the other participating carriers are not designated and no proof of their concurrence is furnished, it is quite possible for the latter to avoid liability, when charged with criminal misconduct in respect of a joint rate so issued, by denying knowledge of its existence or consent to its publication, although the fact that they carried traffic apparently under that tariff may be clearly established. When such avenues of escape and evasion are afforded by the rate sheets in common use, there must be something at serious fault in their contents and construction. Defects in tariff schedules provide opportunity for inhibited practices which might not otherwise be available, and tend to defeat in greater or less degree the beneficial purposes of publicity. More than this, they indicate a measure of disrespect for the law and a disposition to avoid its wholesome restraints. They render its enforcement in many cases impracticable, weaken the authority of its various restrictions, and not unfrequently prove an aid to prohibited and inequitable dealings between shipper and carrier.

The Commission determined in January last to more directly and formally exert the authority conferred by the amendment of 1889, and to this end the following circular letter was issued on the 20th of that month:

The Commission having determined to prescribe the form of schedules of rates and charges required by the Act to Regulate Commerce to be kept open to public inspection, in accordance with authority conferred by the sixth section thereof, and desiring that, while fully meeting the requirements of the law, the form adopted shall not be unnecessarily burdensome to the railways by reason of the expense or otherwise, it is thought proper to invite the carriers subject to the Act to send rep-

resentatives to a conference to be held at the office of the Commission in Washington on Monday, February 12, 1894, when opportunity will be afforded to offer suggestions regarding the preparation of such a form—especially suggested as to a form of joint tariffs—as will comply with the requirements of the statute. In the meantime the Commission will be glad to receive suggestions by letter from those interested.

The conference was held on February 12 and 14, 1894; a second conference on March 13, and on September 8 the Commission filed and subsequently issued a report containing its conclusions and order in this matter. Carriers were required by the order to comply generally with the rules laid down in the pamphlet of December, 1891, above mentioned; and to show distinctly upon all future joint tariffs, and upon future amendments and supplements to existing joint tariffs, the names of the several parties thereto; and whenever named as parties to joint tariffs, or any such amendment or supplement, filed and published by another carrier, to forthwith, upon the publication thereof, file with the Commission a statement or certificate showing their acceptance of and occurrence therein, and making themselves parties thereto. A form to be used in making such statement was added to the order. The opinion and order of the Commission in this matter are set forth in full in Appendix to this report.

Closely connected with this matter of form and contents of rate sheets is the statutory requirement that every carrier subject to the law "shall keep its schedules of rates, fares, and charges open to public inspection;" that they shall "be plainly printed in large type," and that "copies for the use of the public shall be posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected."

We have reason to believe that this mandatory provision of the statute has been neglected to a greater extent than has been generally supposed. We have been informed that a practice of posting a notice that tariffs can be inspected on application to the agent, keeping the rate sheets in a drawer in the office of the agent, and handing them out upon the request of shippers, has been adopted by more than one carrier subject to the law.

This practice is in clear violation of the plain requirement in the statute for the posting in two public and conspicuous places of the rate sheets themselves. Agents may not be aware that they are liable to fine and imprisonment for failure to fully discharge this duty to post duplicate copies of each tariff; and the managers of roads who have charge of this branch of railroad business may not fully understand that failure on their part to have this duty performed will render them subject to like punishment. Neither is it generally appreciated that a circuit court has express statutory power, upon failure of a carrier to comply with the provisions of section 6 of the Act, to restrain, by injunction, any such common carrier from receiving or transporting interstate traffic un-

if it shall comply with such provisions. The carriers cannot neglect or evade duties required to be performed by this section and expect such neglect or evasion to be looked upon as mere disregard of directory provisions of law which are not material to any interest. Such omission or evasion constitutes a denial of public and individual rights, which the statute declares to be both neglect of a civil duty and a criminal offense.

The Commission cannot, in the nature of things, keep itself informed in regard to the proper posting of passenger and freight rates at stations on the various roads. It must depend largely, if not wholly, upon statements in relation to such posting from shippers and others who may be interested. There should not, however, be any necessity for complaint of a carrier's failure to keep its rates properly posted. This provision of the law is plain and easily understood, and its enforcement will in cases be vigorously pressed.

The malicious propensity of some persons to mutilate or destroy all kinds of public notices is sometimes advanced to excuse failure to keep tariffs properly posted. Carriers should instruct their agents to use the utmost diligence in discovering and prosecuting these offenders under local laws applicable to the case. We are aware, however, that this remedy may not always be sufficient, and that it may sometimes be difficult to impress the local court with the fact that tariffs, besides being public notices, are also a species of property, costly to construct, necessary to the carrier's business, often difficult to duplicate, and valuable for reference to the public, as well as to the carriers, even after they have ceased to be in force.

An amendment to the Federal law making it a misdemeanor for any person to mutilate, destroy or remove any tariff or schedule of rates, fares, and charges, posted by any common carrier subject to the Act to Regulate Commerce, as the rates, fares, or charges in force over its lines for the carriage of interstate traffic, whether applying to passengers or freight, and providing a suitable fine for such offenses, would go far toward insuring the safety of posted schedules.

THE CLASSIFICATIONS OF FREIGHTS.

The transportation of freight involves dealing with thousands of commodities presenting infinite variation in kind, use, weight, bulk, value, ease of handling, and risk of carriage. Dividing the general commerce of the country into classes is clearly necessary to any certain and convenient process of making rates, and so even an approximately just and reasonable apportionment of necessary transportation revenue among the kinds of traffic carried; in short, classification must be considered an indispensable feature of railroad operation.

Classification is the foundation of rate-making. The growth of the system from the original custom of an independent classification on each road to the adoption of the three classifications now in general use in eastern, southern, and western territory, respectively, and together covering the whole country, has been described in our former reports to Congress. With the development of through

transportation facilities, these consolidations of classifications mark our progress toward that harmonious railroad operation which is so desirable for the public interest, and which may be fully attained through extension of railway facilities and simplified methods of rate-making and management.

A most important step which should now be taken in this direction is to provide for the whole country a single classification of commodities, a general plan or foundation upon which to base all freight charges. That this is entirely practicable is demonstrated by the great advance which has already been made toward uniformity, and by the fact that such progress could not have been attained without the subordination of business and carrying interests in various localities to the commercial and transportation conveniences of the country at large. The accomplishment of uniform classification involves only a continuance of the work upon the line of rendering individual interest and local advantage subservient to the general welfare. That this will not require any real sacrifice or injury is proven by the absence of any proposition to retrace a single step in the work which has been done toward securing uniformity; on the contrary, all interested parties concede the great desirability, and most commercial interests urge the necessity, of a single freight classification.

There has been no appreciable advance in this direction since the report of the carriers' committee on uniform classification in June, 1890. We can ascribe much of the failure on the part of carriers to attain any material progress during the past four years to the fact that the three classifications now in use have been separately developed by associated lines operating in sections of the country corresponding to those in which the classifications respectively apply. Thus, the Trunk Line Association with its allied Central Traffic Association, which have the official classification in charge, occupy the territory east of the Mississippi and north of the Ohio and Potomac rivers; the Southern Railway & Steamship Association, through which the classification of that name is controlled, is composed of roads operating east of the Mississippi and south of the Potomac and Ohio rivers; and the Western Freight Association, with kindred organizations, assumes direction of the western classification, which is applied generally throughout the territory west of the Mississippi. The carriers so associated having brought about a practically uniform, though still unsatisfactory, classification for each of these sections, we are now confronted with the task of revising and consolidating the three classifications into one.

The fact that the existing stage in this work has been reached through independent action and control in three great sections of the country, rather than by general and gradual progress brought about through common authority, makes the last step all the more difficult. The postponed necessity of reconciling or discarding conflicting transportation customs in the east, south, and west, so far as may be requisite to the work of unification, must now be met. Though this, as before indicated, is merely continuing the old line of action in a wider field, the present necessity for such lev-

eling of sectional preferences and customs appears, in view of the virtual abandonment of effort by the carriers during the past four years, to call for the intervention of Federal authority. Each group of carriers has accomplished its separate task, but the three groups seem unable to agree upon and enforce a general plan of classification; the limit of voluntary action which the carriers of the country, thus territorially grouped and associated, can be expected to take, has apparently been reached.

This emphasizes the individual and joint appeals made to Congress by commercial bodies and railroad commissions, and the yearly recommendations of this Commission for legislative action upon this subject; and it also goes far to prove, what most railroad managers and the great body of the public generally believe, that uniform classification, though necessary to business certainty and fair treatment of railway patrons, depends upon the passage of a statute requiring its accomplishment.

Consideration of the situation leads us to believe that this dependence upon the exercise of Federal authority may lead to greater public benefits than would or could have been conferred if uniform classification had been secured through the voluntary action of the carriers. Something more than unification of the present classification is necessary to the satisfactory working of a generally applied plan. Consolidation alone would be highly valuable, because it would furnish a common basis of rate making, and infuse into the business of transportation a degree of certainty and consistency which can be secured in no other way; but connected with this is the inseparable and important circumstance that corrections of such uniform classification will be constantly sought by interested parties, and will frequently appear necessary from the needs of traffic and changes in commercial and carrying conditions. If we are to have, through Congressional action, the compulsory use of a single classification by all railroads engaged in interstate commerce, the regulating authority, charged with the direct or alternative duty of making the classification, should also be required to amend it from time to time as may appear necessary.

A statement of some of the difficulties which now attend efforts to secure necessary changes in the present classifications may not be out of place. Disobedience of orders of the Commission, involving the correction of an existing classification, are often based upon the refusal of carriers, not parties to the proceeding, but members of the classification association, to sanction the required change. While this is mere pretension of inability to obey the order, it is still, under such practical coercion of the defendants by other lines, sufficient to defeat just regulation for the very considerable time necessary to obtain enforcement of the order through judicial process. The common control exercised over classification in the east, west, and south by associated carriers in those sections has been found powerful enough to prevent compliance, otherwise easy, with requirements of the statute as set forth in the rulings of the Commission.

There are also a great many rules and reg-

ulations contained in the present classifications which, if retained in the uniform classification, ought to be simplified, and which, as now applied, are often the subject of controversy before the Commission. This involves rules as to mixed car loads, carload weights, released and unreleased shipments, character of shipment in respect to form, size, or the kind of package used, and a considerable number of other rules, the imposition of which by a body of carriers controlling the classification may tend to obstruct proper regulations when applied to particular carriers complained against in proceedings before the Commission.

These and other similar embarrassments would obviously be much more serious under a classification made and controlled by all the carriers. On the other hand, the great majority of such difficulties can and should be removed through duly authorized administrative regulation of such classification. A reasonable and suitable uniform classification, promptly amended as general experience shall from time to time demand, will operate largely to prevent unjust and unlawful charges, and will in still greater degree remove the injustice which arises from improper rules of transportation. As before stated, the statute should authorize the Commission to amend the uniform classification in such particulars as may appear needful upon investigation. Such investigation would include hearings, and conferences with sectional and general classification committees, thus utilizing the combined knowledge and experience of those who have had the classification matters in charge. The Commission has heretofore been disinclined to undertake the task of making a classification, and would be glad to avoid it now, but it has been urged upon us as a duty, after this long delay, accompanied with the suggestion that it would be more satisfactory to make the test of a uniform classification which was produced by an independent tribunal, uninfluenced by local or sectional interests.

We firmly believe that a classification can be constructed, with primary reference to the requirements of the law, which will operate with much less friction and be a decided improvement upon those now in force. There can be no doubt of the constitutional power of Congress to compel this work to be done, nor of the propriety of legislative action which shall direct it to be performed by or under the direction of this Commission. The decisions referred to in the first part of this report have removed such questions from further discussion. Moreover, prescribing a uniform classification of commodities for purposes of transportation is a peculiarly proper exercise of legislative or duly granted administrative power. What the carriers fail to do in the direction of necessary transportation reforms is generally proper for Congress, through appropriate means, to require. If two articles of commerce are justly classified together in class 4 of the eastern classification, for instance, it is difficult to understand how it can also be just to place one of the articles in class 3 and the other in class 2 of the southern.

The governing considerations in the construction of a classification are, first, the number of classes which the classification shall

contain, and, second, how the different articles of commerce shall be distributed among these classes according to their character, weight, bulk, value, ease of transportation, and risk of carriage. The rules for determining similarity of freight articles in these particulars ought to be common to all sections, and not varied, as they now are, to accommodate carrying customs or transportation methods in different sections. One of the greatest benefits which will result from a uniform classification will be the evolution of admittedly just general rules or determining the relative classification of commodities.

The necessary provision in the general classification for a number of classes sufficient to meet the commercial and carrying needs of each section will also do much to simplify the present railroad situation. All three classifications now differ in this respect. Much confusion and injustice ensues from this fact that difference in the number of classes results in the higher or lower classification of the same article. This is forcibly illustrated where classification territories overlap each other. The official classification applies from eastern points to Chicago, and also to the Mississippi river. The western classification is in force from Chicago, as well as from the Mississippi. A large manufacturer at Chicago, for instance, shipping west in competition with eastern makers of the same article, pays the western classification second class rate to the Mississippi river and beyond, while the eastern dealer is charged the lower fourth class rating under the official classification on shipments to the Mississippi river. This results in a serious discrimination against the Chicago dealer which uniformity in classification would remove.

A prominent western railway official in writing to a complaining firm said: "The solution of the whole question is a uniform classification all over the country." In another portion of the same letter it is also stated that "the movement is assuming such strength, not only among railroads, but among shippers, that unless a few roads continue to oppose it, the chances are very favorable for legislation on the subject by Congress through the Interstate Commerce Commission." We submit that the selfish opposition of a few or any number of carriers ought not to succeed in accomplishing the defeat of this almost universally demanded legislation.

A year had passed since our last report to Congress on this question, and, although it was then recommended that the carriers be given a year to agree upon a uniform classification, they have failed to take any steps or make any progress whatever in that direction. We therefore feel justified in now recommending, as was required by the resolution which passed the House of Representatives in September, 1888, that this Commission be directed to make and prescribe, prior to the 1st day of July, 1896, one uniform classification of freights for the use and guidance of the various railroads of the United States, and that, in addition thereto, the Commission be directed to amend such uniform classification from time to time thereafter as may, after investigation, appear to be necessary. Suitable penalties for failure on the part of any carrier subject to the law to con-

form to such classification should also be provided.

TRANSPORTATION AND CARRIERS SUBJECT TO THE STATUTE.

When commerce begins to move from one state to another it becomes interstate commerce; it retains that character until its destination is reached, and is not affected in that respect by treatment during the course of such movement in the matter of handling or hauling or delivering, or the amount charged for its carriage. So with transportation subject to the Act to Regulate Commerce. That statute undertakes to regulate the transportation of interstate commerce wholly by railroad or partly by railroad and partly by water, and methods which carriers may employ for the carriage of such commerce should not be allowed to determine the applicability of its provisions. The Act requires, in section 7, that the transportation shall be treated as continuous from the place of shipment to the place of destination, and that no interruption with intent to evade the provisions of the statute shall have that effect; and in the first section the transportation covered by the Act is described, and the term "transportation" is stated to include "all the instrumentalities of shipment or carriage."

These sections, construed together, show that the movement, the transportation, of passengers or property, either by continuous carriage or as a continuous shipment, however accomplished, when it does not take place "wholly within the limits of a single state," is the movement, the transportation, which makes single or connecting carriers by rail, or part rail and part water, subject to the provisions of the Act when they engage in such transportation. When a shipment begins the designation, indicated to the initial carrier, stated in the contract and the billing or the ticketing or shipping instructions, stamps the commerce with its interstate or state character. The Commission has held, and the ruling is clearly sustained by decisions of the courts, that the fact of continuous transportation of through shipments over connecting roads is sufficient evidence of an arrangement for its performance. We believe it impracticable for independently operated lines to carry out in good faith a contract for continuous shipment, or perform through transportation of traffic, without marking the service with some feature or features that will distinguish it from a shipment which is purely local to each carrier.

It has been asserted that where a connecting carrier charges and receives its local rate on a shipment billed through by an initial road the carriage by the connecting carrier is nothing more than local transportation. To admit this claim is to say that the amount of the charge made or received by a carrier determines the character of the traffic it transports, and whether such carrier is subject as to such traffic to Federal or state laws. The charge is only one of several incidents to transportation, and is not controlling upon the question of whether the carrier is subject to the statute. The application of the Act to Regulate Commerce cannot be made to depend upon the whims or

wishes or even the necessities of carriers; it is not their methods of conducting transportation, but the transportation itself, which determines their relations to the law. Broadly, then, every common carrier engaged in the transportation of traffic which is not wholly within a single state, or is not wholly by water, from the point of shipment to the point of destination is subject to the statute.

There may not be adequate machinery provided in the Act by which carriers can be compelled in all cases to join their roads so as to form continuous lines and to forward traffic thereover as a continuous shipment; but when they do carry through shipments over their connected roads they take up such burdens as their action in that relation to the traffic may impose. These considerations settle the general question of jurisdiction in the light of reason and justice, and in the only way possible to give effect to the various provisions of the statute. The degree of responsibility borne by carriers for rates, facilities, or practices under provisions applicable to specific transactions may be, and is, varied by the facts in particular cases; but the broad question whether the Act applies to a given railroad is one which is easily and necessarily determined by the single fact of participation or nonparticipation in the movement of interstate traffic.

Thus, whether a railroad company is required by the twentieth section of the law to make and file annual reports with this Commission is a question which depends solely upon the use or its railroad in the transportation of interstate commerce. The railroad so used may be one mile or a thousand miles in length; mere distance does not extend or limit the application of the law. The fact that it participates in the carriage of passengers or property of interstate commerce is the determining feature.

It has been questioned whether a carrier which owns, but does not operate, a road used for interstate traffic can be required under the twentieth section of the law to make a report of its financial affairs to the Commission. That section was designed to bring out complete information in regard to financial condition as well as the details of of railroad operation. This statistical information might, as a whole, become incomplete and inadequate if, by delegating the operation of its road to another company, the owning corporation should be permitted to refrain from reporting its financial affairs. Authoritative knowledge of capital stock, funded debt, dividends, deficits, stockholders, official organization, and general methods of financial operation would vary in reliability with the many yearly changes in railroad control; and the annual statistical reports of the Commission, which have become standard guides for investments and commercial interests generally, would be seriously deficient for uses involving comparison of year with year, and in other important respects.

That companies owning but not operating roads, and, indeed, nearly every railroad corporation, whether actually confining its operating affairs to state traffic or not, or whatever its situation, have cheerfully made these annual reports without questioning the power of the law to compel them to do so, or indulg-

ing in serious protest, has been highly gratifying to the Commission and contributed greatly to the success and generally recognized value of the statistical branch of its work.

The custom of sending grain by boats to an interstate point, where the traffic is turned with other grain into elevators and thence reshipped over a state railway to a point in the state wherein the elevator is situated, may result in the movement of commerce by independent shipments over two lines which separately are not subject to the law. This is one of several instances that might be cited of the carriage of large amounts of interstate commerce which should be made by suitable amendment clearly subject to the regulation of the statute.

The transportation of interstate commerce by quick transit over railroads subject to the Act by the method of express carriage and through the medium of independent express companies is, so far as directly regulating the charges and practices of the express companies is concerned, exempt from the provisions of the statute. This constitutes a large volume of interstate business, which is being added to yearly by the withdrawal of some railway carriers from affording favorable facilities for the shipment of some kinds of "quick freight," and the provision by the express companies of accommodations for such traffic which, though made less expensive to shippers than ordinary express charges, are still much higher than the railroad company could well charge for rendering suitable service as to freight of this description. What responsibility for unreasonable or discriminating practices or charges still inheres to the railroad company as to the transportation over its road of the business known as "express" has not been judicially determined.

RELATION OF RECEIVERS OF RAILROAD PROPERTY TO THE LAW.

The fact that several important railroad systems have recently passed into the hands of receivers naturally suggests a discussion of the relation of these officers of the courts to the administration of the statute.

The text of the statute recognizes two classes of common carriers, namely, natural persons and corporations; it in terms makes receivers of property amenable to the penal provisions of the Act (§ 10) and subordinates their management to the control of the Commission in the issuance of any order which may be declared to be lawful by the courts. (§ 16).

When a railroad passes into the hands of a receiver his possession is the possession of the court for the benefit of the parties to the suit. *Winnall v. Sampson*, 55 U. S. 14 How. 52, 14 L. ed. 322; *Taylor v. Carryl*, 61 U. S. 20 How. 583, 15 L. ed. 1028; *Davis v. Gray*, 83 U. S. 16 Wall. 203, 21 L. ed. 447; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Gumbel v. Pitkin*, 124 U. S. 131, 31 L. ed. 374.

And while it is said that he cannot be disturbed in this possession without leave of the court appointing him, a consideration of the decided cases will show that this familiar rule of law applies to persons who have some

moneyed or other interest in the estate and does not alter the status of the property as affected by public statutes.

The first section of the Act to Regulate Commerce applies to certain common carriers, and the courts have said that a receiver is a common carrier. In a leading case, which was an action of, *assumpsit*, charging the defendants, who were receivers appointed by a court of chancery, with negligently causing loss, and seeking to recover the value of goods shipped over the line which was in possession of the receivers as such, the defendants claimed that as receivers of the court they were subject to account only in the court which appointed them, and could not be sued *in assumpsit* as common carriers without leave of such court.

The court held that in the relation which the receivers bore to the public as common carriers they were liable as such carriers precisely as if they were not receivers at all. This case has been followed by many others in the jurisdiction of Vermont, New Hampshire, Connecticut, Missouri, Illinois, and other states. Undoubtedly, after a judgment has been obtained in such a suit an execution cannot issue out of a law court to sequester the property which was already *in custodia legis*.

The question has also been presented to the courts in another form, namely, the obligations of receivers of railroad property to pay taxes assessed by the states in which the property was located. The decisions upon this subject are not harmonious, some cases holding that the state officers may levy upon the property directly without application first being made to the court in whose custody the property is. In others it is held that an application must be first made to the court appointing the receivers.

The recent case of *Re Tyler*, 149 U. S. 164, 17 L. ed. 689, may probably be considered as a controlling authority that immediate distraint cannot be made for taxes on property in the hands of a receiver without first making application to the court. The Supreme Court said, in that case, that the course to be pursued was by an intervention of the tax officials in the main case in which the receiver was appointed by an application *pro inter esse suo*. This case, however, recognizes the principle that property in the hands of a receiver is subject to the domination of public statutes, and the courts are careful to say that this principle of applying to the court "does not involve interruption in the payment of taxes or the displacement or impairment of the lien therefor, but on the contrary makes it the imperative duty of the court to recognize as paramount and enforce with promptness and vigor the just claims of the authority for the prescribed contributions to state and municipal revenue."

By the provisions of the Act of March 3, 1887 (24 Stat. at L. 552) all receivers appointed by United States courts can be sued in other courts without leave of the court appointing the receivers, and we have only to discuss, therefore, the relation of those receivers of railroad property to the law who may be appointed by state courts. The status of such a receiver is this: He is the representative of all

persons who have any interest in the property which he is appointed by the court to manage, and the courts will not suffer any interference with his possessions; but he is under a paramount obligation to operate the property in subordination of all public statutes; his appointment does not affect the corporate function or the corporate liability to conduct the business subject to statutory law, and it has accordingly been held (*Louisville, N. A. & C. R. Co. v. Cauble*, 46 Ind. 277) that where a statute made railroad companies absolutely liable for the killing of stock where the road-bed was not securely fenced, the fact that the affairs of the company had passed into the hands of a receiver constituted no defense to an action upon such liability. Many cases of this kind are to be found in the books; but the exposition of the situation as contained in the decision of the supreme court of Illinois in the case of the Ohio & Mississippi Railroad Company against Russell (115 Ill. 52) is well stated. In that case the court said:

The action is brought against the defendant for the nonperformance of duty imposed by statute against which it is apprehended no order of a court can relieve it. It is a public regulation to which the corporation is subjected by the sovereignty of the state and it is not within the rightful jurisdiction of the court, either state or Federal, to arrest its operation. . . . The fact of the appointment of the receivers is simply to give him the temporary management of the railroad under the direction of the court instead of the manager appointed by the directors of the corporation.

It is a principle well understood that all railroads or other corporations transacting business in its nature public are subject to all reasonable police regulations deemed necessary for the common welfare. The mere fact that its property may be temporarily in the hands of a receiver does not relieve a corporation from the operation of such a regulation any more than a private citizen is released from the duty to observe the law because his property may be sequestered by the order of a court for the benefit of his creditors. . . . It is sufficient that the statute has imposed the duty sought to be enforced against the corporation and it must be obeyed.

The object of the Act to Regulate Commerce is to bring within the operation of salutary and wholesome rules the operation of railroads engaged in commerce between the states. It purports to be controlling as to all common carriers thus engaged, and that term, as we have seen, includes the receivers of railroads and controls them to the same extent that it would control the corporation if it was managing its own affairs, subject, perhaps, to the limitation that if the proceedings before the Commission or before the courts in their revisory action upon the findings of the Commission should attempt to give the aggrieved party money damages, it would be necessary to resort to the court appointing the receiver in order to obtain satisfaction of the judgment. It is very clear from all the authorities, as well as from the reason of the matter, that the attitude of a receiver to the law is precisely that of the attitude of corporations whose affairs have not been taken possession

of by the court. The business they perform is public. It is, as has been stated and shown so many times, the administration of a public function. The managers of railroads, whether they are owners or receivers, are putting in operation a function of the government, and the mere fact of sequestration of the property and the appointment of receivers for the benefit of creditors does not exonerate a management from performing its public duty according to the rules and regulations which the statutes may prescribe for such business.

OVERCHARGES AND UNDERCHARGES.

While the mechanical part of railroad transportation has reached a high degree of development in this country, that branch of the service which pertains to shipping, billing, and the statement, collection, and correction of charges is, especially as to traffic over connecting roads, conducted with so much uncertainty, and is so lacking in system and regularity, as to justify charges of gross carelessness and frequent disregard of the property rights of the shipping public.

Complaints of overcharges arise from the misrouting of freight, from agents' want of knowledge of actual rates in force, from failure to correct the billing to proper rates at destination, from erroneous statement of weights, from misapprehension of rules governing minimum rates, from misapplication of classification, and other causes. Whatever the specific cause may be, the occurrence of overcharges is usually ascribed to inadvertence, insufficient information, or failure of some official to perform his duty; in short, to either the ignorance or error of railway agents. Such reasons are, in connection with declarations that all claims are promptly adjusted, given in excuse for the taking of overcharges; but the actual fact is that these overcharge claims are rarely adjusted and paid with promptness. The files of the Commission teem with complaints of delays by carriers in the settlement of overcharges which, in the nature of things, could not have been necessary.

A shipper of hay or grain in the west makes this statement:

Shipment arrives at destination with an overcharge of from \$5 to \$50, and the company, while acknowledging the claim, pass it around from six to eight months, getting authority from each line interested. In this way they keep shippers' money tied up from four months to a year without paying interest on anything. We have \$2400 in railroad companies' hands in this way, and are paying bank 10 per cent interest to handle our business.

We are satisfied that this is not an extravagant statement of the amount which a large shipper or consignee may have involuntarily invested in transportation claims for excessive charges. These amounts are, in effect, enforced loans to railroad companies, and their yearly total must represent a large sum illegitimately withheld from its rightful owners and their business.

Instances of disallowance by carriers of claims just upon their face are not wanting. A shipment of feed from a place in Ohio to a point in New York was chargeable under a plainly worded tariff at the New York City 4 INTER S.

rate of 25 cents a hundred, and this rate was properly specified in the bill of lading. But the car was erroneously forwarded by a more expensive route, and at the delivery point a higher rate was demanded and collected. The claim agent of the initial road refused to honor the claim and curtly informed the claimant that the proper charge had been collected. The claimant finally complained to the Commission. The general traffic manager, upon being notified of the facts by the Commission, ordered the overcharge refunded. Soon after, the same complainant found it necessary to bring to our attention an exactly similar claim against this company, in order to obtain a refund of the excess paid. Cases like these are well calculated to create a belief that carriers are willfully negligent in the manner of paying just claims.

The injustice occasioned by overcharges rests, first, upon the fact that they occur at all; and second, upon failure to promptly settle the claims. The taking of an unlawful charge and its retention for an unnecessarily long period has all the effect of extortion and willful discrimination. There is no justification for such delay in the settlement of overcharges. Agents at delivering stations have authority to correct freight bills containing an apparent undercharge, but they are not generally authorized to make reductions when the bills show an overcharge. The agent is deemed competent to raise the underrate, but the collection of an overrate is usually reserved for the more deliberate action of the claim agent and the red-tapism required to obtain the unnecessary consent of initial and intermediate roads. We think this a senseless distinction. The carrier should employ competent agents and keep them informed, and vest them with full authority to immediately correct errors for or against the company. There should not be, and need not be, any such thing as uncertain transportation rates or a long drawn out claim for overcharges. If the excessive character of the rate be discovered before payment of charges at destination, the agent should correct the expense bill then and there and deliver the goods on payment of what is actually due; and if not shown until after payment of the overcharge, the agent should still be authorized to refund, or at least to do so after telegraphic communication with his superior officers. When freight has been prepaid by the shipper, the agent of the initial road should have authority, upon notification and verification of the overcharge claim, to pay it. The connecting carriers would not be embarrassed by the arrangement; they would have no difficulty in making proper distribution of the corrected rate, or in levying upon each its proportion of the refund. These are matters with which shippers and consignees have no concern, and they should not be compelled to wait for an adjustment of the overcharge as between the participating carriers. The carrier who collects the freight charge should be held directly responsible for the summary settlement and repayment to the proper person of any excess above the rate which is legally in force. This obligation should be enacted into law. Such a provision would, by diminishing overcharges, tend to

allay much of the irritation now manifested by the public toward the railroads.

The ignorance or carelessness of agents in contracting for and billing freight, which results in so many instances of overcharge, often brings about the sending of goods at a rate which is less than that allowed under established tariffs of the carriers. This is likely, in some cases, to be more damaging to shippers and consignees than overcharges. In the absence of collusion between shipper and carrier for the purpose of willful rate cutting, an undercharge is almost certain to be corrected before delivery of the goods to the consignee. Contracts between the shipper and consignee based upon the underrate officially quoted by the carrier's agent to the shipper, or sometimes to the consignee, are thus often rendered wholly unprofitable, and sometimes are the occasion of considerable loss. Not infrequently the shipper of household goods or other personal effects is subjected by this careless naming of low rates, and subsequent correction to higher rates, to the payment of a sum sufficient, if known beforehand, to have deterred him from making the shipment, and possibly to change his plan of place of living, as might be the case with a prospective emigrant.

These are very serious considerations. They are in nowise answered by the fact that injured parties have a right of action in the courts for damages. Patrons of railways should never find it necessary to bring suits for the recovery of damages growing out of the use by a carrier of rates not fixed according to law. One of the main purposes of the statute was to secure the absolute certainty of railroad charges. Besides, the person injured may be hundreds of miles removed from the place where he can properly bring suit against the offending carrier, or if not, and the suit is brought, he must incur considerable expense for attorney and litigation fees, and he may even then fail on the ground of want of jurisdiction in the court, or be obliged to submit to a removal of the cause to a Federal court, and compelled to pursue his remedy there. The conflicting state of the decisions in regard to questions of jurisdiction arising out of the contract relations of shipper and carrier in matters of interstate transportation is alluded to in the first part of his report.

There is, moreover, as the Act to Regulate Commerce now stands, some room for question whether, in view of the requirements for the publication of rates, an action by a shipper or consignee can be successfully maintained when based upon the erroneous insertion in the contract of shipment or bill of lading of a charge which is less than the rate lawfully in force, and exaction of the full legal rate before delivery at destination. Recovery in such cases as been had in some state courts, while in others it has been denied on various grounds; but the question has not been directly raised and decided in any Federal court, so far as we are informed. It seems to us, however, that the existence or nonexistence of such right of recovery is immaterial to the proper remedy for his evil. What is needed is abolition of the practice of inserting in bills of lading or shipping contracts any other charge than that

which may be collected under authority of law. That charge is the one which appears in rate sheets published by the carriers themselves.

Some provision should be added to the law which would require carriers, in every instance, to specify in bills of lading or shipping tickets the routing of the freight and the rate or charge lawfully in force for the transportation service to the point of destination, previous inquiry being made for the purpose of ascertaining such rate, if the same should not be known at the shipping station, and that notice to the shipping agent of an initial or sending carrier of intention to ship certain property between named points shall be sufficient to put upon such carrier the burden of inquiry into the proper rate or sum to be charged on such shipment; that the shippers shall have the right to designate the routing, and the initial carrier shall name only rates which are lawfully in force over routes so designated, and that, in the absence of such designation by shippers, it shall be the duty of the initial carrier to route each shipment by the least expensive route, and name the rate thereon which is at the time lawfully in force for the carriage of the property in question; that violation of this provision by an initial carrier, or the diversion by any carrier of the traffic from the route indicated in the bill of lading or shipping ticket, with which the waybilling of the carriers must correspond, or any change by a carrier in the rate or charge named in such bill of lading, ticket, or waybilling, or the attempt by any carrier to collect a different rate or charge than is specified in the billing of the freight, shall render the carrier liable to a fine, which should be made sufficiently large; that production of the bill of lading, shipping ticket, or expense bill, shall, together with copies of tariffs showing rates in force, be sufficient evidence of any such variation from lawful rates. Provided, however, that it shall still be the duty of every delivering carrier, when freight charges have not been prepaid, to collect only the rate or charge which may be lawfully in force for the carriage of goods included in any shipment, and the billing may be corrected accordingly by such carrier; but in every such case the carrier issuing the bill of lading or shipping ticket showing other than the rate or charge lawfully in force shall be subject to the fine above mentioned.

Though a provision of this character may appear unduly severe at first glance, a little consideration will show that it only aims to bring about what is already sought to be accomplished in the law by the second, sixth, and tenth sections of the present law.

The requirements herein suggested would, in our estimation, substantially eliminate practices of overcharges and undercharges from railroad operation. They would do more—they would make necessary to the carriers' business the simplification of tariffs, which are now so complex as to often puzzle transportation experts, and therefore induce them to do in their own interest what they have hitherto failed to do as a matter of general duty under the law. They would do still more—they would prevent all departures from established rates, except those which result from the secret connivance of shippers and carriers, or false statements by

shippers of the contents of packages offered for transportation; and would greatly reduce the number of supposed secret violations of the law. They would even do still more—they would tend to establish that spirit of observance of law as a matter of self-interest or self-protection which is highly conducive to the satisfactory operation of any remedial legislation.

Experience in the administration and working of the prohibitory and penal features of this statute has demonstrated the necessity for further legislation upon specific subjects, so as to render evasions of its general provisions unsuccessful. In other words, having enacted into law a proper and just theory or scheme of regulation, Congress should, as occasion arises, legislate with reference to methods of practical railroad operation whenever they appear to obstruct or evade the successful application of such theory or scheme. The Commission has been working constantly toward this end, not only in recommending amendments of the law, but in the discharge of its various official duties. It has, as elsewhere described, taken up the work of securing more definite and reliable forms of rate sheets, and has, after investigation and conference with carriers' representatives, issued a general order, the observance of which will accomplish a number of necessary reforms. And in order that shippers and consignees may be supplied with information which will enable them to protect themselves in some degree against the extortion and injustice occasioned by overcharges and undercharges, the Commission hereby invites shippers and consignees, as well as carriers and their agents, to apply to it for information as to rates in force on named commodities between specified points. Such requests, sent by mail or telegraph, will receive immediate attention and prompt reply.

The Act requires all individual and joint tariffs of rates to be filed with the Commission. The parties to the making of such tariffs are also required to post the same for public inspection in two conspicuous places in every station on their roads. But this requirement does not always afford knowledge of the rate or charge which is in force for carrying to a given destination. Such destination may be beyond the initial carrier's road, and on the line of another carrier with which it has no joint tariff. Such destination may not be included in joint tariffs applicable to other shipments from the shipping station, and the agent may not be supplied with precise shipping directions. But interstate rates are supposed to be on file with the Commission, and very many purely state rates are also for various reasons necessarily included in such filing. When doubt exists as to a rate, or when the verification of a rate quoted to a shipper is thought necessary, the shipper may become informed of the actual rate, so far as shown by our files, by making written or telegraphic request therefor. He is thus able to measurably guard himself from the damage and delays attending an undercharge or overcharge before the shipment takes place, and he can forward the information so received to his consignee as a basis for his action and protection. The consignee who has a shipment on the way, or

is about to purchase commodities to be shipped from distant points, may also make similar application, and upon demand of excessive charges by the delivering carrier tender the lawful sum, and if delivery be refused take the customary legal action to secure possession of the goods. This means of information will also be of material assistance to shipping agents who are unable to secure definite and early knowledge of the through rate through his usual channels of inquiry.

These statements of rates must, of course, be rather hurriedly prepared and forwarded to be of use to shippers in most cases, and therefore the information could not be guaranteed correct in every instance, but it is believed that the statements will rarely be found inaccurate. The application should, if possible, state the route which the shipment is proposed to take. If this invitation should be freely acted upon, the constant revision and increasing perfection of our tariff files which such examinations will cause, together with reforms in the carriers' methods of preparing rate sheets, which may fairly be anticipated, will bring about precision in this service by the Commission to the public.

CHANGES IN TRANSPORTATION CHARGES.

As an Appendix to its Fourth Annual Report the Commission published an elaborate and comprehensive paper, prepared by its auditor, in which an effort was made to present, statistically, a complete exposition of the more important changes in freight rates that had taken place since the passage of the Act to Regulate Commerce. As then summarized the result of these changes was stated as follows:

Where changes of any importance have taken place in the freight rates of any section, either for local or competitive traffic, in nearly all cases lower rates are now charged than prior to the date of the Act to Regulate Commerce.

Subsequently a more extended inquiry concerning the rates charged for railway freight transportation, covering a period of forty years (from 1852 to 1892) was undertaken by the Finance Committee of the United States Senate. Fifty-second Congress, and was placed in charge of the auditor of the Commission. The results of this investigation fully justify the statement above made.

A brief résumé of the latter report, with some addition of later data, will be appropriate at the present time.

The general basis of rate making, according to present railway methods, is the classification of freight. Although certain important commodities are still carried at specific commodity rates, far the greater proportion of articles offered for railway transportation are first arranged in a limited number of classes, and the charges finally applied are fixed at certain figures for each class. Obviously, therefore, reductions may be effected either by lowering the rate for an entire class, or by transferring articles from higher to lower classes. Important and far-reaching reductions are very frequently made by the latter method, and such reductions are very likely to escape attention if, as is frequently the case, observation is limited to the established class

rate without regard to the classification of freight in force. Investigation definitely directed to classification shows that the transfer of important articles, and the constant addition of new commodities, to the list of those for which lower rates are given for carload than for less than carload quantities, have resulted in changes quite as important as any that can be cited.

With a constantly increasing number of articles in the classifications, it is shown that since 1887 the proportion assigned to first or highest class in the official classification has been reduced 4 per cent, the articles represented by this figure being now in the lower classes and accordingly carried at lower rates. Were data available as to the tonnage movement in each class more satisfactory information could be obtained bearing upon the importance of these changes. The proportion of articles under the official classification in 1887 taken at less than carload rates was 55.07 per cent; those charged carload rates were 44.93 per cent. Under the present classification only 38.45 per cent are classified as carloads, and 61.55 per cent are provided with carload rating. The variation here shown of 17 per cent indicates important changes and also represents reductions in charges through the lowering of the classification. The report referred to will show similar changes for the other principal classifications.

Following that portion of the Senate report dealing in changes of classification is an extended presentation of the decline in competitive rates, illustrated by numerous tables showing, wherever possible, the actual charges for specific commodities, rather than class rates. It is impracticable to present here sufficient examples to illustrate the extended reductions shown by that report, and it will probably suffice to say that they cover the entire country, and include all important articles commonly offered for shipment by rail. Data were also given illustrating corresponding reductions in charges for river, lake, and ocean transportation, and also summarizing the entire results of the decline in railway rates by statements showing the average charges per ton per mile during an extended period on a large number of the more important lines. These tables are supplemented by others, exhibiting for the same lines the tonnage carried each year, the aggregate transportation performed, measured by tons carried one mile, and the gross revenue from freight traffic. Numerous tables are devoted to changes in local rates, showing an equal if not greater general reduction.

Only from an extended inquiry would it be possible to accurately estimate the total reductions effected since the passage of the Act to Regulate Commerce, but that it has been very considerable is well known. During the five years from 1889 to 1893 the entire transportation performed by the railways of the United States, as shown by the reports of the statistician of the Commission, has been equal to moving 63,837,849,326 passengers and 407,837,116,623 tons of freight one mile, and the aggregate amount of revenue to the carriers from passenger and freight transportation during those years was \$5,106,302,794. The statistician

has also reported the average receipts per passenger and per ton of freight per mile for each of these years and for the year 1888. Comparing the amounts received by the railways for transportation with amounts which they would have received on the volume of traffic carried from 1889 to 1893, if the average receipts per mile for 1888 had been maintained during the subsequent five years, it appears that the public would, in such case, have paid for freight and passenger transportation by railroad from 1889 to 1893, inclusive \$525,459,587 more than was actually paid for such transportation during that period. Of this sum \$133,500,982 would have been added to passenger and \$391,958,605 to freight revenue.

These figures demonstrate the great bearing which a largely increased volume of traffic has upon railway rates. That the above-mentioned large difference between actual revenue based on the average rate of 1888 was rendered possible by the greater economies naturally incident to the continuous increase in density of traffic, is shown by the fact that the net income from operations per mile of line was greater in 1893 than in 1888. What such difference would have amounted to, or whether there would have been any reduction whatever, if the volume of traffic had, instead of increasing yearly, remained as small as it was in 1888, we cannot, of course, undertake to say. The extent of actual reductions are best indicated in the following statement of average receipts per mile on freight and passenger traffic for the years 1888 to 1894 inclusive:

Years.	Freight revenue per ton per mile.	Passenger revenue per passenger per mile.
	Cents.	Cents.
1888	1.001	2.349
1889 .....	.922	2.165
1890 .....	.841	2.167
1891 .....	.866	2.142
1892 .....	.898	2.126
1893 .....	.878	2.108
1894 .....	.866	1.976

But we cannot say that the reductions should not have been greater, nor that they are altogether represented by changes in published tariffs, or that they have been justly distributed among the various articles carried and between the communities served.

It should not be understood, however, that what is properly termed the tendency toward lower charges operates without important occasional exceptions and even temporary suspension. While, as shown in the above table, there are few years during which the average of all charges does not prove lower than during any which have preceded, it is not at all unprecedented to find that, as during the current year, the changes in important rates have included many advances. Without attempting to enumerate the causes which may or may not justify the evident attempt in certain sections of the country to place competitive rates upon a higher permanent basis, it is of interest to note some of the changes which have apparently had that result.

On October 15, by joint action of the lines

comprising the Southern Railway & Steamship Association, rates *via* the all-rail routes from New York, Boston, Philadelphia, Baltimore, and points taking the same rates to all points in the southern states east of a line drawn from Chattanooga, Tenn., to Meridian, Miss., and from thence to Mobile, Ala., were advanced 4 cents per hundred pounds on classes 1, 2, 3, 4, and H, and 3 cents per hundred pounds on the remaining classes. This was an advance over rates which had prevailed during practically the entire period since this Commission was created, but it did not affect the charges *via* the various steamship lines operating from the cities named to Norfolk, Portsmouth, West Point, Savannah, and Charleston in connection with rail lines from those ports to destination, which receive a large and important portion of the traffic.

Since December 20, 1887, the rates on first class freight between Chicago and points on the Missouri river have not been higher than 75 cents per hundred pounds until July 1 of the current year, when an advance was made to 80 cents per hundred pounds. Rates on the lower classes were also increased. On the same date an advance was made in the rates between St. Louis and other Mississippi river points and points on the Missouri river, from 55 cents to 60 cents, first class, with proportionate increases on the other classes. The new rates are in each case higher than any which have been in force since December 20, 1887. As they apply in both directions and are the basis of all freight charges between the east and interior points west of the Missouri river, they affect a large amount of traffic. A complaint is now pending before the Commission, in which the reasonableness of these rates is involved.

Packing house products and live hogs have been taken from the Missouri river to Chicago for a considerable period at the published rate of 22 cents per hundred pounds. On July 1 of this year this rate was increased to 23½ cents per hundred pounds, which, when the amount of the tonnage of these articles is considered, is seen to be an important advance. The rate on packing house products from the Missouri river to St. Louis was at the same time advanced from 15 cents to 18½ cents, or 8½ cents per hundred pounds.

On June 20, 1894, advance was made in the rates charged between Chicago and Colorado points, including Denver, Pueblo, Colorado Springs, etc., from \$2 to \$2.32 per hundred pounds, and in those between Mississippi river points and Colorado common points from \$1.80 to \$2.12 per hundred pounds, on first class freight, with corresponding increases on other classes.

The current year has not been characterized by many especially significant changes toward permanently lower charges. Probably the most notable change was the reduction, on February 27, of the rate on grain and flour from Chicago to New York from the normal sixth class rate of 25 cents per hundred pounds to 20 cents per hundred pounds, the reduced rate remaining in effect until November 12, a period seldom equaled in duration by any similarly low rates by the all rail routes.

This rate is not only that at which these ar-

ticles are carried from the greatest grain market in the country to its principal port of export, but is also the basis of grain and flour rates from all western territory to all points on or adjacent to the Atlantic seaboard, and this reduction accordingly affected a corresponding change in the rates charged for carrying most of the grain and flour produced in the United States and not consumed at or near the point of production.

A concurrent reduction in the rate on grain and flour from St. Paul and Minneapolis to Chicago, which is used in connection with the rate on the same articles from Chicago to New York in making rates to the East, is of interest in this connection. This rate has formerly remained at 12½ cents per hundred pounds, with but few fluctuations. On April 10 a reduction to 10 cents was made, and on May 16 to 7½ cents. The latter rate has since remained in force, but the roads have issued notice of an advance to 10 cents, to take effect December 3, 1894.

The rate on these commodities from Chicago to New York *via* the Great Lakes to Buffalo, Erie, or Fairport, and rail lines to destination has remained practically throughout the entire season at 15 cents per hundred pounds, which is 5 cents lower than the normal charge during former seasons.

It is ascertained that the receipts of wheat and corn at the four ports—New York, Boston, Philadelphia, and Baltimore—from February 25 to October 27 of the current year (during which period the all rail rate of 20 cents, above referred to, was in effect from Chicago) were as follows:

Wheat	bushels..	41,770,113
Corn	do.....	21,156,854
Total		62,926,967

This amount is of course considerably less than the amount affected by the reductions above referred to, but the fact that 5 cents per hundred pounds on this quantity amounts to \$1,845,495.30 tends to show the importance of the change. Other reductions in important rates have occurred that were apparently due to local and temporary causes, such as those noted in relation to changes on traffic from eastern and western cities to points in the southern states, which are treated of elsewhere, and in most cases the restoration of the former rates has been effected.

THROUGH ROUTES AND THROUGH RATES.

Carrying goods and forwarding passengers over connected roads under one billing or ticketing, and making a single charge for the whole service by adding rates in force on different parts of the line, are common features of railroad business, necessary to convenient and economical operation, and recognized as among the transportation requirements of commerce and trade. This kind of through routing and through rating is rarely denied to the public or refused by one connecting carrier to another, but carriers sometimes decline to take goods from or send them by another carrier under one billing and without transfer into other cars, although local rates are offered, when by so doing they can secure a

onger haul for their own lines or hold traffic on a road with which they have close and favorable running connections.

The manner in which through service is conducted enters largely into the question of through routing. Suitable facilities for the prompt interchange of traffic between connecting roads frequently include the joint use of yards, union depots, convenient switching racks, train connections for passengers, and the early forwarding of freights by connecting lines. Facilities of this character, though necessary to reasonable through routing service, are often withheld from one carrier and allowed to its competitor. Such discrimination in respect to the facilities for traffic interchange has been effectively used to injure interests of one road and favor those of another, without regard to resulting damage to business enterprises located along the road of the nonfavored road.

As shown in our former reports, the facilities clause of the third section, when invoked by one carrier as against another, has been construed by the courts to mean little, if anything, more than a duty on the part of one carrier to receive traffic from another carrier and forward it as a purely local shipment. What might be done upon complaint of interested shippers or injured localities under the general prohibition in the third section against giving undue or unreasonable preference or advantage to any person, firm, corporation, locality, or description of traffic, or subjecting any person, firm, corporation, locality, or description of traffic, to undue or unreasonable prejudice or disadvantage in any respect whatsoever, has not been determined. This general provision against injustice through affording or withholding favorable facilities or rates may operate to remedy grievances shown in some cases, but under the ruling of the courts to the effect that a carrier is not prohibited by the statute from selecting the carrier with which it will make the most favorable through routing arrangements, there is reason to fear that such right will not be held subordinate to the interests of localities or shippers on the road to which the more advantageous facilities are denied.

The provision in the latter portion of the third section, that carriers shall not "discriminate in rates between connecting lines," has been held by the Commission and by a United States circuit court to require similar rates in a case where it appeared that the facilities for interchange provided by the suing line were substantially equal to those furnished by the favored line. Whether in a suitable case this language of the statute would be judicially construed to mean more than this is extremely doubtful. Congress evidently intended those words to stand as an absolute prohibition against favors in rates to one connecting road as against another, but it is also as clear that the requirement to afford all reasonable, proper, and equal facilities for the interchange of traffic was intended to prohibit giving one road an advantage over another connecting road in the matter of routing arrangements. This intention has not been recognized by the courts as being expressed in the statute, and the prohibition against discrimination in rates between connecting lines has so far been given a limited application.

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The fundamental defect in the through routes and through rates clause lies, however, in the absence of any provision in the statute under which through routing facilities and through rates, which are less than the sum of rates separately established by the connecting carriers, can be required. A provision of this character, so worded as to be capable of direct application, and yet leave open to carriers proper opportunity for agreement as to rate divisions and routing details, would enable the Commission to give due effect to the legislative intention to affirm the right of the public to continuous transportation at through rates reasonable in themselves and relatively reasonable to different localities. The simple assertion of such a right without providing specific means for its enforcement has proven inadequate. Courts are loth to require unwilling carriers to enter into traffic arrangements, which include the making of joint rates lower than the sum of separately established charges, in the absence of clear expression of the legislative will and provision for giving effect to the statutory requirement. The result is that the second paragraph of the third section of the law, the through routes and through rates provision, is practically inoperative on account of the limited meaning which has been given to its somewhat ambiguous phraseology and the fact that the statute does not provide means by which a reasonable joint through rate can be required and established.

When the rate over one connecting line is a single or joint rate, and that over another connecting line in the same territory is merely a combination of individual charges, regulation of rates, in the absence of power to require joint through rating, cannot be effectual. If a through route over connecting roads is a reasonable one, the public is entitled to a rate over such route which is based upon the whole distance and the entire service, and should not be required to pay the sum of rates established for portions of such distance and for distinct services over parts of the route. Whether this right of railway patrons to through service at such through rates shall be accorded or withheld over any such route now depends altogether upon the will of the carriers; there is no statutory provision under which a through rate over different roads based upon the through distance and through service can be determined and required to be put into effect in case the carriers refuse to make the joint rate themselves. The statute should be amended in several important particulars, but we regard this failure of the through routes and through rates clause to operate in accordance with the legislative will as one of the most embarrassing of the discovered defects in our scheme for railway regulation. The power to enforce a reasonable joint rate over a practicable through route, composed of two or more roads or rail and water lines, is indispensable to the effective and impartial operation of the provisions prohibiting unreasonable or unjustly discriminating charges, undue preference to some and prejudice to other persons, or localities, or kinds of traffic, and greater charges for shorter than for longer distances.

After spending more than sixty years in the development of a system of railway service

which shall meet the needs of an ever-increasing volume of commerce; after building and putting into operation nearly half the railway mileage of the world; after aiding the construction of long transcontinental lines by immense grants of lands and national credit, with a principal view to through transportation at relatively low charges, not only over such aided lines, but over those which might choose to connect therewith; after passing a Federal statute more than twenty-eight years since providing for the physical connection of railway tracks of different carriers so as to form continuous lines of transportation, and thereby freeing the carriers from any trammels upon the formation of such continuous lines and transportation thereover; after passing a general regulating statute in which the duty of performing such continuous transportation at duly published and reasonable rates and without undue preference or discrimination in favor of persons, communities, or kinds of traffic is distinctly imposed, after all this effort and time, we are forced to realize that the progress of communities and the prosperity of persons, which are so greatly influenced by fair or unfair railway service and railway rates over connected roads, still depends very generally upon the inclination of carriers to enter into joint through rate agreements. The location of new business enterprises is frequently settled since the passage of the Act to Regulate Commerce, as well as before, not so much by the wishes of those who control them and the advantages for economical production or trade afforded at particular places as by the favorable transportation rates which railway managers can be induced to put in force.

Joint rates over connecting roads are no longer a public convenience which the carriers are able to afford through great economies in operation and because of very considerable offerings of traffic; they have become a commercial necessity which, as a rule, the carriers find no difficulty in supplying at will with reasonable certainty of profit from rates duly adjusted to the places they serve. Neither is the joint rate of two carriers to be regarded in any sense as exceptional to the general method of rate making employed by individual carriers. Individual and joint rates are based upon the same general plan. A rate of 10 cents from one station to another station and another rate of 10 cents from the second station to the third, all on the same road, do not imply that the rate from the first to third station should be 20 cents, the sum of the two locals; it may, without wrong to any one, be 15 cents, or perhaps 12 cents. Indeed, if roads charged the sum of station-to-station rates they would be subject to the most energetic complaints of extortion, and the volume of traffic would be comparatively small. So with two roads having an individual rate of, say, 25 cents over each, the joint through rates over both roads may be 35 cents, or even less, without undue prejudice to any one, and may be necessary to the fair interest of through traffic.

The main limitation upon both the single and joint rate is that neither shall be less as a whole than any intermediate rate; otherwise

there is an obvious prejudice, which in the absence of exceptional circumstances, the law forbids. If, therefore, the joint through rate is an easily supplied commercial necessity and not exceptional to the usual rate-making methods, there can be no valid objection to vesting the regulating authority with power to order through routes and through rates which connecting carriers refuse to provide, but which appear to the Commission to be reasonable, necessary for the public welfare, and not injurious to any interest of the carriers which should be protected.

To insure reasonableness and uniformity, the scope of regulation should be coextensive with the progress of railroad operation, so that what is right may be required as well as what is wrong prohibited. The absence of any provision in the statute by which the joint route and rate can be required renders regulation halting and defective, deprives many carriers of a legitimate share of through traffic which would be created by reasonable through routes and rates, subjects trade and commerce to unnecessary restraints, and confines much of the business of numerous towns to their immediate localities. Whole sections of the country pay on some traffic the sum of rates to and from certain rivers arbitrarily used as dividing lines; places reached by a single road are often deprived of through rating facilities as to all classes of traffic, while junction points in their vicinity receive the benefit of joint traffic rates; other localities are, for carrier's reasons, denied through joint rating on some important kind of goods while it is freely afforded on other articles between the same points.

Again, the lack of procedure under which denied joint rating can be compelled often forces carriers into irregular rate-making practices not recognized by the Act to Regulate Commerce. These are covered by the phrase "proportional rates," that is, less than regular rates in force between the same points, and intended to be applied on traffic destined to a point beyond carriers own line. Thus carriers between the east and Mississippi river points have regular rates in force for traffic confined to those points, and lower or proportional rates for carrying goods destined through those points to places on the line of another carrier west of that river, such goods taking the local rates of the western carrier added to the proportional rates to the river. This practice, which results in eastern carriers having two sets of rates to the Mississippi river is also in vogue in other sections of the country, and is the subject of a complaint brought before the Commission by an eastern road against a connecting line reaching points in New York. Proportional rates result from the failure of connecting roads to make joint rates, and aside from the question of legality, the carrier making them must bear the burden of the entire reduction so made from the sum of individual rates of the connecting roads which, under an agreement for joint through rating, would be borne by both, and perhaps represent a less through charge to the public than under the proportional rate plan.

The article in our last annual report, entitled "Connecting and Continuous Lines," set forth many illustrations of this defect in the law

and specific reasons for this amendment. As is said under another heading in this report, what the carriers fail to do in the direction of necessary transportation reforms is generally proper for Congress, through appropriate means, to require. This is particularly true of the through joint rate over connecting roads, which is capriciously afforded or denied throughout the country according to prevailing notions of railway management. The through joint rate is an undeniable public benefit; it is the transportation facility which, more than any other, has enabled the products of all sections of the country to be exchanged or compete for sale in common markets; it is one of the great mainsprings of our commercial progress. But the joint-rating facility has, on account of its irregular and capricious application also been a costly benefit to the public, for being applied or withheld by the carriers at will, it has frequently promoted the competition of carriers so that carrying would be done at little or no profit, while, through exaction of much higher rates at many points to which through rating has been denied, the legitimate competition of many communities has been restricted or destroyed. So potent is the through joint-rating facility that it can, and often does, result in confining trade to channels favored by the carriers. Such a tremendously powerful instrument for good or ill to the business interests, not only of persons but of towns and localities, and even great sections of the country, and of connecting carriers also, should not henceforth be left in the hands of the carriers to be exercised without control or regulation.

This power to establish through routes and regulate through rates has been exercised by the English commission for years. The third section of our Act, which includes the through routing clause, was modeled after the English statute of 1854, and the amendment suggested in our former reports to Congress is framed upon provisions in the acts of Parliament of 1873 and 1888.

The absence of such a remedy entails upon trade and carrying interests yearly damage to the amount of many millions of dollars. The fact that needed through rating facilities can be denied with impunity in a single instance would be sufficient reason for Congressional action, so large is the amount of current railway business; and when the entire traffic conducted over nearly half the world's railway mileage is subject to such denial of continuous transportation at through joint rates without any effective legal remedy, the necessity for an amendment of the regulating statute in this respect becomes imperative. We, therefore, earnestly renew the recommendation in our last report that the following clause be added to section 3 of the Act to Regulate Commerce:

The facilities to be afforded shall include the due and reasonable receiving, forwarding, and delivering by every such common carrier, at the request of any other such common carrier, of through traffic at through rates or fares. If any one of such common carriers shall desire to form a through route for interstate traffic or any class thereof over its own line or any part thereof, in connection with the line, or any part of the line of one or more other common

carriers, it shall address a request in writing to the other common carrier or carriers, describing therein the proposed route specifically, and naming proposed through rates or fares and divisions thereof for such traffic, and shall deliver such request to such other carrier or carriers, and also transmit a copy thereof to the Commission hereinafter named. If the other common carrier or carriers shall not, within ten days after receiving such request, make and serve and file with the Commission written objections either to the proposed route or to the proposed rates, fares, or divisions, the same so far as not objected to shall be deemed agreed to; but if either the route, the rates, or fares, or the divisions are objected to, the objection shall be stated in writing and transmitted to the Commission, and the Commission shall then have power to determine whether, having regard to all the circumstances, the route proposed is demanded in the public interest and is a reasonable route for the traffic, and if the Commission shall so find, and the rate or divisions are not assented to, the Commission shall have the further power to prescribe the same; but the Commission in any case in apportioning the through rate shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route, or any part thereof, as well as any special charges which any such common carrier may have been entitled to make in respect thereof, and it shall not be lawful for the Commission in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route. Said Commission, at the request of any person interested in interstate traffic, shall institute, or on its own motion said Commission may begin, proceedings to form through routes over connecting lines in the same manner and to the same effect as though such proceeding had been instituted by a common carrier, as provided in this section.

POOLING OF FREIGHTS AND DIVISION OF EARNINGS.

It must be conceived that the vigorous effort now being made to remove the statutory prohibition against railway pooling is prompted to a great extent by the serious diminution of revenue from railway traffic which has been caused by open and secret cutting of competitive rates. It is also commonly believed that a restraint upon the competition of carriers which will prevent secret rate cutting, and such open rate reductions as are not demanded by the needs of commerce, is necessary to the successful operation of the law. The prevention of this illegitimate competition in transportation by proper amendment of the statute is therefore generally desired; but while all parties are united in a common desire to eradicate the evil, there is the widest difference of opinion as to the means to be employed.

Those who oppose pooling assert that it is

calculated to stifle legitimate as well as illegitimate competition between transportation agencies, and therefore should not be allowed. Those who most strongly favor the practice contend that pooling has no influence upon rates except to give them stability and prevent rebates to favored shippers, and that there is nothing in the practice which can operate in derogation of the public interest. Others who take less extreme views believe that pooling can be so restricted through legislative action as to produce no new evils and yet greatly benefit both the shipping and the carrying public.

The objection commonly urged against pooling, that it is in the nature of a trust and liable to operate in restraint of commerce and trade, is certainly well grounded when directed against railway combinations not formed under authority of law; but it is to be expected that a statute which shall permit any form of railway pooling will effectually eliminate from the practice all those features of the trust which in pooling might be detrimental to public interest or individual enterprise. If this cannot be done, the pooling proposition should be discarded; but if this can be accomplished, then consideration of the plan should not be refused merely because unregulated pooling would be objectionable.

Devising and putting in force an apparently safe plan of conditional pooling cannot, however, be deemed alone sufficient for present urgent needs. Though properly regulated pooling may appear to be a remedy for many transportation abuses, there are others equally grave which cannot be cured without further specific legislation. These are fully described in our reports to Congress. Moreover, it should not be overlooked that if civil and criminal violations of the statute were not so numerous, and the competitive relations of carriers merely resulted in diminishing railway revenues, the pooling proposition would receive but little countenance, and the carriers would probably be left to cure the evils resulting from their own follies in competition. The prevention of these violations must be the principal object of any amendment which may be passed, and allowing the carriers the extraordinary privilege of pooling, however carefully guarded against abuse and however desirable it may seem before trial, cannot with safety be solely relied upon to accomplish the intended purpose.

That legalized pooling would, while the agreements are respected by those who make them, tend to maintain and compel adherence to published rates may be readily admitted; but it might not be difficult for dissatisfied parties to such contracts to find legal pretexts for breaking them or compensating reasons for so doing, although the penalty for the breach should be large. The law reports disclose many instances of successful contract evasion and competitive traffic so large that railway managers will risk fine and imprisonment in order to obtain it might tempt repudiation of the most solemn agreement. It is essential that any pooling privilege however carefully conditioned, shall be supplemented with such other enactments as seem best calculated to insure general obedience to the law, and to ren-

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der the Commission's present duty to "execute and enforce" the statute capable of efficient performance.

It is not easy, however, to frame a bill of this character. There is, in the first place, much difference of opinion as to what constitutes an attribute of general conformity with the provisions of the statute. Many railway managers assert that interstate transportation now being conducted in conformity with law, except where competition between themselves has forced them into violations in order to obtain or retain carrying business. In this they are mistaken. Very many civil and criminal violations of the law have been indulged in which cannot be properly traced to the carrier's competitive relations. These violations, as well as those which do arise from competitive conditions, should be prevented as far as possible in any Act which authorizes pooling.

Our reports show many instances of injustice to places whereby their legitimate prosperity has been retarded or destroyed. Rates established under pooling contracts would not be in effect at numerous places which are competing for trade with localities where the pooling rates would be in effect; and thus, by operation of the proposed law, one set of rates would be made by individual carriers, while control of the other set would be legally exercised by or through the pool. It seems to us that points not covered by the pooling contract should receive as ample protection in conditional pooling legislation as those which may be directly affected by the pool, and that any additional authority which may be conferred on this Commission to annul or modify the pooling contract, and control rates or facilities maintained under or affected by the pooling contract, should also extend to rates and facilities which are not maintained under or directly affected by the contract.

Before concluding this article we desire to call attention to the claim of pooling advocates that the pooling contracts can have no effect upon competitive rates except to promote their maintenance and observance. We do not think this a sound proposition. The mere fact that a pooling contract is in existence does not concern railway patrons or communities. That which may be done under such a contract is what vitally affects the public interest, and is what has led to the line of decisions, including a recent opinion emanating from high judicial authority, to the effect that pooling not authorized by law is contrary to public policy. A common agreement as to rates and their observance is necessary to the successful operation of a pool. It is beside the question to say that, throughout the old pooling territories, competitive rates have been agreed upon by the carriers since pooling was prohibited. Continuance of rates in force has nevertheless been voluntary, while under these contracts established rates would be kept in effect until the parties thereto agree upon a change; and it is plain, moreover, that a substantial advantage accrues from an arrangement for division of earnings which would make a carrier willing to keep rates in force that, without it, would be reduced. The division of earnings would also probably reconcile a carrier to the establishment of lower rates than would ordin-

irily be charged over its lines. The effect of a legalized pooling contract upon rates would be, therefore, to require the parties to agree, while now they only do so voluntarily.

The extraordinary and forceful powers of any combination of persons over those of an individual are to be continually borne in mind at every point in the formulation of any bill on this subject, and it is folly to suppose that a combination of carriers would not, in the absence of legislative restrictions, have immensely greater power over rates than those possessed by individual carriers, or that such power would not be exercised in the direction of higher rates, if it should appear that the private interests of the carriers would be served by such action.

Although the Commission has paid much attention to the subject of pooling in former reports, it has not taken a position in favor of or against a renewal of the practice, but has confined itself to collecting and laying before Congress the opinions and views of carriers, shippers, commercial bodies, and others interested in, or who have made a study of, the subject of transportation. In deference to such opinions, and in view of the earnest consideration which has been given the subject by the committees of Congress, and because of urgent requests by Senators and Representatives for some expression as to the policy and advisability of legalized pooling, we submit for the consideration of Congress that pooling without other remedial legislation is, we think, inadvisable. Pooling under conditions to be approved by the Commission and rendered capable of easy and direct regulation, with accompanying effective remedial legislation, we believe, might safely be tried. Amendments recommended to Congress in this and former reports should be adopted. Each of them is necessary to remedy some existing transportation evil, and some of them would accomplish reforms and public benefits indispensable to the original purposes of the Act.

ANNUAL REPORT OF COMMON CARRIERS.

Pursuant to section 30 of the Act to Regulate Commerce, reports are required to be made to the Commission by all common carriers subject to the Act, showing in detail the amount of capital stock issued by each of such common carriers, the dividends paid, its surplus fund, the funded and floating debts, the interest paid thereon, salaries paid, amounts expended, how expended, the earnings and receipts from all sources, the balance of profit and loss, and a complete exhibit of the financial operations of the carrier for each year, including an annual balance sheet.

In response to this requirement an important railroad system filed with the Commission a report, verified by the oaths of its president and auditor, for the year 1893. It subsequently appeared from a statement made by an expert accountant, who made an examination of its affairs and accounts on behalf of parties interested therein, that during the period covered by said report large sums of money had been paid out by the company by way of rebates and drawbacks, but were falsely covered under the head of legitimate expenditures.

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Under the existing law no indictment for perjury can be predicted upon such false and fraudulent report, though made under oath. In order to prevent the making of such false reports, offenders in this respect should be subjected to punishment for perjury. It is important also that carriers required to make reports under the law should be subject to reasonable penalty or forfeiture for failure to do so. The Commission therefore recommends that section 20 of the Act referred to be amended by striking out the first sentence and inserting in lieu thereof the following:

That the Commission is hereby authorized to require annual reports, verified by oath, from all common carriers participating in interstate commerce, and from all companies or corporations owning railroads over which interstate commerce is carried, to prescribe the manner in which such reports shall be made, and to require specific answers therein to all questions upon which the Commission may need information.

And also by adding to said section the following:

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the 30th day of June in each year, and shall be made out and filed with the said Commission, at its office in Washington, on or before the 15th day of September then next following, unless additional time be granted in any case by the Commission; and if any common carrier subject to the provisions of this section shall fail to make and file said annual reports or shall fail to make specific answer, under oath, to any lawful question authorized by the provisions of this section within the time herein provided, such common carrier shall be subject to a penalty of one hundred dollars for each and every day it shall continue to be in default as aforesaid shall be deemed to be a separate offense, and the district courts of the United States for the district in which the principal office of such delinquent carriers shall be located shall have jurisdiction to enforce the penalty herein provided for upon information to be filed by the United States attorney for such district.

Such annual reports shall be verified by the oath of the president, treasurer, comptroller, auditor, or receiver of such common carrier, administered by a notary public, United States commissioner, or judge of a United States court.

GOVERNMENT OWNERSHIP OF RAILROADS.

This subject has received the attention of writers on different phases of the railroad problem, and indeed of the general public, to a considerable extent during the past year.

The Commission is inclined to the opinion that on controversial questions of this nature, not directly involving matters specifically covered by the Act to Regulate Commerce, its duty is best discharged by presenting the facts bearing upon and necessary to an intelligent determination of the question, rather than to undertake a statement of the argument pro and con.

On this line the Commission made a preliminary report in response to a resolution of the Senate passed August 24, 1894. The facts

then collected will be found in Appendix hereto.

In that preliminary report the subject was treated, as therein expressed, under four heads, as follows:

(1) Relations of Governments to the railroads of the world.

(2) The data thereon tabulated.

(3) Comparison of freight and passenger rates on Government-owned railroads and on roads within the United States.

(4) Views of various writers on the subject.

Under all of the above headings the facts are so broadly and concisely stated, and yet cover the ground so fully, that nothing would be gained by undertaking here to give an abstract of the same. The whole will be seen by turning to the Appendix.

There is, however, one consideration that should be kept in mind in connection with the facts bearing upon this question, and that is whether the more objectionable features of railroad management under private ownership which are relied upon to support the argument for public ownership, can not be remedied by legislative regulation through the instrumentality of a commission quite as effectual as by government acquisition and control.

There are some amendments to the Interstate Commerce Law, as the Commission has repeatedly pointed out, which are required to make the law express what it was generally understood to mean, and which have been found essential in order to secure reasonableness in rates and equality of treatment by railroad carriers.

There may be serious objections to government ownership, even if it is legally possible to provide for the compulsory transfer of the railroads to the government. For illustration, the railroad mileage in the United States is, in round numbers, 177,000 miles, nearly one half of all the railway mileage in the world. The amount of its stock and bonds is more than \$10,000,000,000. The employes fall but little below a million persons. To become the owner of all this property would involve the government in tremendous debt; to operate it would involve a patronage eclipsing all precedent in the civil administration of the Government. Thoughtful men believe that the creation by this government of such a debt and such a patronage should be avoided if possible, both on political and commercial considerations.

Omitting a restatement of the many other objections which writers offer to state ownership and control in this country, perhaps of less weight than the above, it may well be said that experience has not yet shown and no satisfactory reasons have been advanced why legislative and administrative regulation can not bring about all needed reforms in railway management.

No one has ever attacked the fundamental principles of the national law. It is based on the just idea of reasonable rates and equality of treatment in the broadest sense. The statutory machinery, if we may so term it, to secure these results, has been found inadequate in some measure, but this may be accounted for by the fact that the law is of recent origin and to a certain extent tentative. The time for dis-

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cussion of amendments has been short. Other questions have absorbed the attention of Congress and the country. Legislators have hardly yet come to realize that this matter exceeds all others of a public nature in its importance to commercial interests and general prosperity. It is a source of encouragement, however, that discussion in and out of Congress during the past year has taken on a breadth of view and an intelligence and vigor that give promise of early and advantageous results. It is to be remembered that a statute like this, covering a new field of legislation, is generally and naturally the result of a compromise between different and conflicting theories, and that debatable questions as to the intent and interpretation of various provisions must inevitably arise, to be settled by the decisions of the courts or by amendatory enactments.

It is necessary in this matter not only to discover a remedy for existing evils, but to find one that will avoid other evils of still more dangerous character.

THE GREAT STRIKE OF 1894.

This report might be deemed incomplete if it omitted to notice the great railway strike which took place during the year. The history of this unprecedented contest between railway employes and employers has been fully detailed in the press of the country, and officially reported by the "Strike Commission" appointed by the President under the provisions of the Act of October 1, 1888. Soon after the trouble commenced, one of the large railway systems having its headquarters at Chicago requested this Commission to take such action in the premises as would remove the trammels on interstate commerce which were created by the strike. We were obliged to reply that the Commission possessed no authority to relieve the situation. The employes interested in the controversy, as a body, had determined to cease from labor pending the continuance of certain conditions, and it is conceded that this resulted not merely in interference with interstate traffic, but that it served for a time to bring transportation to a standstill in various parts of the country, and especially on lines centering in Chicago.

Although the Act to Regulate Commerce requires interstate carriers by rail to perform continuous transportation, provide reasonable and proper facilities for the prompt forwarding of traffic over connecting lines, and to refrain from subjecting shipping interests to undue prejudice; and although this Commission is required "to execute and enforce" the provisions of the statute, no power is conferred upon us to remove obstructions to interstate commerce which are not brought about by the carriers themselves. Even in cases against the carriers the statute has been judicially construed to have such limited application as to be practically valueless in matters involving the furnishing by carriers of suitable facilities for continuous carriage over connecting lines; but, whatever may be the extent of our authority in proceedings against carriers, it is clear that the law gives the Commission no jurisdiction of parties not common carriers, and that any order it might issue in regard to the strike or its con-

quences must have been directed against the carriers and not against their employes.

But while this lack of power in the Commission was evident, it was not so clear that the exercise of general investigating functions by the Commission, which is required by the statute, did not include a duty to inquire into the causes of the strike, its conduct on both sides and its results, and make a report thereon with such recommendations as might be warranted, not only for the future guidance of the carriers, but for the information of the public and as a basis for legislative action.

It was manifest early in the contest that the damage to commercial and consuming interests through the various obstructions to traffic would be almost beyond computation, and it was frequently claimed that the carriers themselves were not confining their actions during the struggle to an attitude of resistance merely, but were endeavoring in some ways to make the public believe that their inability to move traffic was greater than was actually the case. But the propriety, while the strike was in progress and the minds of all parties were inflamed, of carrying on an investigation which must take a wide range and include matters outside of our jurisdiction was extremely doubtful; besides, it seemed certain that, in the absence of express direction by Congress through resolution or otherwise, our investigation would be resisted by one side or the other, and perhaps both, according as inquiry might involve interests not subject to the Interstate Commerce Law; and this consideration was given additional force by the fact that Congress was then in session. Still another deterring reason was the law of October 1, 1888, which provides for investigation in cases of this character by a special tribunal to be appointed by the President, and the general belief that in a matter so grave as this the President would make the necessary appointments and direct an investigation through such a commission.

These facts seemed controlling at the time, but we desire to state, in the light of present knowledge, that under a recurrence of similar conditions we might feel it our duty to attempt an investigation. Innocent of criminal intention, as the strikers and employers may have been, great exertion both by the executive and judiciary was required to repress the lawlessness which attended the progress of this strike; and while any action on our part could have had no immediate result, the report of our inquiry might have added something to the knowledge of facts necessary to devising proper methods of dealing in the future with the question of labor as affecting railway transportation and public interests connected therewith.

We still think, however, that an investigation by us would have been limited to the scope of our jurisdiction, for at such a time of anger and excitement, the courtesy which could extend needed information would probably have been refused. Without making any specific recommendation, it seems to us that when contests between railway employers and employes take place, the tribunal charged with the duty of railway regulation should have express statutory powers to investigate the acts of

all parties, and not be restricted to inquiry into the methods of carriers alone.

This Commission has the care of public interests as affected by railway operation, and to this has been added by recent statute the duty of supervising the use of safety appliances on railroads. The familiarity with railway methods and requirements, and with the risks and needs of railway labor, acquired by the Commission through the exercise of its functions, would be a material aid in investigations of labor contests on railways, and such inquiries, though directly authorized by statute, need not interfere with investigations by other bodies which have for their express object the settlement of the immediate controversy. An inquiry by the Commission would be with a view of promoting the public interest, though incidentally all concerned might be benefited.

While we do not desire to embarrass other proposed measures, it seems proper to suggest that whenever strikes or lockouts are apprehended by either railway management or railway employes, or by the Commission, which would be likely to bring about serious injury to commercial interests and the public generally, that the Commission should have authority to enter upon immediate investigation, have the testimony of all persons and the aid of judicial process to compel the giving of such testimony and to enforce such recommendations, based upon the investigation, as may be constitutionally devised.

FINANCIAL CONDITION OF RAILWAYS.

In the last report of the Commission reference was made to the financial embarrassment of railways. During the last eighteen months the country has been passing through one of the most remarkable periods of commercial and financial depression in its history, and the railways have suffered in common with all other industries. Some of the largest systems in the country have passed into the hands of the courts. The extent of the disaster to railway interests resulting from the depression and other causes suggests the propriety of further reference to the matter in this report.

On June 30, 1894, there were 156 railways in the hands of receivers. The mileage of road owned by these companies was about 30,000 miles, and the mileage operated was nearly 39,000 miles. Sixty-seven per cent of the mileage owned and 80 per cent of the mileage operated is accounted for by 28 important lines with either an owned or operated mileage in excess of 300 miles. Of the remaining 128 roads, 95 were small lines of less than 100 miles in length, some of them the parts of larger systems, and a number were new lines still in process of construction.

The total capitalization of the railways in the hands of receivers was about \$2,500,000, or one fourth of the total railway capital of the country. The capitalization of the 28 important roads accounts for 79 per cent of this amount. It is, of course, impossible to make any satisfactory estimate of the actual money value of the capitalization, the amount stated being based on the par value of the securities.

Although it is probable that a majority of the receiverships of the last eighteen months

were hastened by the commercial and financial depression, it is believed that in most of the cases the primary cause of disaster may safely be attributed to other reasons. Many were the natural sequence of mismanagement, over-capitalization and ill-advised projection. A majority of the roads were weighed down with heavy loads of indebtedness, and an investigation of the reports filed with the Commission and of the best authorities available for the years previous to the creation of the Commission discloses that only 18 roads out of the entire 156 had paid any dividend to their stockholders, from 1880 to the present date, or since their organization if subsequent to 1880, their entire net earnings in prosperous times being scarcely adequate to pay the interest on their indebtedness and other fixed charges. Many of these roads, therefore, were placed in the hands of receivers, and in several cases on application of the management of the roads themselves, when the first effect of the commercial and financial depression was felt in the depletion of traffic and consequent loss of earnings. In some cases the application for the appointment of receivers were made before any great loss of traffic had obtained, caused by inability to renew loans on account of the stringency of money. They were in fact in a condition to fail at the first breath of adversity.

One reason for this condition is undoubtedly over-capitalization. It is a notorious fact that many of the lines now in the hands of receivers were capitalized out of all reasonable proportion to the actual cost of the properties. Until there is some practical restriction upon the capitalization of railway properties at fictitious values, there must still continue to be nondividend-paying stock, defaulted interest on bonds, receiverships, and foreclosure sales. It is worthy of special mention that only 1 of the 156 roads is located in the New England group, where the matter of capitalization of roads is largely under the control of the state commissions.

It is believed that another reason for the present condition is ill-advised projection and construction. Roads have been built for speculative purposes when the business of the locality did not warrant or demand them, and was found insufficient to support them when constructed. This condition has led to another source of trouble, ruinous competition, and the tendency to such competition has been greater during the period of depression than in prosperous times. The endeavor to obtain traffic has led to such fierce competition that the revenue to be derived from it and the cost of handling it have been secondary considerations, and it is probable that a large amount of competitive traffic has been handled at such low rates that it became a source of loss rather than of revenue.

In 1892 the average rate per passenger per mile was 2.126 cents, and the average rate per ton per mile .898 cent, as against 2.108 cents per passenger per mile and .878 cent per ton per mile in 1893. To illustrate the effect of even this slight reduction in average rates, it may be stated that on the basis of the traffic of 1893 it caused a decrease in revenue of the railways of over \$21,000,000. Considering the magnitude of the railway system this is a 4 INTER 8.

small amount, but it is sufficient to pay interest at the rate of 4 per cent on two thirds of the amount of funded debt upon which no interest was paid in that year.

In order to ascertain to what extent the traffic of the railways has been affected by the business depression, comparative traffic data have been compiled for the years ending June 30, 1893 and 1894, for 570 roads. This includes all roads whose reports for the year ending June 30, 1894, had been filed up to November 23, 1894, and covers an operated mileage of 149,559.21 miles. The number of passengers carried was 505,285,446, and the number of passengers carried 1 mile was 12,899,936,578, as compared with 555,918,603 passengers carried and 12,873,272,594 passengers carried 1 mile by the same roads for the year ending June 30, 1893; and the number of tons carried was 571,955,942, and the number of tons carried 1 mile was 70,426,344,965, as compared with 687,561,865 tons carried and 84,968,987,747 tons carried 1 mile by the same roads for the year ending June 30, 1893. These figures show the decrease in traffic for 1894.

It has been stated that the steady decrease in rates during the past few years has been made possible by the constant increase in traffic. The fact, then, that regardless of the large decrease in volume of traffic during the year ending June 30, 1894, the rates continued to decline, must be accepted as an indication of unusually sharp competition during that year. The average receipts per passenger per mile for 1894 were 1.976 cents, as compared with 2.108 cents for 1893, and the average receipts per ton per mile were .866 cents, as compared with .878 cent for 1893. An illustration of the effect of the slight decrease in average rates from 1892 to 1893 on the bases of the traffic for the latter year was shown above. Applying the same formula to the traffic for 1894, it is found that the maintenance of 1893 average rates would have increased the revenues of the railways in 1894 \$12,579,143, or 4 per cent on \$314,478,575, and the maintenance of the 1892 rates on the 1894 traffic \$41,886,342, or 4 per cent on \$1,047,158,550, or one fifth of the entire funded debt of the railway system.

It is possible that these average rates are in excess of the actual receipts which finally found their way into the treasuries of the companies. It is thought, and it has been openly charged, that rebates were made to shippers by some roads in disobedience of the law in a degree sufficient to amount to millions of dollars per annum. If such practices do exist, their effect on the earnings may or may not be shown by the averages above stated. It is believed, and the above figures show, that if the railways all lived up to the spirit of the law, and reasonable rates had been maintained, that although many of the disasters could not have been averted on account of other causes referred to, the revenue from the traffic for the past year would have been more nearly adequate to meet the fixed responsibility of the roads, and the extent of disaster much less.

STATISTICS OF RAILWAYS.

Mileage.

The report of the statistician to the Commis-

sion for the year ending June 30, 1893, contained in Appendix,—shows that the total mileage of railways in the United States on June 30, 1893, was 176,461.07, being an increase during the year of 4897.65. The corresponding increase during the previous year was 3160.78, from which it appears that there was some revival in railway construction during the year covered by the report. The state of Washington leads in construction, with 556.32 miles; Montana shows an increase of 409.66 miles; West Virginia of 385.01 miles, and Texas of 298.97 miles. The other states which show an increase in mileage in excess of 100 miles are California, Florida, Indiana, Michigan, Minnesota, Missouri, New York, Ohio, Pennsylvania, Wisconsin, and Wyoming. The states of Kansas, Oregon, the territory of New Mexico, and the District of Columbia show a slight decrease in mileage, due to remeasurement of main lines or abandonment of small unimportant lines. The number of roads abandoned during the year was 19. The total length of line, including all tracks, was 230,187.27, which includes 10,451.36 miles of second track and 42,048.40 miles of yard track and sidings.

Classification of Railways.

The total number of railway corporations in existence June 30, 1893, was 1890, being an increase of 68 during the year covered by the report. Of this number 752 were independent operating roads and 939 maintained operating accounts. The number of subsidiary roads which maintained financial accounts only was 178, of which 326 were leased for a fixed money rental, and 195 for a contingent money rental, the remainder being operated under some form of traffic agreement not easily subjected to classification. The tendency toward some form of consolidation during the year has been quite marked; 28 roads, representing 49.87 miles, have been merged; 20 roads, representing 1732.79 miles, have been reorganized; and 16 roads, representing 1469.19 miles, have been consolidated. These items are higher than the corresponding items of the previous year. A classification of railways according to length of line operated shows that there are 2 companies in the United States having a mileage in excess of 1000 miles; 26 companies operating a mileage between 600 and 1000 miles; 23 companies operating a mileage between 400 and 600 miles; 41 companies operating a mileage between 250 and 400 miles; and 92 companies operating a mileage of 250 miles or less. The total length of line controlled by the 42 companies operating an excess of 1000 miles was 98,385.54, being equal to 55.78 per cent of the total mileage of the country. The second class of roads controlled 11.20 per cent of total mileage, from which it appears that 68 companies controlled 66.98 per cent of the total railway mileage.

Capitalization and Valuation.

The aggregate of property classified as railway capital was on June 30, 1893, \$10,506,35,410, which shows railway capital equal to 63,421 per mile of line. The amount of stock outstanding was \$4,668,935,418, of

which \$3,932,000,602 was common stock, the remainder, \$686,925,816, being preferred stock. The funded debt outstanding was \$5,225,689,821, classified as follows: Mortgage bonds, \$4,504,383,162; miscellaneous obligations, \$410,474,647; income bonds, \$248,132,730, and equipment trust obligations, \$62,699,282. The amount of investment in the railway securities has increased during the year from \$1,891,457,053 to \$1,563,022,238, being an increase of \$171,565,180.

The amount of stock paying no dividends during the year was \$2,859,334,572, being 61.24 per cent of the total stock outstanding. Of stocks paying dividends, 5.25 per cent of the aggregate stock paid from 4 to 5 per cent, 11.62 per cent paid from 5 to 6 per cent, 5.24 per cent paid from 6 to 7 per cent, and 5.82 per cent paid from 7 to 8 per cent. The total dividends paid was \$100,929,885. The amount of mortgage bonds paying no interest was \$492,276,999, or 10.93 per cent of the total or mortgage bonds, and the amount of income bonds paying no interest was \$204,864,269, or 82.56 per cent of the total of income bonds.

Public Service.

The total number of passengers carried during the year ending June 30, 1893, was 593,560,612. Passenger mileage during the same year was 14,229,101,084. The average journey per passenger was 28.97 miles. The number of tons of freight reported by the railways for the year was 745,119,482. Ton mileage was 93,588,111,833. The average number of tons in a train was 183.97, and the average haul per ton for the entire country was 125.60 miles. Passenger train mileage was 335,618,770, and freight train mileage 508,719,506.

Earnings and Expenses.

The gross earnings from operation of the railways of the United States for the year ending June 30, 1893, was \$1,220,751,874, being an increase of \$49,344,531 over gross earnings reported of the previous year. Operating expenses during the year were \$827,921,299, being an increase of \$46,923,303 over the previous year. The income from investments reported by the railways was \$149,649,615, while deductions on account of fixed charges and other analogous items were \$431,422,156. The final net income available for dividends was \$111,058,034, being a sum less than the corresponding amount for the previous year of \$4,907,157. After deducting from this amount the dividends paid, the income account of railways in the United States for the year shows a surplus of \$3,116,745, which is less than the surplus of the previous year by \$5,919,311. The complete report shows a full income account for each of the ten territorial groups into which the country is divided. The gross amount received from carrying passengers was \$301,491,816; from carrying mail, \$23,445,053, and from carrying express matter, \$23,681,394. The gross amount received for carrying freight was \$320,053,861. The passenger service accounts for 29.49 per cent of the earnings from operation, and the freight service for 68.23 per cent of such earnings.

Equipment.

The total number of locomotives on June 30, 1893, was 84,788, being an increase of 1652 during the year. Of these, 8957 were passenger locomotives, 18,599 freight locomotives, and 4802 switching locomotives, the remainder being unclassified. The total number of cars owned by the carriers making report was 1,119,878, to which should be added 154,068 leased cars, making a total of 1,273,946 cars operated directly by the carriers. This shows an increase in the number of cars directly controlled of 58,854, during the year. Of the total number of cars, 81,384 were in the passenger service, and 1,047,577 in the freight service. The number of passengers carried per passenger locomotive was 66,268, and the number of passenger miles per passenger locomotive was 1,588,601. These figures show an increase in the efficiency of passenger locomotives. The number of tons of freight carried per freight locomotive was 40,062, and the number of ton-miles accomplished per freight locomotive was 5,081,889. These figures show no change in the efficiency of freight locomotives as compared with previous years. The number of passenger cars per 1,000,000 passengers carried was 53, and the number of freight cars per 1,000,000 tons of freight carried was 1613. The increase in equipment fitted with train brakes, or automatic couplers, as compared with the increase in equipment itself, is not so marked as in the previous year. Thus, from a total increase in equipment during the year ending June 30, 1893, of 60,506 the increase in equipment fitted with train brakes was 42,158, and the increase in equipment fitted with automatic coupler was 77,904.

Employées.

The total number of employées in the service of railways on June 30, 1893, was 873,602, being an increase of 52,187. Of this total of employées 85,884, are assigned to the work of general administration, 256,212 to maintenance of way and structures, 175,464 to maintenance of equipment, and 397,915 to conducting transportation, the remainder, 8627, being unclassified by the carriers making report. If the employées be assigned to mileage, it appears that 515 men found employment in the railway industry in the United States per 100 miles of line, 31 being assigned to general administration, 151 to maintenance of way and structures, 103 to maintenance of equipment, and 234 to conducting transportation.

Railway Accidents.

The number of railway employées killed during the year was 2727, being greater by 173 than those killed during the previous year. The number of employées injured was 31,729, being greater by 3462 than the number injured the previous year. The number of passengers killed during the year was 299, being less by 77 than the number killed the previous year, and the number injured was 3229, being 2 in excess of the number injured the previous year.

Of the total number of deaths to employées
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on account of railway accidents, 433 were due to coupling and uncoupling cars, 644 to falling from trains and engines, 73 to overhead obstructions, 247 to collisions, and 153 to derailments, the remainder being due to causes not so clearly defined. An assignment of casualties to the opportunity offered for accidents shows 1 employé to have been killed for every 320 men employed, and 1 to have been injured for every 28 men employed. The most dangerous service is that of trainmen, and for these the statistics show one employé to have been killed for every 115 trainmen, and 1 employé to have been injured for every 10 engaged in this service. A similar comparison shows 1 passenger to have been killed for each 1,985,153 passengers carried, or for each 47,588,966 passenger miles accomplished, and 1 passenger injured for each 183,822 passengers carried, or for each 4,406,659 passenger miles accomplished. An assignment of accident statistics to the territorial groups shows great diversity in the relative safety of travel and railway employment in the various sections of the country.

Conclusion.

Mention is made in the report of an important step toward the realization of uniformity in railway accounts, in that the Commission has, with the assistance of the Association of American Railway Accounting Officers, revised the classification of operating expenses.

Another subject of interest touched upon in the report is the necessity of compiling freight statistics more fully than at present is the case. The statistician also renews the recommendations made in previous reports to the effect that the Act be amended so that express companies, companies or persons owning rolling stock leased to railways or shippers for use in interstate commerce, companies or persons owning depot properties (stock yards, elevators, and the like) used by railways for interstate traffic, and carriers by water lines, shall be required to render appropriate reports to the Commission.

PRELIMINARY INCOME ACCOUNT.

In addition to the statistics given above, covering the year ending June 30, 1893, a preliminary income account covering the operations of 570 roads, for the year ending June 30, 1894, has been compiled and is made a part of this report, being contained in Appendix. It includes the returns from all roads for which reports were filed on or before November 23, 1894, and covers an operated mileage of 149,559.21 miles. A similar report was prepared the two years previous and distributed in pamphlet form to meet the demand of the public for early statistics regarding the operations of railways. This report has been so much sought after and so favorably received that it has been thought advisable to continue its compilation and publication. It is of especial interest this year, as it discloses the effect of the commercial and financial depression through which the country has been passing on the revenue and traffic of the railways. It will be noted that the operations of about 15

per cent of the mileage of the country is not included in this account for the reason that the reports for many roads had not been filed by the date (November 28, 1894) on which it was necessary to close this compilation. In this connection it seems proper to again renew the recommendation made in previous reports as to the necessity for such amendment of the Act as will secure a prompt filing of reports from the railways.

SAFETY APPLIANCES ON RAILWAY EQUIPMENT.

Reference was made in the last report of the Commission to the enactment of the safety appliance Act, and statistics were given showing the extent to which the railway equipment of the country had been fitted with such safety appliances prior to the date of the Act and up to June 30, 1893.

In Appendix—will be found a similar compilation to that presented in the preceding report, covering the years ending June 30, 1889, 1890, 1891, 1892, and 1893, and showing the total railway equipment, the equipment fitted with train brakes and with automatic couplers, together with a statement of the number of passengers carried, the number of employes, and the number of accidents to each.

The increase in equipment, meaning locomotives and cars, during the year ending June 30, 1893, was 60,506; the increase in such equipment fitted with train brakes was 42,158, and the increase in the number fitted with automatic couplers was 77,904. The figures in the Appendix do not show the measure of compliance by the railways with the provisions of the safety appliance Act, since the latest figures given are for the year ending June 30, 1893, and the Act was not passed until March 2, 1893. As the date on which all equipment must be fitted with train brakes and automatic couplers is July 1, 1898, sufficient time is allowed for the changes necessary to be made to comply with the provisions of the Act in these respects. It is stated that all new cars ordered are being supplied with automatic couplers, while a very large proportion of new equipment is being fitted with train brakes.

To show the extent to which the different classes of equipment had been fitted with safety appliances up to June 30, 1893, it may be stated that 98.50 per cent of passenger locomotives, 75.59 per cent of freight locomotives, 56.88 per cent of switching locomotives, 97.88 per cent of passenger cars, and 19.18 per cent of freight cars are fitted with train brakes; 29.47 per cent of passenger locomotives, 3.52 per cent of freight locomotives, 2.54 per cent of switching locomotives, 97.01 per cent of passenger cars, and 21.89 per cent of freight cars are fitted with automatic couplers. On the basis of the whole equipment, it appears that 79.51 per cent of the locomotives and 21.30 per cent of the cars are fitted with train brakes, and 11.81 per cent of the locomotives and 24.99 per cent of the cars are fitted with automatic couplers.

The number of different kinds of train brakes in use on June 30, 1893, was 15, and the kinds of couplers, without any attempt to classify by the type to which they belong, numbered 55.

As stated in the last report, communications from the leading railroads show that the requirement of the law in regard to the establishment of a uniform height of drawbars on or before July 1, 1895, is meeting prompt acquiescence. The law also provides that hand holds shall be placed at the sides of each freight car by the date last mentioned.

The statistics of accidents which appear in detail in the Appendix show 1 passenger killed for every 1,985,153 carried, and 1 injured for every 183,822, a smaller ratio of fatal casualties than in any year for which the data have been compiled by the Commission. The ratio of injuries not resulting fatally is also less than for the two years preceding, but greater than in 1889 or 1890. The ratio of casualty to railway employes was 1 killed for every 320 employed, and 1 injured for every 28. The extra hazard of employes on trains is shown by the fact that 1 was killed for every 115 in service, and 1 injured for every 10 so employed. These ratios have remained nearly stationary for the three years prior to July, 1893, and it is not probable that they will be materially lessened until under the operation of the law greater uniformity, especially in regard to couplers, is attained.

CONVENTION OF RAILROAD COMMISSIONERS.

The sixth annual convention of railroad commissioners was held May 8 and 9, 1894, at the office of the Commission, at which seventeen States were represented by their commissioners or by accredited representatives.

Hon. George M. Woodruff, of Connecticut, was again chosen chairman, with Hon. Allen Fort of Georgia, vice chairman, and the secretary of the Interstate Commerce Commission, secretary.

Reports were read and a general interchange of views was had upon the subjects of pooling of freight and division of earnings, uniform classification of freight, abuses caused by use of shipper's cars in railway equipment, railway statistics, and accounts.

Propositions for legislation to prevent trespassing on railways by walking on the track, and to require the blocking of frogs, switches, and guard rails, were discussed at length.

A paper on "Stock and Debt Watering," by Hon. George G. Crocker, formerly of the Massachusetts railroad commission, was read and made a part of the record of the convention.

A communication from Mr. E. P. Wilson, representing the National Transportation Association, on the subject of "The Harmonizing of State and Federal Legislation in the Regulation of the Business of Common carriers," was read, and after discussion the following resolution was adopted:

Resolved. That a committee of three members be appointed by the chair to consider and report at this session concerning measures necessary to be taken in regard to pending and needed legislation in Congress upon the subject of interstate transportation, and that this committee have power to confer with representatives of other bodies.

The interest in these conventions is increasing, and with the purpose of making their proceedings still more instructive and valuable,

the last meeting adopted the plan of selecting subjects for discussion at future meetings through committees.

A complete report of this convention has been published and sent to all members of Congress and others.

GOVERNMENT AIDED RAILROADS AND TELEGRAPH LINES.

In performance of the duty imposed upon the Commission in regard to Government aided railroad and telegraph lines—Act of Congress August 7, 1888 (Acts of Fifty-first Congress, chap. 772, 25 Stat. at L. 382)—the Commission served blanks for the purpose of making annual reports upon the following companies: The Sioux City & Pacific Railroad Company, the St. Joseph & Grand Island Railroad Company, the Western Union Telegraph Company, the United States Telegraph Company, the Atchinson, Topeka & Santa Fé Railroad Company, the St. Louis & San Francisco Railway Company, the Northern Pacific Railroad Company, the Oregon & California Railroad Company, the Southern Pacific Company, the Union Pacific Railway Company, the Central Pacific Railroad Company, the Atlantic & Pacific Railroad Company.

With the exception of the St. Louis & San Francisco Railway Company, the Atchinson, Topeka & Santa Fé Railroad Company, the United States Telegraph Company, the Western Union Telegraph Company, and the Atlantic & Pacific Railroad Company the companies have furnished the information required. The Attorney General has been notified of the failure on the part of these companies to comply with the law.

RECAPITULATION OF RECOMMENDATIONS FOR AMENDMENTS TO THE STATUTE.

(1) That power be conferred upon the Commission to prescribe minimum as well as maximum rates.

(2) That section 8 of the statute be amended so as to provide a procedure for the establishment of through routes and through rates similar to that outlined on pages — of this report.

(3) That the Commission be directed to prescribe a uniform classification of freights and change the same from time to time as, after investigation may appear necessary, and that the carriers be required by suitable provisions to conform to such classification.

(4) That for the purpose of preventing overcharges and undercharges for interstate transportation the Act be amended so as to connect the contract of shipment and its performance by carriers with their duty to charge or receive only such rates as have been put in force according to law, and a provision similar to that set forth on pages — of this report is suggested.

(5) That the procedure provided in the statute for enforcement of orders of the Commission be amended as suggested in former reports.

(6) That mutilation, destruction, or removal of any tariff, or schedule of rates, fares, or charges, posted by any carrier subject to the

statute as in force over its line, be made a misdemeanor punishable by suitable fine.

(7) That corporations subject to the Act be made liable to indictment for offenses against the statute; and that the present provisions subjecting individuals engaged in railway service to punishment by fine or imprisonment for prohibited acts be retained, but that shippers, consignees, and individuals not connected with railway employment be relieved from liability to fine and imprisonment under section 10, except for such fraudulent acts as false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight.

(8) That a law be enacted allowing appeals or writs of error on behalf of the Government in penal cases which involve construction of the Constitution of the United States, or in which a demurrer to the indictment has been sustained, or motion in arrest of judgment granted.

(9) That the word "line" when used in the Act shall be construed to be a physical line, not a business arrangement, and the words "any common carrier" as used in the Act shall be construed to mean one or more than one common carrier, as in the application of the law may appear to be required.

(10) That any Amendment of the fifth section or anti-pooling clause of the law shall be in accordance with the suggestions and recommendations stated under the head of "Pooling of freights and division of earnings" in this report.

(11) That the provisions of the Act be made to apply to all transportation of interstate commerce over rail or rail and water lines, and to all common carriers, corporations, companies, firms, and persons in anywise engaged in such transportation, or owning lines, cars, yards, or properties used in connection therewith.

(12) That section 20 of the Act be amended so as to fix the time within which carriers, corporations, companies, or persons subject to its provisions shall make and file annual reports with the Commission, and a money penalty for failure to file such report within the time prescribed, and also provide for the enforcement and collection of such penalty; that this section be further amended so as to require such reports to be verified by oath before an officer therein specially authorized to administer such oath, and that any person making oath to any false statement in any such report shall be liable to indictment and conviction for perjury.

In addition to the recommendations for amendment above specified, attention is respectfully called to the various considerations set forth in the body of this report as demonstrating the necessity for legislative action. We also beg to refer to the suggestions herein made in regard to legislation authorizing the Commission to investigate threatened labor contests on railways, and to require annual reports from various companies whose business is closely related to that of transportation.

All of which is respectfully submitted.

Wm. R. Morrison.
W. G. Veazey.
Martin A. Knapp.
J. C. Clements.
J. D. Yeomans.

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ACTION OR SUIT. See also TELE-
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1. The enforcing of an order of railroad commissioners requiring a railroad company to conform to their schedule of rates is a matter of public right for which an action may be maintained in the name of the state. *Campbell v. Chicago, M. & St. P. R. Co.* (Iowa) 203

2. All the carriers which united in making a joint rate are not necessary parties in a suit for an injunction against one of them, founded on an alleged disobedience of an order of the Interstate Commerce Commission, which commanded its abandonment. *Interstate Commerce Commission v. Texas & P. R. Co.* (C.C. App. 2d C.) 408

3. The duty enjoined by the Act of Congress of Aug. 7, 1888, § 2, upon the Pacific railroad companies, of affording equal facilities to all connecting lines of telegraphs without discrimination against any, should be enforced in the mode prescribed by § 3, of application to the Interstate Commerce Commission, which is required to proceed by mandamus, rather than by bill in equity, as the remedy provided is exclusive. *Union P. R. Co. v. United States* (C. C. App. 8th C.) 705

4. The mingling indiscriminately of matters of legal and equitable cognizance in the same complaint, and the enforcement in a single suit of all the rights and duties mentioned, is not authorized by the Act of Congress of Aug. 7, 1888, § 4, providing in effect that to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines belonging to the railroad and telegraph companies mentioned in the Pacific Railroad Companies Acts, and to have them possessed, used, and operated in conformity with the statutes, it is made the duty of the attorney general by proper proceedings to prevent any unlawful interference with the rights and equities of the United States, to have legally ascertained and adjudicated all alleged rights of all persons and corporations claiming any control or interest in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, and to have set aside all contracts and their provisions entered into by such companies unlawfully and beyond their powers. *Id.*

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the Supreme Court of the United States only the Federal questions in the case. *Ashley v. Ryan* (U. S. Sup. Ct.) 664

2. The extent of a tax upon a foreign corporation is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of the Supreme Court of the United States. *Horn Silver Min. Co. v. New York* (U. S. Sup. Ct.) 57

3. The Act of March 3, 1891, establishing United States circuit courts of appeals, repealed those clauses of the Act to Regulate Commerce which relate to appeals from the circuit court of the United States in cases prosecuted under the Interstate Commerce Act. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.* (U. S. Sup. Ct.) 347

4. A claim for the refunding to a shipper of an overcharge, made in a petition to railroad commissioners for the enforcement of their order as to rates, is waived on appeal if the refund is not asked in the appellate court. *Campbell v. Chicago, M. & St. P. R. Co.* (Iowa) 203

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1. A bridge across waters between two states and connecting such states is an instrument of interstate commerce; and traffic across it is interstate commerce. *Corington & C. Bridge Co. v. Kentucky* (U. S. Sup. Ct.) 649

2. A state has no power to regulate tolls upon a bridge connecting such state with another state; Congress alone has such power. *Id.*

3. The Kentucky law of 1890 fixing the tolls and fare over the bridge connecting that state and Ohio, and spanning the Ohio River at Cincinnati, is in conflict with the interstate commerce clause of the constitution. *Id.*; *Corington & C. Elev. R. & T. & Bridge Co. v. Kentucky* (U. S. Sup. Ct.) 658

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- j. *Discrimination as to Other Carriers.*
- k. *Criminal Prosecutions; Liabilities.*

See also ACTION OR SUIT, 2; COMMERCE, 8-17; COMMON LAW, 2; CONFLICT OF LAWS; CONSTITUTIONAL LAW, 2, 8-10, 16, 17; CONTRACTS, 2, 5, 7-9, 12, 18; POSTOFFICE, 2.

I. OF PASSENGERS.

See also *infra*, III. d.

1. The word "owner," as used in the Minnesota act regulating the sale of carriers' tickets, includes all those who operate a railroad or steamboat in the transportation of passengers, —as, for example, leasees, receivers, and the like. *State v. Corbett* (Minn.) 694

2. The Kentucky statute requiring all companies operating railroads within the state to provide separate cars or compartments for white and colored passengers is so broad as to embrace all passengers, including those whose passage commences or ends in other states, and is void as an interference with interstate commerce. *Anderson v. Louisville & N. R. Co.* (C. C. D. Ky.) 764

3. A railroad company must furnish to colored people who pay first-class fare cars to ride in that are as safe and comfortable in their conditions and appointments as the cars furnished to white passengers who pay first-class fare. *Houck v. Southern P. R. Co.* (C. C. W. D. Tex.) 441

See also CONSTITUTIONAL LAW, 13-15.

II. OF FREIGHT.

a. *In General; Contracts.*

4. A shipper is not bound by his order for a specified number of cars on a specified day, in the absence of an acceptance of the order so as to bind both parties. *Missouri P. R. Co. v. Texas & P. R. Co.* (C. C. E. D. La.) 484

5. A shipper should not be subjected to unnecessary restrictions as to the kind of case or package he shall use. *Rhode Island Egg & B. Co. v. Lake Shore & M. S. R. Co.* (Com.) 512

6. Where the weight of merchandise is uniformly the same, the carrier or the consignee may ask to have the weight verified up to the moment of delivery; and it is the weight disclosed by the scales, and not the weight mark on the bill of lading, that controls. *Baird v. St. Louis, I. M. & S. R. Co.* (C. C. E. D. Ark.) 422

7. Ark. Act Feb. 27, 1885, prohibiting the 4 INTER 8.

collection of freight in excess of that specified in the bill of lading, was not intended to give validity to stipulations in bills of lading which are the result of fraud or mistake. *Id.*

8. The shipper can base no right of recovery upon the violation of a contract between connecting railways, as to the apportionment of an agreed rate of freight. *Arkansas & L. R. Co. v. Smith* (Ark.) 415

9. Misrepresentation by a carrier as to the rate charged, but without injury, affords no ground of redress in a suit for damages. *Id.*

b. *Liability of Carrier of Goods.*

See also CONFLICT OF LAWS.

10. A railroad company in the carriage of goods is subject to the liability of a common carrier, and must answer for all losses not occasioned by the act of God or the public enemy, and cannot, in Nebraska, by special contract, limit or relieve itself from this liability. *St. Joseph & G. I. R. Co. v. Palmer* (Neb.) 494
See also COMMERCE, 9.

11. A statute forbidding common carriers within the state, on land or in boats or vessels on the waters entirely within the body of the state, to limit or restrict their liability as it exists at common law, applies to shipments purely domestic beginning and ending in the state. *Missouri P. R. Co. v. Sherwood* (Tex.) 240

12. There is nothing in the Interstate Commerce Law which, by reason of an allowance of a rebate to the agents of the owners or consignees of goods, if actually made, would invalidate the contract of affreightment or exempt a railroad company from liability on its bills of lading. *Merchants Cotton-Press & S. Co. v. Insurance Co. of North America* (U. S. Sup. Ct.) 499

13. A shipment is not within the provisions of a statute forbidding carriers within the state to limit their common-law liability, where the contract provides for the carrying of the goods to a foreign port by means of the carrier's own line, its connecting lines in another state, and an ocean steamship company. *Missouri P. R. Co. v. Sherwood* (Tex.) 240

14. The burning of cotton while awaiting compression, as provided by a bill of lading, in a compress not owned or operated by the carrier, is within a clause in the bill exempting the carrier from loss by fire while the property is on deposit in place of transshipment or depots or landings or at points of delivery. *Id.*

15. A carrier which receives cotton for transportation under a contract by which it agrees to deliver it to the consignee within a reasonable time is liable for its loss if it leaves it for eighteen days on a barge moored in a river, exposed to sparks from passing boats and engines on the levee above, by some of which it is set on fire. *Thomas v. Wabash, St. L. & P. R. Co.* (C. C. S. D. Ill.) 802

16. Permitting a shipment of cotton to lie at one station for eighteen days is negligence under a contract to transport it within a reasonable time. *Id.*

17. A carrier which receives, under a contract to transport it within a reasonable time, freight for shipment which must go through a point at which the facilities are so greatly overcrowded that a delay will be necessary at that point, will be liable for the loss of the property caused by the delay at that point. *Id.*

c. Connecting Carriers.

See also *infra*, III. j.

18. A clause limiting the liability of a railway company to its own line, which is wholly within the state, will not convert into a domestic bill of lading an instrument which purports on its face to be a through bill of lading to a foreign port, providing for the transportation of goods to their foreign destination, and fixing the through rate of freight. *Missouri P. R. Co. v. Sherwood* (Tex.) 240

19. It is the right of shippers to have their goods carried, and the duty of common carriers to receive and forward freight, by the least expensive routes at reasonable through rates. *Newland v. Northern P. R. Co.* (Com.) 474

20. A carrier which sends freight over its own line, which is much longer and more expensive to operate than another route over continuous lines operated in part by other common carriers with which it exchanges traffic, can charge only a rate which is reasonable for the transportation by the shorter and less expensive route. *Id.*

21. A railroad company receiving freight from a connecting road is under no obligation to advance to the latter the charges due it for transportation, although if it does so it has a lien for payment on the goods. *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* (C. C. D. Or.) 249

22. A railroad which accepts freight in the cars of a connecting road, and transports it therein, when it has cars of its own not in use, is not liable for mileage upon such cars, in the absence of an arrangement to that effect; but the existing custom that when a railroad takes the freight in the foreign cars because it has none of its own out of use, or because the freight would be injured by the transfer, it shall pay certain mileage on the cars used, is reasonable and will be enforced. *Id.*

III. GOVERNMENTAL CONTROL; RATES; DISCRIMINATION.

a. Control Generally.

23. Railroad companies engaged in interstate commerce shall, unless prevented by circumstances beyond their control, run their trains in a reasonable manner and as often as the ordinary business of commerce requires, but are entitled to determine how many and what cars and engines shall constitute their trains, and are not required to divide the train and run a less number of cars upon refusal of their employees to move the usual and customary trains. *Re Charge to Grand Jury* (No. 1) (D. C. S. D. Cal.) 777

24. Several railroad companies which bill and carry freight from points in one state to

points in another will not be heard to say that the carriage by each is local and that they are not engaged in interstate commerce, for the purpose of avoiding the requirements of the Interstate Commerce Act. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* (C. C. App. 5th C.) 582, Rev'g 833

25. The receipt successively by two or more carriers for transportation, of traffic shipped under through bills for continuous carriage over their lines, is assent to a "common arrangement" for continuous carriage or shipment; and previous formal arrangement between them is not necessary to bring such transportation under the terms of the Interstate Commerce Law. *Trammell v. Clyde Steamship Co.* (Com.) 120

26. The successive receipt and forwarding in ordinary course of business, by two or more carriers, of interstate traffic shipped under through bills for continuous carriage over their lines, is assent to a "common arrangement" for such carriage within the meaning of the Act to Regulate Commerce, without previous express agreement between them. *Troy Bd. of Trade v. Alabama Midland R. Co.* (Com.) 348

27. The continuity of the carriage of freight over a line formed by two or more roads is not broken in fact and cannot be broken in law by the charge of a local rate by one or more of such roads as its proportion of the through rate. *Id.*

28. Where a railroad company is not restricted or inhibited by its charter or the law of the land, it is not unlawful for it to make an arrangement of rates for special purposes, on a sufficient consideration, and for the legitimate increase of its business. *Missouri P. R. Co. v. Texas & P. R. Co.* (C. C. E. D. La.) 428

29. A contract with a carrier for rates less than those on its schedule, and which is therefore unlawful as to the carrier because in violation of the Interstate Commerce Law, may nevertheless be enforced by the shipper if he had no knowledge that the schedule rate was higher than that given him. *Mobile & O. R. Co. v. Dismukes* (Ala.) 200

30. The clause in the charter of the Union Pacific Railroad Company giving Congress power over the rates of freight to be charged thereon does not preclude the several states from interfering with such rates. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 885

31. Interstate shipments only are affected by the United States Act of March 2, 1889, against obtaining transportation for property over railroads at less than regular rates. *United States v. Howell* (D. C. W. D. Mo.) 818

32. A contract for interstate shipment does not come within a state law regulating rates, because made in that state, so that such law will introduce a new term into the contract, but its utmost effect would be to forbid a contract for an unreasonable rate and make the contract unlawful, leaving the transaction open to adjustment under the laws of the United States. *Swift v. Philadelphia & R. R. Co.* (C. N. D. Ill.) 638

33. A state law prohibiting the exaction by carriers of unreasonable rates is, as applied to a contract for shipment from one state to an-

other, an interference with interstate commerce, and cannot be so applied. *Swift v. Philadelphia & R. R. Co.* (C. C. N. D. Ill.) 838

84. In the absence of some prohibition or restraint, common law or statutory, a common carrier may lawfully demand or contract for such compensation for carriage as he may be able to obtain, without regard to its unreasonableness. *Id.*

85. Outside of the Interstate Commerce Act there is no law of the United States as a distinct sovereignty, imposing any restraint upon the imposition by a carrier of unreasonable rates. *Id.*

See also COMMON LAW.

86. A tariff of railroad rates fixed by a commission, which will so diminish the earnings of a road that they will not be able to pay half the interest on its bonded debt above the operating expenses, is unjust and unreasonable, where, without waste or mismanagement in construction or operation, the road has cost far more than the amount of stock and bonds outstanding, which represent money expended in its construction, and the rates have been voluntarily decreased by the company during ten years more than 50 per cent, while under these rates the stock representing two fifths of the value of the road has never received a dividend, and for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt. *Reagan v. Farmers' Loan & T. Co.* (U. S. Sup. Ct.) 560

See also CONSTITUTIONAL LAW, 8.

87. A reduction of 29½ per cent by the legislature in the local freight rates of a railroad is unreasonable and void, where the new rates would result in a loss on local business to more than half of the roads affected by it, and as to the other roads the earnings from local business would not be enough to pay the proportion of the interest on the bonded debt which should be paid by such business in comparison with business of other kinds. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 835

88. That railroad investments may be as secure as other property, the reasonable rates should be liberal until earnings are sufficiently large for a fair return on actual expenditure. *Newland v. Northern P. R. Co.* (Conn.) 474

89. The agreed rental cannot be accepted as the amount which leased property, part of a system, must earn and the lessee may retain before any reduction can be made in the rates over the leased lines. *Id.*

40. The fact that the freight rates are higher in one state than in another is not of itself sufficient to justify an arbitrary reduction of them by the legislature in the former state, for the purpose of equalizing rates. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 835

41. A schedule of rates made by railroad commissioners, being challenged as a whole, the court must either condemn or sustain it as a whole, and cannot rearrange it or prepare a new schedule. *Reagan v. Farmers' Loan & T. Co.* (U. S. Sup. Ct.) 560

42. Division of territory between lines to a common market is without warrant in law 4 INTER 8.

when made for the benefit of the carrier without regard to the interest of shippers in the territory so divided, to whom it is in effect a denial of the privilege of shipping their goods or produce to market by the line or route they may prefer. *Cincinnati Freight Bureau v. Cincinnati, N. O. & T. P. R. Co.* (Conn.) 592

b. Rules for Fixing Rates; Reasonableness.

43. A practice of billing cotton at a proper estimated weight per bale should not be deemed unlawful when actual weights of shipments cannot be ascertained without great inconvenience to the shipper or carrier, and when transportation charges are promptly adjusted by the carrier upon the basis of actual weights furnished by the consignee. *Pelphs v. Texas & P. R. Co.* (Com.) 868

44. No departure from the rule requiring rates in all cases to be reasonable in themselves can be justified on the ground that it is necessary in order to maintain existing trade relations, or to "protect competing markets," or to "equalize commercial conditions," or to secure to carriers traffic from certain territory assumed to be exclusively theirs. *Cincinnati Freight Bureau v. Cincinnati, N. O. & T. P. R. Co.* (Com.) 592

45. The amount invested in a railroad cannot be ignored in determining the reasonableness of rates fixed by law to be charged thereon, although such amount is far in excess of the present value of the property. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 835

46. In passing upon the reasonableness of rates, the question whether they afford the carrier a proper return for the service rendered is to be considered, as well as the result of the business to the shipper or producer of the traffic. *Loud v. South Carolina R. Co.* (Com.) 205

47. Rates should bear a fair and reasonable relation to the antecedent cost of the traffic as delivered to the carrier, and to the commercial value of such traffic. *Id.*

48. Where a special service is required of the carrier,—such as rapid transit and speedy delivery in cases of perishable freight,—a higher rate than for the carriage of ordinary freight is warranted; and if a carrier charging a rate based on such special service fails to render it, to the damage of the shipper and without legal excuse, the remedy of the latter would seem to be by a proper proceeding in a court of law, and not by a complaint of excessive rates. *Id.*

49. A reduction in rates by a carrier is not *per se* evidence that the former rates were unreasonable, as such reduction may, as in the present case, be accounted for because of a decrease in cost of transportation and an increase in the volume of the traffic to which such rates apply. *Id.*

50. Where the reasonableness of rates is in question, comparison thereof may be made, not only with rates on another line of the same carrier, but also with those on the lines of other and distinct carriers. *Cincinnati Freight Bureau v. Cincinnati, N. O. & T. P. R. Co.* (Com.) 592; *Morrell v. Union P. R. Co.* (Com.) 469

51. Rates maintained and which may be reasonable under the conditions existing in one section or part of the country afford no safe criterion by which to measure reasonable charges in other localities, where the expense of operating a road and other conditions affecting transportation are widely different. *Morrell v. Union P. R. Co.* (Com.) 469

52. The division among themselves which a number of connecting carriers make of a through rate should not affect the question of the reasonableness or unreasonableness of the rate as an entirety. *Florida Fruit Exch. v. Savannah, F. & W. R. Co.* (C. C. N. D. Fla.) 400

53. The fact that a rate in one direction is materially higher than that in the opposite direction does not, as in case of hauls over the same line in the same direction, establish prima facie the unreasonableness of the higher rate. This is especially true where the hauls are of great length. *Duncan v. Atchison, T. & S. F. R. Co.* (Com.) 385

54. The joint through tariff rates established by two or more carriers over their lines or any parts thereof cannot be made the basis by which the reasonableness of the local rates on either line can be determined. *Chicago & N. W. R. Co. v. Osborne* (C. C. App. 8th C.) 257

55. When great disparity exists between charges which are lower to competitive than to intermediate points much less remote, the inference is irresistible that the lower rate must be unremunerative upon any theory, or else the larger rate gives an unwarranted return for the service rendered. *Chattanooga Bd. of Trade v. East Tennessee, V. & G. R. Co.* (Com.) 218

56. The grouping of two stations by a railroad company as stations to which the freight rates from the far east may properly be made the same is a conclusive admission by it that, so far as the transportation from the east to its warehouses at such stations is concerned, it is under substantially similar conditions and circumstances. *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* (C. C. W. D. Mich.) 722

57. When rates from any cause are made greater for shorter than for longer distances, the difference between such rates must in no instance be unreasonable. *Gerke Brew. Co. v. Louisville & N. R. Co.* (Com.) 267

58. Rates on wheat from points in North and South Dakota to Minneapolis should be adjusted upon the basis of distance over nearest practicable routes. *Minneapolis Chamber of Commerce v. Great Northern R. Co.* (Com.) 230

59. The difference between the rate on carloads and that on less than carloads must be reasonable. *Duncan v. Atchison, T. & S. F. R. Co.* (Com.) 385

60. The reasonableness of a carrier's rate on fruit is not necessarily to be determined by the question of the profit or loss which the producer receives upon his product. *Florida Fruit Exch. v. Savannah, F. & W. R. Co.* (C. C. N. D. Fla.) 400, Aff'd on 589

61. The increase of rates for the transportation of oranges from Florida points to north-

eastern cities over the line of the Savannah, Florida, & Western Railway and its connections, which was made Nov. 28, 1890, and amounted to 83½ per cent upon rates previously in effect, is unjust, unreasonable, excessive, and in violation of the Interstate Commerce Act; and it is not justified by the increased facilities which have been afforded by the carriers for handling and preserving the fruit. *Id.*

62. The rates charged on "household goods" will not be declared unlawful on the mere fact that as a condition of granting them the defendants required the shipper to release all claim for damages in case of loss to the amount of \$5 per 100 lbs., or \$1,000 per carload of 20,000 lbs., there being no proof showing that such rates are unreasonable in view of said limitation. *Duncan v. Atchison, T. & S. F. R. Co.* (Com.) 385

63. A local rate which presumably is adopted as covering both the initial and final expense of a local haul is prima facie excessive as part of a through rate over a through line composed of two or more carriers. *Troy Bd. of Trade v. Alabama Midland R. Co.* (Com.) 348

64. The practice of making one rate on the same product over a large district is only justifiable under special and exceptional circumstances, and is not to be encouraged when the difference in the transportation expense from the various parts of such district is considerable and substantial. *Newland v. Northern P. R. Co.* (Com.) 474

65. Where the roads and branches of two companies extend to and penetrate a wheat-producing district, from which they make a joint rate for distances of 480 miles, and each company makes the same rate separately from the same district, one for distances of 450 and the other for distances of 650 miles over their respective lines to the same destination, the rates so jointly and separately made must be held excessive for a shorter distance of 311 miles over a less expensive route, from the same district to the same destination. *Id.*

66. A rate which may be reasonable when applied to the transportation of egg cases as a disconnected service may be unreasonable if the carriage of returned cases at favorable rates is in fact a special service, the discontinuance of which would unduly burden the business of shipping eggs to points of sale. *Rhode Island Egg & B. Co. v. Lake Shore & M. S. R. Co.* (Com.) 512

c. Posting or Filing Rates.

67. The rates which carriers are required by the Act to Regulate Commerce, § 6, to publish, file, and adhere to without deviation, cover not merely the carriage, but services rendered in receiving and delivering property as well. *Phelps v. Texas & P. R. Co.* (Com.) 363

68. To sustain an indictment for conspiring to obtain less than established rates for the shipment of property over a railroad, it is not necessary that the rate should have been published by posting it, as required by the Inter-

state Commerce Law. *United States v. Howell*
(D. C. W. D. Mo.) 818

d. *Passenger Traffic.*

See also *supra*, I.

69. A carrier is not compelled to give special excursion rates to one political convention because it has given them to a similar convention of another political party on another date. *Cator v. Southern P. R. Co.* (Com.) 897

70. A party-rate ticket which is a single ticket covering the transportation of ten or more persons from one place to another on a railroad is not in violation of the Interstate Commerce Act, although sold at a reduction from the regular passenger rates. *Interstate Commerce Commission v. Baltimore & O. R. Co.* (U. S. Sup. Ct.) 92

71. The Interstate Commerce Act was not designed to prevent competition between different roads, or to interfere with the customary arrangement made by railway companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination against other persons traveling over the road. *Id.*

e. *Discrimination between Shippers.*

72. Unless within the authorized exceptions to the general rule of the statute, discriminations in charges upon like shipments of the same commodities, based solely upon the purpose or "business motive" of the shipper, are unlawful, whether effected directly or indirectly by methods of classification. *Duncan v. Atchison, T. & S. F. R. Co.* (Com.) 885

73. All charges made for any service in the transportation of any passengers or property, or for receiving, delivering, storing, or handling property, must under the Interstate Commerce Act be reasonable and just; and no discrimination can be made in rates, charges, or facilities. *Cutting v. Florida R. & Nav. Co.* (C. C. N. D. Fla.) 424

74. Railway companies are bound under the Interstate Commerce Act only to give the same terms to all persons alike under the same conditions and circumstances; and any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. *Interstate Commerce Commission v. Baltimore & O. R. Co.* (U. S. Sup. Ct.) 92

75. In order to constitute an unjust discrimination under the Interstate Commerce Act, § 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but in either case it must be for a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions. *Id.*

76. Any benefit in relation to the shipment of goods, having a definite money value, conferred gratis by the carrier upon one shipper and not conferred upon another, is an undue reduction in the price of carriage to the former, 4 INTER S.

and is illegal under the Interstate Commerce Act, where the service to each is admittedly under substantially similar circumstances and conditions. *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* (C. C. W. D. Mich.) 722

77. An advantage resulting from just rates coupled with the enterprise and outlay necessary to utilize them is legitimate; and carriers should not undertake to deprive a shipper of this advantage by a change of such rates. *Potter Mfg. Co. v. Chicago & G. T. R. Co.* (Com.) 223

78. A carrier is not free to make dissimilarities to any extent it may choose in the freight rates on foreign and domestic traffic, from the fact of the existence of some dissimilarity of conditions. *Interstate Commerce Commission v. Texas & P. R. Co.* (C. C. App. 2d C.) 408

79. The practice by a common carrier of arbitrarily determining what persons should receive a so-called "manufacturers' rate" is a violation of the Act to Regulate Commerce. *Re Louisville & N. R. Co.* (Com.) 157

80. The exercise by a railway company of the right to prepayment, or to retain a lien upon the goods until payment is made, or to hold the consignee responsible in case of delivery before payment, or the waiver of some of such rights at different times, cannot be construed to be a denial of equal facilities or a discrimination. *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* (C. C. W. D. Ark.) 587

81. A party to an interstate shipment cannot be excluded by the carrier from privileges afforded to other patrons in the same locality because of his refusal to pay excessive freight charges, even though an agreement to subsequently refund the excess should accompany the demand. *Phelps v. Texas & P. R. Co.* (Com.) 868

82. A guaranty executed to a carrier by consignees or third parties, which might be construed to enable the carrier, in consideration of freight delivery before settlement of transportation charges, to exact for services rendered in moving and delivering the freight whatever it chooses to demand, cannot be used by the carrier to force payment of charges in excess of those it would be entitled to collect or receive if previous freight delivery had not been made. *Id.*

83. Where a contract is made with a shipper by a carrier, member of a through line, for shipment of goods over the line at a less than the published lawful rate charged shippers in general, it is not a violation of the Act to Regulate Commerce within the jurisdiction of the Interstate Commerce Commission for the delivering carrier to exact payment of the full lawful rate before delivery, although if the shipper was an innocent party he might be entitled to his goods on payment of the contract rate. *Duncan v. Atchison, T. & S. F. R. Co.* (Com.) 885

84. Where oil is transported by the carrier both in barrels and tank cars, but the use of the tank cars is practically limited to one class of shippers, the charge for the barrel package in barrel shipments, in the absence of a corre-

sponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipments and destination than to the tank shipper, is a discrimination against the former in favor of the latter for which no legal justification has been shown in these cases. *Independent Ref. Asso. v. Western N. Y. & P. R. Co.* (Com.) 162

85. Ownership of a car rented to a carrier and for the use of which the carrier pays a full consideration does not of itself entitle the owner to the exclusive use of such car; and if the owner may, in the contract of hire to the carrier, stipulate for the exclusive use of the car, it must be upon such terms as shall not constitute an unjust discrimination against shippers of like traffic in cars owned by the carrier and who are excluded from the use of the car so hired. *Id.*

f. Classification; Discrimination between Articles.

86. No unjust discrimination results to the carload shipper of eggs from the equal rating of carload and less than carload lots, and the special service rendered in gathering and forwarding small shipments in "pick-up" cars, where for carload shipments ice to the amount of 6,000 pounds is furnished by the carrier without extra charge. *Brownell v. Columbus & C. M. R. Co.* (Com.) 285

87. When an article moves in sufficient volume and the demands of commerce will be better served, it is reasonable to give a lower classification for carloads than that which is applied to less than carload quantities; but the difference in such classification should not be so wide as to be destructive to competition between large and small dealers. *Id.*

88. Two west-bound carload rates from Mississippi River points to Pacific Coast terminals on goods termed "Emigrants' Movables" (including "household goods")—one a general class rate; and the other designated a "commodity" rate and less than the general rate, being published as open to "intending settlers only," but in practice given to shippers indiscriminately, and not apparently unreasonable in itself—are improper, as their retention can only serve to mislead the public and afford opportunity for the practice of favoritism and unjust discrimination as between shippers; and the rate should not be in excess of the amount of said commodity rate. *Duncan v. Atchison, T. & S. F. R. Co.* (Com.) 385

89. When an article of traffic does not move on account of burdensome rates, and the carrier is hauling a considerable number of empty cars in the direction such article would naturally move if accorded a lower rate, the carrier may be justified in carrying at a rate sufficient to induce the movement of such traffic, provided no extra or additional charge is in consequence put upon other articles carried; but the fact that freight will furnish return loads for empty cars is not a reason for the reduction of rates on such freight, when it does not appear that the rates are unreasonable. *F. Schumacher Milling Co. v. Chicago, R. I. & P. R. Co.* (Com.) 378

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90. A mixed carload rate for cereal products or for cereal products and flour, that would have the effect of throwing out of the trade many competitors of complainant who manufacture only certain kinds of cereal products, and of centralizing the business in the hands of one or more dealers, should not be granted when, without it, no wrong is done to any one and the market is open to all competitors. *Id.*

91. The fact that different rates and classifications are in force in different sections of the country will not of itself, without proof of unlawful discrimination or disadvantage or of unreasonably high rates, warrant an extension of the lower rate and classification to the section where the higher rate and classification are applied. *Id.*

92. Cost of service is only one of the elements to be considered in determining proper classification and relative rates for different articles. *Id.*

93. While the difference in cost to the carrier in transporting cereal products and flour is not in itself sufficient to warrant a higher classification upon cereal products, the facts that these products range higher in value than flour, while in the matter of volume of traffic afforded there is a very wide difference in favor of flour, are some of the conditions compelling a low rate upon flour which do not apply in the transportation of cereal products. *Id.*

94. Mixed carloads of celery and cauliflower or other vegetables in the same class should be transported at no higher rate per carload than for a carload quantity of either. *Tecumseh Celery Co. v. Cincinnati, J. & M. R. Co.* (Com.) 318

95. Celery should be classed with cauliflower, asparagus, lettuce, green peas, string beans, oyster plant, egg plant, and other vegetables enumerated in Class C of the Western Classification, rather than with berries, peaches, grapes, and other fruits specified in Class III thereof. *Id.*

96. Salt requires and gets a commodity rate lower than class rates, and railroads should only be limited as to such lower rating by the rule that a commodity shall not be carried at such unremunerative rates as will impose burdens upon other articles transported, to recoup loss incurred in carrying that commodity. *Anthony Salt Co. v. Missouri Pac. R. Co.* (Com.) 33

97. The rate on unfinished cheap bedroom sets shipped knocked down from Lansing, Michigan, to Oakland, California, should not exceed 85 per cent of whatever rate may be adopted for such sets in a finished condition. *Potter Mfg. Co. v. Chicago & G. T. R. Co.* (Com.) 233

g. Long and Short Hauls.

98. Authority from the Interstate Commerce Commission is not necessary where the circumstances and conditions are substantially different, to enable a carrier lawfully to charge more for a shorter than for a longer distance over the same line, under the Interstate Com.

merce Act, §14 (24 Stat. at L. 379), providing that it shall be unlawful to make such charge for transportation of passengers or like kind of property under substantially similar circumstances and conditions, but that the Commission may, after investigation, authorize a less charge for longer than shorter distances. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.* (C. C. S. D. Cal.) 323

99. The carrier has the right to judge in the first instance whether it is justified in making a greater charge for a shorter distance, under the Act to Regulate Commerce, § 4, in all cases where the circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers not subject to regulation under that Act. In other cases under § 4 the circumstances and conditions are not presumptively dissimilar, and carriers must not charge less for the longer distance except upon the order of the Commission. *Trammell v. Clyde Steamship Co.* (Com.) 120

100. The total rate for through carriage over two or more lines, whether made by the addition of established locals, or of through and local rates, or upon a less proportionate basis, is the through rate that is subject to scrutiny by the regulating authority. How the rate is made, is only material as bearing upon the legality of the aggregate charge; and how any reduction may be accomplished, is matter for the carriers to determine among themselves. *Id.*

101. No violation of the long and short haul clause of the Interstate Commerce Act which will sustain an action for damages is shown by the mere fact that a larger tariff rate was collected for shipments between points on a carrier's road than the proportion of a joint through rate which such carrier received for hauling over its road similar commodities billed to points beyond its road a longer distance which included the shorter one. *Chicago & N. W. R. Co. v. Osborne* (C. C. App. 8th C.) 257

102. The fact that two carriers have established a joint tariff rate between two points will not, under the provisions of the long and short haul clause of the Interstate Commerce Act, prevent each from charging its local rates upon shipments to and between intermediate points, although the combined local rates exceed the through rate for the longer haul. *United States v. Mellen* (D. C. D. Kan.) 247

103. Comparison of the local freight rate from a terminal to an intermediate point on a carrier's line, with the share which it receives of a joint through rate established with a connecting carrier for hauling freight received from the latter between such points, is not a proper method of determining whether or not the local rate is within the provision of the Interstate Commerce Act, § 8, which prohibits undue and unreasonable preferences or advantages. *Tozer v. United States* (C. C. N. D. Mo.) 245

104. The only justification for a through rate less than an intermediate rate on the same article is the compulsion of rail carriers to accept the reduced compensation or suffer ocean 4 INTER S.

rivals to perform the service, and where the pressure of this alternative is not felt, there is no ground upon which the lower through charge can be excused. *Merchants' Union v. Northern P. R. Co.* (Com.) 183

105. Any greater charge for the transportation of like kind of property from seaboard points to Chattanooga than for the longer distance through Chattanooga to Nashville is in violation of the Act to Regulate Commerce, § 4. *Chattanooga Bd. of Trade v. East Tennessee, V. & G. R. Co.* (Com.) 218

106. That a shipper was not informed of the through tariff rates when making shipments between local points will not avail him as a basis for an action for violation of the long and short haul clause of the Interstate Commerce Act of 1887, where he made no inquiry, and no false statements were made to him, and the shipping point was a noncompeting one where no publication of the joint rate was required under the order of the Commission made June 21, 1887. *Chicago & N. W. R. Co. v. Osborne* (C. C. App. 8th C.) 257

107. The rule expressed by the Act to Regulate Commerce, § 4, that distance shall ordinarily limit the adjustment of rates, is not rendered inoperative by the existence at one point of converging lines subject to the Act, for the law applies to each of these lines, and neither can put in rates to that point which are lower than shorter-distance charges on its line until, upon a showing of special considerations grounded in justice to its patrons and itself, it obtains permission from the regulating authority so to do. This principle applies both to lines between the same points and to lines reaching the same destination from different points of consignment. *Gerks Brew. Co. v. Louisville & N. R. Co.* (Com.) 267

h. Effect of Competition.

108. Competition may constitute a circumstance or condition of dissimilarity which will prevent the operation of the long and short haul clause of the Interstate Commerce Act, § 4. *Missouri P. R. Co. v. Texas & P. R. Co.* (C. C. E. D. La.) 484

109. A carrier cannot justify a discrimination in rates merely upon the ground that, unless it is given, the traffic obtained by giving it would go to a competing carrier. *Interstate Commerce Commission v. Texas & P. R. Co.* (C. C. S. D. N. Y.) 114

110. The competition of carriers subject to the Act to Regulate Commerce does not create circumstances and conditions which the carriers can take into account in determining for themselves in the first instance whether they are justified under § 4 in charging more for shorter than for longer distances over their lines. *Trammell v. Clyde Steamship Co.* (Com.) 120

111. Active competition by water and other railroads at a terminal point, for the transportation of certain goods, renders the circumstances and conditions substantially dissimilar from those affecting an intermediate noncompeting point, and justifies a railroad company in charging a less rate to the former than to the lat.

ter point when necessary to meet such competition. *Interstate Commerce Commission v. Aichison, T. & S. F. R. Co.* (C. C. S. D. Cal.) 323

112. Water competition to justify rates must be clearly established, to be a controlling factor in the transportation of traffic important in amount from the point in question. *James v. Canadian P. R. Co.* (Com.) 274

113. Water competition in favor of the more distant point does not make the circumstances and conditions substantially dissimilar, within the implied permission of the Interstate Commerce Act to charge less under such circumstances for a longer than for a shorter haul, where the competition is not with a carrier by a parallel water route between the point of shipment and destination, but between routes from different points of shipment, and the lower rate is made for the purpose of giving the shipping point the advantage in the markets at the destination. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* (C. C. App. 5th C.) 582, Rev'g 332

114. The rail rate on shingles from a Canadian mill to market being fixed with special reference to the effect of a log drive down a river to the mill, and water competition for shingle traffic from the seaport below, the rate from a Maine mill higher up on the same river should be made upon the same basis. *James v. Canadian P. R. Co.* (Com.) 274

115. The competition of markets or the competition of carrying lines subject to regulation under the Act to Regulate Commerce does not justify carriers in making greater short-haul or lower long-haul charges over the same line in the same direction (the shorter being included within the longer distance), in the absence of an order of relief issued by the Commission upon application therefor and after investigation. *Behlmer v. Memphis & C. R. Co.* (Com.) 520

116. The competition of markets on different lines, for the sale of commodities at a given point served by both lines, does not create circumstances and conditions which the carriers can take into account in determining for themselves in the first instance whether they are justified under the Act to Regulate Commerce, § 4, in charging more for shorter than for longer distances over their lines. *Trammell v. Clyde Steamship Co.* (Com.) 120

117. One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it. *Chattanooga Bd. of Trade v. East Tennessee, V. & G. R. Co.* (Com.) 218

118. Transportation by rail from eastern points to the "Pacific Coast Terminals," Portland, Tacoma, and Seattle, is affected by the competition—of controlling force and in respect to traffic important in amount—of water carriers reaching the same terminals; but such competition does not affect like transportation from said points to the city of Spokane, Washington. *Merchants' Union v. Northern P. R. Co.* (Com.) 188

119. A charge of \$3.70 per hundred pounds upon domestic traffic from New Orleans to 4 INTER S.

San Francisco, when only 80 cents per hundred between the two points is charged under substantial equality of conditions upon similar goods coming to the port of New Orleans from Liverpool, is not justified by the fact that there is competition with water routes in carrying between Liverpool and San Francisco, since the gross inequality shows that the carrier is either injuring itself by carrying without profit, or is receiving an unwarranted return from the domestic traffic for the service rendered. *Interstate Commerce Commission v. Texas & P. R. Co.* (C. C. App. 2d C.) 408

1. Discrimination between Places.

120. No dissimilarity in circumstances or conditions justifying a discrimination in rates exists between a shipment of cotton from Mobile to New Orleans by a person who receives it by vessel from Demopolis, Alabama, and a person who receives it from any other part of Alabama or by rail, where there is no question of a proportion of rates under a joint traffic arrangement. *Bigbee & W. Rivers Packet Co. v. Mobile & O. R. Co.* (C. C. S. D. Ala.) 829

121. A person who receives cotton at Mobile from any particular point on the Alabama rivers, whether it comes by boat or wagon or any other way, and desires to ship it from Mobile to New Orleans by a railroad line, is entitled to have it shipped at the Mobile rate, as much as any person who receives his cotton from any other point or who may have bought it at Mobile; and it is no objection to such right that it would give every town located on such rivers equal facilities and advantages with those of Mobile, as that is the purpose of the Interstate Commerce Act. *Id.*

122. An agreement by a railroad company with other companies within a specified territory, for the purpose of maintaining a uniform rate upon all shipments of cotton from certain points in Alabama in vessels plying the Alabama rivers and received at Mobile to be re-shipped and transported to New Orleans, to charge a certain sum per bale in excess of its regular rate from Mobile, is no justification of such discriminating charge, and contravenes the Interstate Commerce Act. *Id.*

123. The furnishing of free cartage at one place, and not at another at a less distance from the point of shipment, is a violation by a railway company of the long and short haul clause of the Interstate Commerce Act, where the transportation is under substantially similar circumstances and conditions. *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* (C. C. W. D. Mich.) 722

124. The furnishing of free cartage by a railroad company at one place and not at another cannot be justified as analogous to the providing of a switch track for the benefit of customers whose storehouses are convenient to the railway track, since the latter is usual railway business, while cartage is something not usually undertaken by railways. *Id.*

125. That the competitors of a railway company have their stations in a certain place in the business center, while its own is at a distance, does not create a dissimilar condition which will allow such company to furnish

free cartage of goods while at another station it does not do so, if it would justify it in furnishing cartage at a price equal to that for which cartage can be obtained from the stations of such competitors. *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* (C. C. W. D. Mich.) 723

126. The fact that the station of a railroad company is at a greater distance from the business center in one town than in another does not justify it in furnishing free cartage in the former on the ground that the circumstances and conditions are dissimilar, since in any case the consignees would have to pay cartage though the price might be less. *Id.*

127. The fact that one city is a larger place than another does not create different circumstances and conditions which will justify a railroad company in furnishing free cartage for goods transported by it in the former and not in the latter, though it may reduce the cartage cost to the shipper at the former place in so far as the greater amount of business enables it to do carting at a cheaper rate than at the latter place. *Id.*

128. The facts that one city is much larger and has more important and extensive business interests than another, and has been treated by the carriers in making rates to surrounding points as a "trade centre," is no justification for a continuation of discriminatory rates in favor of such city. *Troy Bd. of Trade v. Alabama M. R. Co.* (Com.) 348

129. Manufacturing industries should not be deprived, through a carrier's adjustment of relative rates, of advantages resulting from their favorable location in respect of cost of raw material supplied from a common source, or of distance to the common market for the finished product. *James v. Canadian P. R. Co.* (Com.) 274

130. A milling town possessing great natural, acquired, and improved advantages for the carrying on of that industry, and favorably situate in point of distance to a large grain-producing region, is entitled to the benefits arising from its location; and carriers of grain to that point and to a competing town considerably more remote from points of production and in other particulars less advantageously located are not justified in making rates on grain to the competing towns which destroy the advantage the former is entitled to enjoy. *Minneapolis Chamber of Commerce v. Great Northern R. Co.* (Com.) 230

131. A town favorably situated with respect to one through route, but competing in a common market with another town more favorably located on another through route, should not have a reduction of the local rate over roads connecting the two through routes for the purpose of overcoming the natural advantage which the latter competing town enjoys. *Id.*

132. A rate of \$1 per ton from certain mines to Nashville, charged upon coal "run of mines nut and slack," being about 1 cent per ton per mile and \$1.15 on screened coal, is not unreasonably low nor disproportionate to a rate of \$1.40 per ton to Memphis, which is a little over $\frac{1}{2}$ cent per ton per mile; and any reduction in the Memphis rate should be accompanied by a propor-

tionate reduction in the Nashville rates. *Re Louisville & N. R. Co.* (Com.) 157

133. A railroad cannot be said to discriminate against a town which it does not reach and in whose carrying trade it does not participate. *Rau Claire Bd. of Trade v. Chicago, M. & St. P. R. Co.* (Com.) 65

134. Rates should not be fixed in inverse proportion to the natural advantages of competing towns, with the view of equalizing "commercial conditions." *Id.*

135. Transportation charges need not be proportioned to the distances between different points, where those distances are greatly dissimilar. *Id.*

136. Where all the distances brought into comparison are considerable, and the differences between them relatively small, there should be substantial similarity in the respective rates, unless other modifying circumstances justify disparity. *Id.*

137. Any advantages which enure to Michigan salt manufacturers as against those of Kansas, from rates to points in Iowa, Illinois, Missouri, and Nebraska, are advantages arising from natural situation; and a low rate to Missouri River points is influenced by water competition and also by the heavy preponderance of east-bound freight over west-bound freight. *Anthony Salt Co. v. Missouri P. R. Co.* (Com.) 38

138. The advantages of distance belonging to Kansas salt fields as against those of Michigan should be given to them by a carrier in any territory supplied by its lines, which lies as near, or nearer, to Hutchinson as to St. Louis. *Id.*

j. Discrimination as to Other Carriers.

139. A railroad company is not under obligation to furnish an express company with facilities for doing an express business upon its road, such as it provides for itself or some other express company, unless it holds itself out as a common carrier of express companies. *Atlantic Exp. Co. v. Wilmington & W. R. Co.* (N. C.) 294

140. A statute making it unlawful for any common carrier to give undue or unreasonable preference to any person, company, firm, corporation, or locality, does not require equal facilities to be given to express companies for carrying on business over a railroad, unless it holds itself out as a common carrier of such companies. *Id.*

141. No power exists at common law, and none is given by the Act to Regulate Commerce, to compel connecting railroad companies to unite in a joint tariff, or to enter into a through-rate arrangement for transportation, unless they desire to do so. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* (C. C. N. D. Ga.) 332

142. Other connecting carriers are not entitled to through billing and rating and to the use of tracks and terminals of a carrier which has voluntarily made an arrangement giving these advantages to one connecting carrier. *Little Rock & M. R. Co. v. St. Louis & S. W. R. Co.* (C. C. App. 8th C.) 854

143. Requiring prepayment of freight charges

by a connecting carrier, without requiring it of other shippers or carriers at the same place, does not constitute an unreasonable or undue disadvantage within the meaning of the Interstate Commerce Act. *Id.*

144. Combination with the other railroads, even if it charges one railroad with some duty toward lines connecting physically with another, cannot excuse it from fulfilling its own obligations to roads which connect physically with itself, unless its union with the other combined lines is of such a character that their lines have become its own. *New York & N. R. Co. v. New York & N. E. R. Co.* (C. C. S. D. N. Y.) 116

145. An order of the Interstate Commerce Commission to one railroad company to desist from refusing to furnish another equal facilities to those furnished a third company for interchange of through traffic may be enforced by compelling a desistance from discrimination by changed arrangements, as well as by those in force at the time of the order. *Id.*

146. No common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other in the same manner and to the same extent a third carrier is. *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* (C. C. W. D. Ark.) 587

147. Refusal to permit a forwarding company to perform an act involving the use of the tracks and terminal facilities of a receiving company is not a discrimination or denial of equal facilities by one carrier to a connecting carrier. *Id.*

148. A connecting railway company desiring an interchange of passengers and freight cannot demand as a matter of right an interchange of freight at the point of physical connection, without first furnishing at such point reasonable and proper facilities for the interchange sought, and cannot rely upon the terminal facilities at another point, or compel the receiving railway to go to any expense of providing proper facilities at the point of physical connection. *Id.*

149. The fact that one connecting railway company has a contract for the interchange of interstate commerce freight, which involves the use of the receiving railway's tracks and terminal facilities, will not authorize a court of equity to compel the receiving railway to grant a like contract or compensation to another connecting company. *Id.*

150. The tracks and terminal facilities of a railroad company can be used by a connecting company for the exchange of interstate freight only with the consent of the former. *Id.*

151. A court of equity has no power under the Interstate Commerce Act to compel a receiving company which has made a contract or agreement with another connecting company to establish the same rate upon through freight in favor of another company with which there is no contract, as no power is conferred by the Act upon any tribunal to provide for the necessary divisions growing out of a through routing and a through rating. *Id.*

152. A railroad company cannot be com-

pelled to receive freight from a connecting road in cars other than its own, although it receives freight from another competing road in the cars of the latter and transports them over its road. *Id.*

153. The refusal by a railroad company to transport freight on foreign cars originating east of a certain meridian, when its own cars are not in use but are free to be employed in the transportation desired, or where a transfer of freight will not be injurious to it, is not an unreasonable discrimination against another railroad company, or a denial to it of reasonable and proper facilities, under the Interstate Commerce Act, although it accepts in such cars freight originating west of such meridian. *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* (C. C. App. 9th C.) 718, Aff'g 249

154. The provision of the Act incorporating the Northern Pacific Railroad Company, that it shall be its duty to permit any other railroad to form running connections with it on fair and equitable terms, does not require it to permit the use of its road by the cars of other companies, or to honor tickets of such other companies. *Id.*

155. The refusal of a railroad company to honor tickets or coupons for passage issued by another company over its line does not constitute a discrimination within the Interstate Commerce Act, as, in the absence of arrangement between the companies, there is no obligation on the part of either to honor tickets issued by the other. *Id.*

156. The requirement of the agreement of a railway and steamship association, that its members apply "full local rates upon all traffic subject to the association agreement coming from or going to" connecting lines which do not maintain association rates, while to traffic from other connecting lines conforming to such rates, full local rates are not applied, is repugnant to that clause of the Act to Regulate Commerce, § 3, which forbids carriers to "discriminate in their rates and charges between connecting lines." *Cincinnati Freight Bureau v. Cincinnati, N. O. & T. P. R. Co.* (Com.) 593

157. A charter provision of a railroad, granting the power to take "tolls from all persons, property, merchandise, and other commodities transported on their road, provided only the net profits of the road shall never exceed 25 per cent per annum," does not give the company the right to discriminate between connecting steamboats in the matter of freights. *Samuels v. Louisville & N. R. Co.* (Ala.) 490

158. A common carrier has not the right to make a discrimination where the conditions are equal, between two steamboats, in delivering freight to them, on the ground that the greater charge is not unreasonable. *Id.*

159. In making contracts for through transportation of passengers, the initial carrier may lawfully prefer a road going through to the point of destination to one going only part of the way, an arrangement with which would necessitate further arrangements to reach the desired point. *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* (C. C. W. D. Tenn.) 361

160. No unlawful discrimination against a railroad is effected by the traffic arrangement of a rival road running parallel with it for a considerable distance from their common initial point, by which through tickets are sold to points on the rival road beyond the point of divergence exclusively over the latter, without granting the former any facilities for securing a share of the traffic to such points for the distance which it could carry it. *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* (C. C. W. D. Tenn.) 261

161. A railroad company cannot appropriate the grievance of a traffic or locality, under the Interstate Commerce Act, § 3, prohibiting preference by a carrier to persons, firms, or corporations, and to localities and traffic, and complain on account of it. *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* (C. C. App. 9th C.) 718

k. Criminal Prosecutions; Liabilities.

See also *supra*, III. c; CONSPIRACY.

162. Officers of an interstate railroad company may be indicted under the Interstate Commerce Act, § 4, for fixing and charging a local freight rate upon the same kind of merchandise under substantially similar circumstances and conditions, greater in amount between two points on the main line than that fixed between one of them and a point also on the main line lying in the same direction but farther away than the other. *United States v. Mellen* (D. C. D. Kan.) 247

163. Collecting and receiving freight charges does not subject one who had nothing to do with fixing the rates, to indictment under the long and short haul clause of the Interstate Commerce Act, although the rates are within the prohibitions of that Act. *Id.*

164. A conviction for criminal violation of the section of the Interstate Commerce Act which prohibits undue or unreasonable preferences or advantages cannot be sustained upon the finding of a jury that a certain charge was an unreasonable preference, if no standard of comparison is established by which such unreasonableness is shown with definiteness and certainty. *Tozer v. United States* (C. C. N. D. Mo.) 245

165. The "fines" or "penalties" imposed by the provisions of the agreement of the Southern Railway & Steamship Association on members for violation of association rules appear on the face of that agreement to be available as substitutes for payment which would be exacted under a regular pooling system, and the arrangement under which they are imposed is tantamount to a combination, contract, or agreement "for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof," which are forbidden by the statute. *Cincinnati Freight Bureau v. Cincinnati, N. O. & T. P. R. Co.* (Com.) 592

166. But one overt act need be proved to sustain an indictment for conspiring to violate the United States Act of March 2, 1889, against obtaining transportation for property over rail-

roads at less than regular rates. *United States v. Howell* (D. C. W. D. Mo.) 818

167. Employers who knowingly permit their employes to obtain less than schedule rates for transportation of their property over railroads, and who receive the benefit of such conduct, either directly or indirectly, may be punished under the United States Act of March 2, 1889, against obtaining transportation at rates less than the schedule. *Id.*

168. When the refund of an excessive charge by a carrier has been unnecessarily delayed for a considerable period, the officials responsible therefor become fairly chargeable with willful intention to violate the law. *Phelps v. Texas & P. R. Co.* (Com.) 363

169. Railway companies which enter into an association to control traffic to a common market, and maintain rates higher than are reasonable, unjustly prejudicial, and preferential, if not jointly liable, are at least severally liable. *Cincinnati Freight Bureau v. Cincinnati, N. O. & T. P. R. Co.* (Com.) 592

CARS. See CARRIERS, 4, 22, 85, 152, 153; CONSPIRACY, 6.

CIVIL RIGHTS. See CARRIERS, 2, 3; CONSTITUTIONAL LAW, 18-15.

CLASSIFICATION. See CARRIERS, III. f.

COMMERCE.

I. INTERSTATE COMMERCE GENERALLY.

II. PEDDLERS; DRUMMERS AND AGENTS.

III. IMPORTATIONS.

See also BRIDGES; CARRIERS, 13, 23, 29, 33. COMMON LAW, 2; CONSPIRACY, 15-19 21-25; CORPORATIONS, 5, 6; INJUNCTION 12-14; TAXES, 1, 2, 6.

I. INTERSTATE COMMERCE GENERALLY

1. Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. *Re Charge to Grand Jury* (No. 3) (D. C. N. D. Cal.) 784

2. Congress has plenary power, subject to the limitations imposed by the Constitution, to prescribe the rule by which commerce among the several states is to be governed. *Interstate Commerce Commission v. Brimson* (U. S. Sup. Ct.) 545

3. The grant to Congress of the power to regulate commerce among the states does not embrace that commerce which is completely internal or between different parts of the same state. *Lehigh Valley R. Co. v. Pennsylvania* (U. S. Sup. Ct.) 87

4. No state can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on. *Brennan v. Titusville* (U. S. Sup. Ct.) 658

5. A state statute regulating the rights of carriers and declaring what rates shall be re-

garded as extortionate does not apply to the case of interstate shipments. *Mobile & O. R. Co. v. Dismukes* (Ala.) 200
See also CARRIERS, 2.

6. The business of insurance as ordinarily conducted by insurance companies organized under the legislation of other states is not interstate commerce so as to be exempt from state legislation as to combination by insurance companies to control rates. *State v. Phipps* (Kan.) 299

7. The regulation of the charges of a grain elevator is not a regulation of interstate commerce, although the grain passing through it is brought from another state. *Budd v. New York* (U. S. Sup. Ct.) 45; *Brass v. North Dakota*, *Stoeser* (U. S. Sup. Ct.) 670

8. In the carriage of freight and passengers between two points in one state, the mere passage over soil of another state does not render that business foreign which is otherwise domestic. *Lehigh Valley R. Co. v. Pennsylvania* (U. S. Sup. Ct.) 87; *Campbell v. Chicago, M. & St. P. R. Co.* (Iowa) 203

9. The fact that a contract was for the carriage of goods from one state to another does not relieve a corporation of the state in which the contract was made from the rule of law existing in that state, which prohibits special contracts limiting liability. *St. Joseph & G. I. R. Co. v. Palmer* (Neb.) 494

10. A state statute limiting the rates to be charged by freight carriers does not interfere with interstate commerce because it adopts a different classification for freight from that which has been established by the railroads for the section of country in which such state is located. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 835

11. Limiting local rates of freight does not necessarily interfere with interstate commerce because the carriers for their own convenience rearrange the interstate rates to make them conform to the local rates prescribed by the statute. *Id.*

12. A statute prohibiting the shipment out of the state of oysters taken in the waters of the state while they are in shells, and also prohibiting the taking of such oysters by any person who is not a resident of the state, is not unconstitutional as a regulation of interstate commerce. *State v. Harrub* (Ala.) 99

13. The provision of Ga. Code, § 4578, making it a misdemeanor to run a freight train upon any railroad in that state on the Sabbath Day, is a regulation of internal police, and not a regulation of interstate commerce, even as to freight trains passing through the state from and to adjacent states, and laden exclusively with goods and freight received on board before the trains entered the state, and consigned to points beyond its limits. *Hennington v. State* (Ga.) 418

14. The imposition by a state of a condition, upon giving permission to lay railroad tracks in the streets of a city, that such tracks shall be public and open to the use of citizens; and a regulation by the state of the switching rates to be charged by such railroad in the city,—do not clearly show an unconstitutional interference with or regulation of commerce

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between the states, although cars engaged in interstate traffic may be switched over such tracks. *State v. Chicago, M. & St. P. R. Co.* (C. C. N. D. Iowa) 425

15. A statute regulating the sale of transportation tickets is not an interference with interstate commerce. *State v. Corbett* (Minn.) 694

16. A state statute making railroad tickets good for six years, and giving the holder of one the right to stop off at as many stopping places as he pleases before reaching his destination, cannot, in view of the power of Congress over commerce, be applied, contrary to their terms, to tickets sold beyond the limits of the state and entitling their holders to passage from a point in a foreign state or country to one in the state which enacted the statute. *Lafarier v. Grand Trunk R. Co.* (Me.) 198

17. The doing of business—such as that of an express company—which constitutes interstate commerce, by a person who is also at the same time engaged in business of the same kind which constitutes state or local commerce, cannot be made a bar or exemption of the local or state commerce business from taxation or regulation by state authority. *Osborne v. State* (Fla.) 731

18. A state statute prescribing a penalty for failure to deliver a telegram, where the regulations of the company itself require the delivery, is not unconstitutional as a regulation of interstate commerce. *Western U. Teleg. Co. v. Tyler* (Va.) 481

19. A territorial act which regulates the order of receipt and transmission of telegraphic messages, and prescribes a penalty for its violation, but which does not attempt to regulate the delivery of messages outside the territory, or of messages sent from without the territory, is not a regulation of interstate commerce. *Butner v. Western U. Teleg. Co.* (Okla.) 770

II. PEDDLERS; DRUMMERS AND AGENTS.

20. A statute denying the right of a corporation of another state to bring an action within the state until it has filed its articles of incorporation therein is inoperative as to an action brought for the purchase price of goods sold within the state by commercial agents or drummers, as this constitutes interstate commerce. *Bateman v. Western Star Milling Co.* (Tex. Civ. App.) 260

21. A contract by which a resident of a state agrees with a foreign corporation to canvass certain territory for the sale of its sewing-machines, which the corporation thereby agrees to sell to him on credit, and a bond given to secure payment to the corporation of any sum that may become due under such contract, constitute a part of the interstate commerce carried on by the sale of such sewing-machines in accordance with said contract, and therefore cannot be affected by a state statute prohibiting business within the state by a foreign corporation which has not complied with certain requirements,—such as filing a certificate to designate an agent on whom process may be served. *Gunn v. White Sewing-Mach. Co.* (Ark.) 309

22. A regulation as to the manner of sale of subjects of commerce, whether by sample or not, whether by exhibiting samples at a store or at a dwelling-house, is a regulation of commerce. *Brennan v. Titusville* (U. S. Sup. Ct.) 658

23. That one having goods for sale is a non-resident manufacturer, and sells his goods within the state through an agent, does not, under the Federal Constitution, relieve him from the operation of the local police laws, if he keeps in the state a store containing a stock of goods for the inspection of customers, from which he makes sales to actual customers. *Com. v. Schollenberger* (Pa.) 488

24. A statute prohibiting any person not licensed by payment of a prescribed fee, from traveling from place to place within the state for sale of goods at retail or to consumers, by sample or otherwise, is invalid as an interference with interstate commerce as applied to an employé of a person carrying on business in another state, soliciting orders from sample for sale of goods then situated in such other state and constituting legitimate and proper articles of commerce. *Re Mitchell* (D. C. E. D. Wis.) 767

25. A license tax imposed by a state upon an agent of a citizen of another state, for the privilege of selling his goods in the former state, is a direct burden on interstate commerce, and therefore beyond the power of the state. *Brennan v. Titusville* (U. S. Sup. Ct.) 658

26. A manufacturer of goods which are legitimate subjects of commerce, who carries on his business of manufacturing in one state, can send an agent into another state to solicit orders for the products of his manufactory, without paying to the latter state a tax for the privilege of thus trying to sell his goods. *Id.*

27. The fact that the business of a merchandise broker chances to consist for the time being, wholly or partially, in negotiating sales between resident and nonresident merchants, of goods situated in another state, does not necessarily make a license fee involve the taxation of interstate commerce, forbidden by the Constitution. *Ficklen v. Shelby County Taxing Dist.* (U. S. Sup. Ct.) 79

28. A merchandise broker may be required, as a condition of obtaining a license for that business, to pay a license fee and in addition 2½ per cent upon his gross commissions from the business, including that which is wholly interstate. *Id.*

29. An ordinance of a city imposing a license fee upon every telegraph company or agency doing business in the city, for business done exclusively in the city, not including business done to and from points without the state, or business done for the government, its officers or agents,—is not void as an interference with interstate commerce. *Postal Teleg. Cable Co. v. Charleston* (U. S. Sup. Ct.) 687

30. A privilege tax on telegraph companies, graduated according to the value of the property of the company measured by its mileage, and imposed in lieu of all other taxes, although incidentally affecting interstate commerce, is not unconstitutional as an interfer-

ence with such commerce. *Postal Teleg. Cable Co. v. Adams* (Miss.) 416

III. IMPORTATIONS.

31. The shipment of merchandise from one state to another is interstate commerce, and any requirement of a state in respect of such commerce, in conflict with the requirements of the Interstate Commerce Act, is of no validity. *Baird v. St. Louis, I. M. & S. R. Co.* (C. C. E. D. Ark.) 422

32. It is an act of interstate commerce for a foreign corporation to sell and set up machinery in a state where it has no agency or office. *Milan Mill. & Mfg. Co. v. Gorton* (Tenn.) 851

33. A state statute requiring every person who sells nursery stock grown without the state to file an affidavit with the secretary of state and a bond of \$2,000, and exhibit to every purchaser a certificate of compliance from the secretary of state,—is invalid as imposing an obstruction to and regulating interstate commerce. *Re Schechter* (C. C. D. Minn.) 849

34. A license tax of \$500 per annum imposed on every person selling in a city any meat which is not from animals of his own raising, unless he rents a stall in a public market, while the rent of such stall is \$150 per year and the market regulations are so restricted and burdensome as to preclude the reasonable conduct of a wholesale business there,—is unconstitutional in respect to wholesale dealers in meat brought from other states, by reason of the necessarily resulting discrimination against them, although the ordinances on the subject on their face purport to apply to vendors irrespective of the place from which it comes; especially where neither sales nor inspection of meat are restricted to the market, and the regulations are clearly made for the purpose of revenue, and not merely to prevent the sale of uninspected meat. *Georgia Packing Co. v. Macon* (C. C. S. D. Ga.) 508

35. A state statute positively prohibiting the sale of oleomargarine does not apply to original packages of the article brought from another state. *Re Worthen* (C. C. S. D. Ohio) 484

36. The sale of a package of goods, entire and unbroken as imported from another state, will be protected as interstate commerce only when the form and size of the package is that usually adopted in the trade for purpose of transportation, and not when adopted with a view to unlawful interstate retail trade. *Com. v. Schollenberger* (Pa.) 488

37. Showing that a package of material to be used as food was made, stamped, and branded in another state, is not sufficient to show that it is an original package, trade in which is protected by the Federal Constitution, without showing further that it was in the form usually adopted in the trade for purposes of transportation. *Id.*

38. An original package, trade in which is protected by the Federal Constitution, is such form and size of package as is used by pro-

ducers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce.

Id.

39. Liquors imported into a state arrive therein so as to be subject to its police power under the Wilson Act, providing that all intoxicating liquors shall, upon arrival in a state or territory, be subjected to the operation and effect of its laws enacted in the exercise of its police powers, to the same extent as if produced in such state or territory, when they reach their destination in such state, although they are not then delivered by the carrier to the consignee. *Re Langford* (C. C. D. S. C.) 487

40. A state statute forbidding the inbringing of any intoxicating liquors into the state by a common carrier engaged in interstate and foreign commerce is void as an interference with interstate commerce; and no new power to prohibit such importation is given to the states by the Wilson Act of 1890. *Ex parte Edgerton* (C. C. D. S. C.) 685

41. A sale of the contents merely of the packages in which liquor was imported into the state, the purchaser being required to open them and empty the liquor into glasses furnished by the seller, is not a sale by original packages, exempt as interstate commerce from the operations of state laws regulating the sale of intoxicating liquors. *Hopkins v. Lewis* (Iowa) 68

42. A state statute prohibiting the sale of seed unless the year in which it is grown is plainly marked on each package, except on a sale of seed in open bulk by farmers to other farmers or gardeners, is void as to seed brought from another state and sold in original packages. *Re Sanders* (C. C. E. D. N. C.) 805

COMMON LAW. See also CARRIERS, 85; STATUTES, 7.

1. Congress has not adopted the common law of England as a national municipal law. The enforcement of the common law by the courts of the United States has in every instance been as the municipal law of the state by which the subject-matter was affected. *Swift v. Philadelphia & R. R. Co.* (C. C. N. D. Ill.) 638

But see case following.

2. The duties and obligations of carriers to their patrons when engaged in interstate commerce are governed by the common law, in the absence of any legislation of Congress on the subject. *Murray v. Chicago & N. W. R. Co.* (C. C. N. D. Iowa) 806

8. The principles of the common law apply to controversies in the Federal courts in matters of national control, so far as they are applicable to the subject-matter. *Id.*

COMPETITION.

Effect of, on Rates, see CARRIERS, III. b.

COMPLAINT.

For violation of interstate commerce law. 44, 45

Prayer for dismissal of. 104

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CONFLICT OF LAWS. See also COMMERCE, 9.

A state statute prohibiting carriers from limiting their liability for loss by fire cannot be made to apply to property being transported under a bill of sale from a point in one state to a point in another state, both foreign to the state enacting the statute, although the carrier's charter was granted by such state and the point where the loss occurs is actually within its boundaries. *Thomas v. Wabash, St. L. & P. R. Co.* (C. C. S. D. Ill.) 802

CONGRESS.

Powers of, as to Commerce, see COMMERCE, 2, 8.

Congress may in its discretion employ any appropriate means not forbidden by the Constitution, to carry into effect, and accomplish the objects of, a power given to it by the Constitution. *Interstate Commerce Commission v. Brimson* (U. S. Sup. Ct.) 545

CONSPIRACY.

I. IN GENERAL.

II. STRIKES AND BOYCOTTS.

III. ANTI-TRUST LAW.

See also BOYCOTT; CARRIERS, 68, 166, 167; CONTRACTS, 4; COURTS, 2; EVIDENCE, 4, 17-19; INDICTMENT, ETC., 2, 3; INJUNCTION, 5, 8-12, 14.

I. IN GENERAL.

1. Conspiracy is an agreement, combination, or undertaking entered into between two or more persons to do something which is against the law of the country. *United States v. Howell* (D. C. W. D. Mo.) 818

2. A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (C. C. S. D. Ohio) 788

3. One who joins a conspiracy for the purpose of furthering its design is punishable as though he had been a party to it from the beginning. *United States v. Howell* (D. C. W. D. Mo.) 818

4. A conspiracy to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise, is not within the prohibition of the Act of Congress against conspiracies in restraint of trade, where there is no aim to engross, monopolize, or grasp the market. *United States v. Patterson* (C. C. D. Mass.) 775

5. Violence and intimidation are as much within the mischief of the Act of Congress against conspiracies in restraint of trade or commerce as negotiations, contracts, or purchases, if such means are used for the purpose of engrossing, monopolizing, or grasping a particular trade. *Id.*

6. A combination of railroad employes to compel railroad companies to injure the manufacturer of cars by breaking their contracts

with him is an unlawful conspiracy. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (C. C. S. D. Ohio) 788

7. The right of assembly and free speech secured by the constitution of Ohio cannot be used to carry out an unlawful and criminal conspiracy to obstruct the operation of a railroad by a receiver. *Id.*

II. STRIKES AND BOYCOTTS.

See also **BOYCOTT.**

8. It is not unlawful for employes to associate, consult, or confer together with a view to maintain or increase their wages by lawful and peaceful means. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 619

9. Illegal combinations are not sanctioned in any degree by the Act of Congress of June 29, 1886, legalizing the incorporation of national trades unions. *Arthur v. Oakes* (C. C. App. 7th C.) 744

10. A combination of railroad employes to quit their employment, to compel their employer to withdraw from a mutually profitable relation with a third person, for the purpose of injuring the latter, when such relation has no effect on the character or reward of their services,—is an unlawful conspiracy. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (C. C. S. D. Ohio) 788

11. An unlawful combination in restraint of interstate or foreign commerce may exist among labor organizations, although their original purpose and general character is lawful. *United States v. Workingmen's Amalgamated Council* (C. C. E. D. La.) 881

12. The interdiction by Act of Congress, of contracts or combinations in restraint of trade or commerce among the several states or with foreign nations, applies to combinations of labor as well as of capital, which are in restraint of such trade or commerce. *Id.*

13. A strike is not unlawful if it is merely a combination among employes having for its object their orderly withdrawal in large numbers or in a body from their employer's service, to accomplish some lawful purpose. *Arthur v. Oakes* (C. C. App. 7th C.) 744

14. The stopping of transportation of goods and merchandise in transit from state to state and to and from foreign countries, which is caused by a strike of all the members of labor organizations in a certain city, in all kinds of business, in an attempt to compel the employment of none but union men in a certain business,—is an unlawful restraint of commerce in violation of the Act of Congress. *United States v. Workingmen's Amalgamated Council* (C. C. E. D. La.) 881

15. A combination whose professed object is to arrest the operation of interstate railroads until they accede to certain demands, whether such demands are reasonable or unreasonable, just or unjust, is an unlawful conspiracy in restraint of commerce among the states, under the Act of Congress of July 2, 1890, declaring every conspiracy in restraint of trade or commerce among the several states illegal. *United States v. Elliott* (C. C. E. D. Mo.) 798

16. A combination between railroad em-

ployes with the purpose of paralyzing the interstate commerce of the country by refusal of such employes to perform their duties is an unlawful conspiracy under the Act of Congress of July 2, 1890, declaring illegal every combination or conspiracy in restraint of trade or commerce among the several states. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (C. C. S. D. Ohio) 788

17. A combination or conspiracy that will interrupt the transportation of commodities from one state to another is within the Act of Congress of July 2, 1890, declaring illegal every combination or conspiracy in restraint of trade or commerce among the several states. *Re Charge to Grand Jury* (No. 8) (D. C. N. D. Cal.) 784

18. Any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in transporting the interstate commerce of the country is a violation of the Act of Congress of July 2, 1890, declaring illegal every combination or conspiracy in restraint of trade or commerce among the several states. *Id.*

19. A combination or conspiracy to obstruct or retard the passage of the mail, or to interfere or restrain commerce between the states, is unlawful. *Re Charge to Grand Jury* (No. 1) (D. C. S. D. Cal.) 777

20. A combination of railroad employes to quit employment for the purpose of preventing their employers from running certain cars, with the intent to stop mail trains as well as others, is an unlawful conspiracy under U. S. Rev. Stat. § 3995, imposing a penalty for obstructing or retarding the passage of the mail. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (C. C. S. D. Ohio) 788

21. Any concerted action upon the part of others to demand or insist, under any effective penalty or threat, upon railroad employes quitting to the injury of the mail service or the prompt transportation of interstate commerce, is a conspiracy, unless such demand or insistence is in pursuance of a lawful authority conferred upon them by the men themselves, and is made in good faith in the execution of such authority. *Re Charge to Grand Jury* (No. 2) (D. C. N. D. Ill.) 781

22. The corrupt or wrongful agreement of two or more persons with each other, that the employes of several railroads carrying mails and interstate commerce shall quit, and that successors shall by threats, intimidation, or violence, be prevented from taking their places, will constitute a conspiracy against interstate trade or commerce. *Id.*

23. A wrongful and corrupt agreement between two or more men connected with a railroad, whatever their position, for the purpose of creating public sympathy in a threatened strike, or any other purpose, to cause the mail trains and trains carrying interstate commerce to be stopped, with acts in pursuance of such agreement,—constitutes a conspiracy. *Re Charge to Grand Jury* (No. 4) (C. C. N. D. Ill.) 801

24. An agreement between two or more men connected with a railroad, in view of a threat-

ened strike, that they will not employ men to take the place of those who quit their service, but will allow mail and interstate commerce trains to stand still, for the purpose merely of creating public sympathy or indignation against the strikers,—constitutes conspiracy, unless the circumstances and situation were such that the employment of new men, reasonably viewed, would lead to danger to them or to the railroad property or to any public interest. *Id.*

25. An agreement between two or more men connected with a railroad company, that for the purpose of creating public sympathy in a strike they will discharge men from their employ who would otherwise not have been discharged, intending that such discharge shall stop the running of mail or interstate commerce trains and thereby raise public indignation, constitutes a conspiracy. *Id.*

III. ANTI-TRUST LAW.

See also CONTRACTS.

26. An alleged violation of the Anti-Trust Act of Congress must be clearly within its provisions, as the statute is a criminal one. *United States v. Trans-Missouri Freight Asso.* (C. C. App. 8th C.) 443

27. A combination by foreign insurance companies to increase the rates of insurance is in violation of Kan. Laws 1889, chap. 257, as an unlawful trust and combination "in restraint of trade and products;" and such companies and their local agents who attempt to and do enforce such combined rates are subject to prosecution under that statute. *State v. Phipps* (Kan.) 299

CONSTITUTIONAL LAW. See also COMMERCE, I.; CONGRESS; CONSPIRACY, 7; CONTEMPT, 1; CONTRACTS, 18.

1. Investing a railroad commission with authority to make just and reasonable rules and regulations to prevent excessive charges and unjust discriminations and preferences by carriers, the reasonableness and legality of which is reviewable by the courts, is not unconstitutional as a delegation of legislative power. *Atlantic Exp. Co. v. Wilmington & W. R. Co.* (N. C.) 294

2. No delegation of the police power of the state to grant licenses to engage in a business is made by a statute allowing the sale of tickets only by agents licensed by the carrier. *State v. Corbett* (Minn.) 694

3. There is no unconstitutional delegation of power to railroad commissioners by a statute authorizing them to fix reasonable maximum rates of charges for freight and passenger traffic, where their schedule is not final, but is made merely prima facie evidence of the reasonableness of the rates established. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 683

4. The business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers, and may be controlled by public legislation for the common good. *Budd v. New York* (U. S. Sup. Ct.) 45

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5. The New York law of 1888 regulating the fees for elevating and discharging grain by elevators, fixing maximum charges therefor, and also limiting the charge for trimming or shoveling to the leg of the elevator and for trimming when loaded, to the actual cost thereof,—is a proper exercise of the police power of the state. *Id.*

6. Owners of a grain elevator are not deprived of the equal protection of the laws by a statute regulating fees and establishing maximum charges. *Id.*; *Brass v. North Dakota, Stoesser* (U. S. Sup. Ct.) 670

7. The legislature can fix a maximum beyond which any charge would be unreasonable for the use of property in which the public has an interest, but cannot compel the doing of services without reward. *Budd v. New York* (U. S. Sup. Ct.) 45

8. The fixing and enforcement by a railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstitutional denial of the equal protection of the laws. *Reagan v. Farmers' Loan & T. Co.* (U. S. Sup. Ct.) 560, 578; *Reagan v. Mercantile Trust Co.* (U. S. Sup. Ct.) 575, 577

See also CARRIERS, III. a.

9. A classification of railroads as those which have been in operation for a certain length of time and those which have been recently built, and limiting the rates which may be charged on the old roads, is not an arbitrary classification denying such roads the equal protection of the laws, nor does it make the statute invalid as class legislation. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 635

10. The Minnesota act to regulate the sale and redemption of transportation tickets of common carriers, and to provide punishment for the violation of the same, is not unconstitutional as "class legislation" granting special privileges to carriers. *State v. Corbett* (Minn.) 694

11. The provision of S. C. Act Dec. 24, 1892, § 25, subd. 2, that any servant, agent, or employé of a railroad or express company or other carrier, who shall remove any intoxicating liquors from any railroad car, vessel, or other vehicle of transportation, at any place other than the usual and established stations or places of business of such carriers within an incorporated city or town where there is a dispensary, shall be punished,—is not a valid exercise of the police power of the state, since it singles out one class of persons from the whole community for prosecution and punishment in contravention of S. C. Const. art. 1, § 12, providing that no person shall be liable to any other punishment or subjected in law to any other restrictions or disqualifications in regard to any personal rights, than such as are laid on others under like circumstances. *Re Langford* (C. C. D. S. C.) 437

12. A state statute requiring every person selling nursery stock grown in another state to file with the secretary of state an affidavit and bond of \$2,000, and exhibit to every purchaser a certificate from the secretary, is unconstitutional as depriving citizens of other states dealing in a sound article of commerce produced therein, of the valuable

privilege and immunity enjoyed by the citizens of the state, that every person shall be presumed honest and innocent of wrong. *Re Schlechter* (C. C. D. Minn.) 849

13. The Kentucky statutes requiring all railroad companies to furnish separate coaches or compartments for colored and white passengers does not violate U. S. Const. 14th amend. prohibiting discrimination by a state because of race or previous condition of servitude, as it prohibits any discrimination in the quality, convenience, or accommodations in the cars and compartments set apart for the different classes of passengers. *Anderson v. Louisville & N. R. Co.* (C. C. D. Ky.) 764

14. A statute requiring separate cars or compartments to be furnished white and colored passengers upon railroads is valid as a proper exercise of the police power of the state, when confined to the interstate commerce of the state, and not applying to interstate commerce. *Id.*

15. The prohibition contained in U. S. Const. 14th amend. against discrimination by a state because of race or previous condition of servitude, though securing to citizens certain fundamental rights as against state action, does not secure the joint and common enjoyment of such rights. *Id.*

16. A statute prohibiting more than fair and reasonable rates by a railroad corporation, being merely declaratory of a common-law rule, although penal, does not deprive the company of its property without due process of law, because the statute does not fix any limit of the rates,—especially where a provision is made in the same statute for the fixing of rates by commissioners. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 688

17. A statute prohibiting the sale of tickets except by licensed agents is not—at least as to tickets purchased after the passage of the Act—void as depriving a citizen of his property “without due process of law.” *State v. Corbett* (Minn.) 594

18. The regulation of the fees for elevating and discharging grain by elevators does not deprive the owner of his property without due process of law,—at least where the charges are not shown to be unreasonable. *Budd v. New York* (U. S. Sup. Ct.) 45; *Brass v. North Dakota, Stoesser* (U. S. Sup. Ct.) 670

CONTEMPT.

1. In matters of contempt a jury is not required by “due process of law.” Courts possess the power to punish for contempt. *Interstate Commerce Commission v. Brimson* (U. S. Sup. Ct.) 545

2. It is a contempt of court to interfere with property in the hands of a receiver, or with men in their employ. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 619

3. Any willful attempt, with knowledge that a railroad is in the hands of a court through its receiver, to prevent or impede the latter from complying with the order of the court in running the road, which as between private individuals would give a right of action for damages,—is a contempt of court. *Thomas* 4 INTER S.

v. Cincinnati, N. O. & T. P. R. Co. (C. C. S. D. Ohio) 788

4. Inciting the employes of a road in charge of a receiver to quit their service, in pursuance of the plans of an unlawful conspiracy, constitutes a contempt of court. *Id.*

5. Instigating the employes of a receiver to leave their employment may be a contempt without being a crime. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (C. C. S. D. Ohio) 788

6. Imprisonment for six months was imposed as a punishment for contempt of court in interfering with the operation of a railroad by a receiver, where, after the service of the restraining order, the defendant continued in his unlawful course and aggravated his contempt by speeches to the employes of the receiver. *Id.*

CONTRACTS. See also CARRIERS, 29; CONSPIRACY, 12.

1. A contract between competing railroad companies is not necessarily “in restraint of trade” and illegal, within the meaning of the Anti-Trust Act of Congress, because it in some manner imposes a restriction upon competition. *United States v. Trans-Missouri Freight Assn.* (C. C. App. 8th C.) 443

2. An agreement of a transcontinental association to promote harmony of action between carriers and the maintenance of joint rates, with a proper division of through rates, is not on its face unlawful. *Duncan v. Atchison, T. & S. F. R. Co.* (Com.) 885

3. An association of railroad companies cannot be held to create a monopoly within the meaning of the Anti-Trust Act of Congress, where it is not intended to have any trade of its own, but to be a mere adviser of its members, who are competitors of each other. *United States v. Trans-Missouri Freight Assn.* (C. C. App. 8th C.) 443

4. An association of railroad companies for mutual protection by establishing and maintaining reasonable rates, rules, and regulations, is not illegal as in restraint of trade, under the Anti-Trust Act of Congress, merely because it incidentally tends to restrict competition in some degree, where each member of the association must still compete with other members for business, and while regular monthly meetings are provided for, at which action may be taken, five days' notice of any proposed reduction of rates or change of rules must be given, and members are bound by the decision of the association unless they give written notice in ten days thereafter to the contrary, and any member may withdraw on thirty days' notice. *Id.*

5. The provision of the Act of Congress of Feb. 4, 1887, § 8, that common carriers shall afford equal facilities for the interchange of traffic between their lines, but need not give the use of their tracks and terminal facilities to other carriers, does not affect a contract made by a railroad upon being given permission to use the streets of a city for its tracks, that it will pass the cars of other railway companies over its tracks when necessary to reach their customers' warehouses, and that it will not exceed a

certain rate in its charges for switching. *State v. Chicago, M. & St. P. R. Co.* (C. C. N. D. Iowa) 425

6. An action will not lie to compel a railroad company to pay over its earnings in excess of its share under an illegal pooling contract by which several companies agree to divide the earnings from a certain class of business by either giving each its share of the business or of the earnings, since it is not a suit merely to compel an accounting of moneys received, but is one to compel specific performance of the contract. *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* (C. C. App. 8th C.) 578

7. A pooling contract between several railroad companies which control the business of a large section of country, by which all their roads are to be run as one so far as through business is concerned, and each company is to receive a certain proportion of the gross earnings by either a division of business or of receipts,—is void as against public policy. *Id.*

8. It is illegal for a railroad company to enter a "pool" whereby a parallel road has preference over it in rates, where its charter, granted by Congress, forbids discrimination against any connecting or intersecting road, and a state land grant to the railroad forbids it to enter into any combination with any parallel road in the state that will allow the latter to control rates on it. *Missouri P. R. Co. v. Texas & P. R. Co.* (C. C. E. D. La.) 428

9. A Federal court will not refuse to abrogate an illegal pooling contract of a railroad in the hands of its receiver, upon the prayer of the representatives of other lines connected with it, because the receiver is willing to enter into such combination with such objecting lines, and they may also be willing. *Id.*

10. Performance of an illegal contract on one side only does not make it an executed contract so that an action can be maintained for the consideration. *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* (C. C. App. 8th C.) 578

11. In determining whether a contract of employment to procure rebates from railroads included railroads within the operation of the Interstate Commerce Act, the conduct of the parties in obtaining rebates from roads outside the state may be resorted to. *Parks v. Jacob Dold Packing Co.* (Buff. Super. Ct.) 486

12. A contract of employment for the main purpose of getting cut freight rates and rebates from railroad companies within the Interstate Commerce Act is void, and no recovery can be had for its breach, under the provisions prohibiting special rates and rebates and making it a misdemeanor for the shipper or his agent to solicit or induce the violation of its provisions. *Id.*

13. The power of railroad commissioners to make a schedule of reasonable maximum rates does not impair the obligation of the contract of a railroad company, under a statute which authorizes its board of directors to establish rates of toll from time to time, but also provides that the company's by-laws shall not be repugnant to the constitution and laws of the 4 INTER S.

state. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 663

CORPORATIONS. See also CARRIERS, 162; COMMERCE, 20, 21; COURTS, 9; TAXES, 3-5.

1. A state has the right to determine upon what conditions its laws as to the consolidation of corporations may be availed of. *Ashley v. Ryan* (U. S. Sup. Ct.) 664

2. The granting of the rights and privileges which constitute the franchises of a corporation may be accompanied with any such conditions as the legislature may deem most suitable to the public interest and policy. *Horn Silver Min. Co. v. New York* (U. S. Sup. Ct.) 57

3. A foreign corporation cannot claim a right to do business in another state, except subject to the conditions imposed by its laws. *Id.*

4. Having the absolute power of excluding the foreign corporation, a state may impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient,—such as the payment of a specific license tax, or a sum proportioned to the amount of its capital. *Id.*

5. Foreign corporations selling through itinerant agents and delivering goods manufactured outside of the state are not, in view of the commerce clause of the United States Constitution, affected by state statutes requiring foreign corporations to file their articles of association with the secretary of state and pay a franchise fee as a condition of doing business within the state. *Coit v. Sutton* (Mich.) 768

6. The exaction of a charge by a state for the filing of articles of consolidation of several railroad companies forming a connecting line, only one of which is a corporation of the state, as a condition imposed by the state upon the taking of corporate being or the exercise of corporate franchises, constitutes no tax upon interstate commerce or the right to carry on the same or the instruments thereof, and its enforcement involves no attempt on the part of the state to extend its taxing power beyond its territorial limits. *Ashley v. Ryan* (U. S. Sup. Ct.) 664

7. A foreign corporation which simply contracts to furnish milling machinery and place it in a mill, without having any office or agency in the state, is not carrying on business in the state within the meaning of a statutory prohibition of carrying on business. *Milan Mill. & Mfg. Co. v. Gorton* (Tenn.) 851

COURTS. See also APPEAL AND ERROR; CARRIERS, 41; REMOVAL OF CAUSES.

1. The fact that a subject like interstate commerce is beyond state legislative control does not *ipso facto* exclude the jurisdiction of state courts from cases growing out of such commerce. *Murray v. Chicago & N. W. R. Co.* (C. C. N. D. Iowa) 806; *St. Joseph & G. I. R. Co. v. Palmer* (Neb.) 494

2. Residence within the territorial jurisdiction of a court is not necessary to render one punishable by such court for a conspiracy committed there. *United States v. Howell* (D. C. W. D. Mo.) 813

3. A Federal court having jurisdiction will not, through principles of comity, hold its hand and leave the determination of the validity of a state statute to the state courts. *Re Langford* (C. C. D. S. C.) 487

4. To give a Federal court jurisdiction on the ground that the matter in dispute arose under the Constitution, laws, or treaties of the United States, it must clearly and unmistakably appear from the record that such Federal question must necessarily be decided before the merits of the case can be disposed of. *State v. Chicago, M. & St. P. R. Co.* (C. C. N. D. Iowa) 425

5. The constitutionality of a state statute will not oust the jurisdiction of a Federal court in a suit between citizens of different states to prevent the wrongful administration of the statute by state officers, so as to make it an illegal burden and exaction upon an individual. *Reagan v. Farmers' Loan & T. Co.* (U. S. Sup. Ct.) 560

6. Although the formation of a tariff of charges for transportation by a common carrier is a legislative or ministerial, rather than a judicial, function, the court may decide whether or not such rates are unjust and unreasonable and such as to work a practical destruction to rights of property, and, if found so to be, restrain their operation. *Id.*

7. That the remedies prescribed by the Interstate Commerce Act are not applicable to a particular case arising under its provisions does not deprive the United States circuit court of jurisdiction, since by the Judiciary Act such courts are given jurisdiction of all controversies arising under any Act of Congress. *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* (C. C. W. D. Tenn.) 261

8. Diversity of citizenship of the parties is not necessary to give jurisdiction to United States circuit courts of suits arising out of alleged violations of the Interstate Commerce Act. *Id.*

9. The principal office, within the meaning of the Act of Congress authorizing a circuit court where such office is situated, to enforce orders of the Interstate Commerce Commission, of a railroad corporation created by an Act of Congress which does not prescribe where such office shall be kept, is the one where its principal officers have their business domicile, the meetings of stockholders, directors, and executive committee are held, the stock books kept and the dividends declared, rather than the place where the subordinate officers in charge of the operating, traffic, and accounting departments of the business, discharge their duties. *Interstate Commerce Commission v. Texas & P. R. Co.* (C. C. S. D. N. Y.) 62

10. A proceeding to compel the attendance of a witness before the Interstate Commerce Commission, or to require him to answer questions put to him, or to compel the production of books, documents, or papers in his possession, is a case of which, under the Constitution, a court of the United States may take cognizance. *Interstate Commerce Commission v. Brimmon* (U. S. Sup. Ct.) 545

See also INTERSTATE COMMERCE COMMISSION, 1.

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11. Where a carrier has an office in one state, which is that of the executive officers, and where the stockholders' and directors' meetings are held, and the stock certificate books and the records of stockholders' and directors' meetings are kept, while the administrative offices of the carrier are in another state, the former is its principal office within the meaning of the Interstate Commerce Act, § 16, relating to the place of bringing suits to enforce orders of the Commission. *Interstate Commerce Commission v. Texas & P. R. Co.* (C. C. App. 2d C.) 408

12. A state statute duly authenticated will be regarded by the United States courts as having been enacted in full compliance with all the prescribed forms, unless the constitution or decisions of such state require a determination of the question of enactment upon different evidence. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 885

13. In Nebraska a statute duly authenticated cannot be overturned by extrinsic evidence, if the journals of the two houses show that everything was done which the constitution requires should be done and recorded in the due passage of the act. *Id.*

CRIMINAL LAW. See CARRIERS, III. k; EVIDENCE, 18-23.

DAMAGES.

Damages for mental pain and suffering alone, occasioned by the negligence of a telegraph company in failing to deliver a message announcing the death of a relative, cannot be recovered. *Butner v. Western U. Teleg. Co.* (Okla.) 770

DEFINITIONS. See also COMMERCE, 1; CONSPIRACY, 1, 2; INSURRECTION, 1.

Owner, see CARRIERS, 1.

DELEGATION OF POWER. See CONSTITUTIONAL LAW, 1-3.

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DISCRIMINATION.

In Rates, see CARRIERS, III.

DRUMMERS. See COMMERCE, II.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 16-18; CONTEMPT, 1.

ELEVATOR. See also COMMERCE, 7; CONSTITUTIONAL LAW, 4, 6, 18.

One who enters upon the business of elevating and storing the grain of other persons for profit in North Dakota becomes subject to the statutory regulations, although he also elevates and stores his own grain in the same warehouse. *Brass v. North Dakota, Stoesser* (U. S. Sup. Ct.) 670

EQUITY.

1. A state legislature cannot deprive a United States equity court of jurisdiction over an

alleged unlawful reduction of freight rates affecting citizens of other states, by itself prescribing them by direct act, instead of delegating the authority to a commission. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 885

2. There is no sufficient remedy at law to deprive a United States court of equity of jurisdiction over an alleged unlawful reduction by a state statute of freight rates, by reason of the fact that the statute provides for a petition to the state court, which may in its discretion direct the board of transportation to permit the carrier to raise its rates to the former amount. *Id.*

EVIDENCE. See also STATUTES, 8.

1. The court will take judicial notice that for the first \$36,000,000 of stock issued by the Union Pacific Railroad Company it received less than 2 cents on the dollar, and that the profit on construction represented by outstanding bonds was nearly \$44,000,000. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 619

2. The court will take judicial notice of the geographical location of Kansas City and Wichita, and that transportation by railroad from these places is over lines outside the State of New York. *Parks v. Jacob Dold Packing Co.* (Buff. Super. Ct.) 486

3. Fraud and illegality in contracts are not to be presumed. *United States v. Trans-Missouri Freight Assn.* (C. C. App. 8th C.) 448

4. Proof of demand and insistence, under effective penalty or threat, that railroad employes quit their service, and of consequent injury to the transportation of the mails or interstate commerce, imposes the burden upon those making such demand or insistence, of showing lawful authority conferred by the men themselves, and good faith in its execution. *Re Charge to Grand Jury* (No. 2) (D. C. N. D. Ill.) 781

5. Where a proportion of a through rate for part of a through haul is greatly disproportionate to the balance of the through rate, the burden is on the carrier to make proof of justifying circumstances and conditions. *Troy Bd. of Trade v. Alabama Midland R. Co.* (Com.) 348

6. The burden is on a carrier to justify the fact of discrimination, when that is admitted, and the service is stated to have been substantially the same and rendered under substantially the same circumstances and conditions. *Samuels v. Louisville & N. R. Co.* (Ala.) 420

7. When, on complaint of a carload shipper, unjust discrimination is alleged to result from equal rates on carloads and less than carload quantities of the same commodity, the burden of proof is upon the complainant. *Brownell v. Columbus & C. M. R. Co.* (Com.) 285

8. The burden is on a company making a departure from equal mileage rates, on different branches or divisions of a road, to show its rates to be reasonable when disputed. *James v. Canadian P. R. Co.* (Com.) 274

9. The attorney general of the United States in a suit to enforce the duty imposed upon the Pacific railroad companies by Act of Congress of Aug. 7, 1888, § 2, of affording equal facilities

ties to all connecting lines of telegraphs without discrimination, has, if such suit can be maintained, the burden of showing that some telegraph company has placed itself in a position to demand of the railway company the same facilities accorded to other companies, and that such demand has been refused, as it cannot be presumed that the railroad company intends to disregard its duty. *Union P. R. Co. v. United States* (C. C. App. 8th C.) 705

10. When the schedule of wages in force at the time a court assumes the management of a railroad is the result of mutual agreement between the company and its employes, which has been in force for years, the court will presume the schedule to be reasonable and just, and any one disputing that presumption must overthrow it by satisfactory proof. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 619

11. A schedule of rates cannot be excluded from evidence under the Illinois statutes, when accompanied by a regular certificate of the commissioners as to its publication, on the ground that it never took effect because never published as required by statutes, since the statutes make the schedule and accompanying certificate prima facie evidence that the schedule offered is a schedule of the commissioners. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 683

12. Making a schedule compiled by commissioners prima facie evidence that the rates therein fixed are reasonable maximum rates of charges for railroad carriage does not infringe upon the right of trial by jury. *Id.*

13. A written notification to the consignor, by a carrier's freight claim agent, of the destruction of property received for transportation, is not admissible against the carrier to prove the loss of the property, until it is shown to have been made in discharge of the agent's duties or within the scope of his powers and while the obligation of the carrier with reference to the property yet continued. *Missouri P. R. Co. v. Sherwood* (Tex.) 240

14. Parol testimony is not admissible to impeach the validity of an act which by the record is shown to have been duly and legally passed. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 835

15. That a witness did not see the fire will not preclude his testifying that it consumed certain property, where he states that he knows of his own knowledge that it did so. To exclude the evidence it must appear that his knowledge was founded so entirely on hearsay as to be inadmissible. *Missouri P. R. Co. v. Sherwood* (Tex.) 240

16. Evidence of the value of an entire lot of cotton, while not sufficient to prove the value of a portion of it, in the absence of facts showing the average weight, value, and quality, is admissible as tending to show such value. *Id.*

17. Declarations by one of the parties to a conspiracy during the pendency of the illegal enterprise is evidence against all the others when the combination is proved. *Re Charge to Grand Jury* (No. 3) (D. C. N. D. Cal.) 784

18. A conspiracy may be established by circumstantial evidence. *United States v. Howell* (D. C. W. D. Mo.) 818

19. Circumstantial evidence which is equal in proving power to the testimony of one positive, uncontradicted, creditable eyewitness, is sufficient to sustain a conviction of conspiracy to violate the United States Act against obtaining illegal shipping rates. *United States v. Howell* (D. C. W. D. Mo.) 818

20. Although a conviction may be had on the testimony of accomplices if it produces on the minds of the jury a full and complete conviction of its truthfulness, it is a prudential rule that such witnesses should be corroborated by circumstances or otherwise as to some material point of their testimony. *Id.*

21. To sustain a conviction the proof must be sufficient to establish all the material allegations in issue, so that reasonable men upon a matter of importance or concern would be satisfied of their being true. *Id.*

22. A reasonable doubt which will require acquittal must be a real and substantial one, and not a mere conjecture or a surmise as to the possibility of innocence. *Id.*

23. Variance between allegations and proof as to the point of shipment of property for which less than schedule rates was obtained is immaterial, if both points were within the same state and subject to the same rates for shipment to the points of destination in another state. *Id.*

EXCURSION. See CARRIERS, 69.

EXPRESS COMPANIES. See CARRIERS, 139, 140; COMMERCE, 17; LICENSE, 1.

FIRE. See CARRIERS, 14, 15.

FRAUD. See CARRIERS, 7; EVIDENCE, 3.

FREE SPEECH. See CONSPIRACY, 7.

IMPORTS. See COMMERCE, III.

INDICTMENT. See also CARRIERS, 162, 163.

1. Insufficient allegations in an indictment which alleges the offense with reasonable precision are only surplusage under a general demurrer. *United States v. Patterson* (C. C. D. Mass.) 775

2. An indictment for conspiracy in restraint of trade or commerce, under the Act of Congress of July 2, 1890, must declare the means by which it is intended to engross or monopolize the market; and it is not sufficient to declare the conspiracy in the words of the enactment. *Id.*

3. Allegations of what was done in pursuance of an alleged conspiracy cannot enlarge the necessary allegations of an indictment for conspiracy under a particular statute, such as the Act of Congress against conspiracies in restraint of commerce. *Id.*

4. The objection that an indictment under the long and short haul clause of the Interstate Commerce Act is an attempt by the government to interfere with the revenues of the railroad contrary to the terms of the contract 4 INTER 8.

under which it was built cannot be raised upon a motion to quash. *United States v. Mellen* (D. C. D. Kan.) 247

INJUNCTION. See also ACTION OR SUIT, 2.

1. The enforcement of city ordinances which attempt an unconstitutional interference with interstate commerce may be restrained by injunction from a Federal court. *Georgia Packing Co. v. Macon* (C. C. S. D. Ga.) 508

2. No one can have an injunction against the collection of a tax until he has paid so much of the tax assessed against him as it can plainly be seen he ought to pay. *Northern P. R. Co. v. Clark* (U. S. Sup. Ct.) 641

3. The enforcement of an unreasonable reduction, by the legislature, of freight rates, may be enjoined. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 835

4. An injunction against the enforcement of unreasonable and unjust rates fixed by railroad commissioners must not extend to restraining the commission from proceeding to establish other rates. *Reagan v. Farmers' Loan & T. Co.* (U. S. Sup. Ct.) 560

5. Trade unions are not prohibited by an injunction against illegal combinations of workmen. *Arthur v. Oakes* (C. C. App. 7th C.) 744

6. Equity will not enjoin employes of a receiver of a railroad from quitting his service, although the effect of such action will be to cripple the property or prevent or hinder the operation of the road. *Id.*

7. An injunction will not be granted to prevent the employes of a railroad in the hands of a receiver from interfering with the property or other employes, since such an action is punishable as a contempt. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 619

But see contra, cases following.

8. Injunction is a proper remedy to restrain threatened acts of employes of a railroad receiver, which would inflict irreparable loss upon the property, and seriously prejudice the interests of the public involved in the regular, continuous operation of the road. *Arthur v. Oakes* (C. C. App. 7th C.) 744

9. Equity will enjoin any combination or conspiracy among the employes of the receiver of a railroad, which has for its object and intent the physical injury of the property in the receiver's possession, or actual interference with the regular, continuous operation by him of the railroad. *Id.*

10. Employes of a receiver of a railroad may be enjoined from disabling rolling-stock or other property in the receiver's possession, from interfering with its possession or obstructing its management, and from using force, intimidation, threats, or other wrongful methods against the receiver, his agents or employes, or persons seeking employment. *Id.*

11. Employes of the receiver of a railroad may be enjoined from combining and conspiring to quit his service, with the object and intent of crippling the property in his custody or embarrassing the operation of the railroad. *Id.*

12. An injunction will lie against railroad employes who, continuing in employment, refuse to perform their duties, where the direct result of such refusal works irreparable damage to the employer, and at the same time interferes with the transmission of the mail and with commerce between the states, notwithstanding there is no precedent for such injunction. *Southern California R. Co. v. Rutherford* (C. C. S. D. Cal.) 800

13. A preliminary injunction will be granted to restrain threatened acts in pursuance of an unlawful conspiracy in restraint of commerce between the states. *United States v. Elliott* (C. C. E. D. Mo.) 798

14. An injunction against an unlawful combination in restraint of trade, in violation of the Act of Congress, will not be denied because, after the filing of the bill, the unlawful interference with trade ceases. *United States v. Workmen's Amalgamated Council* (C. C. E. D. La.) 881

15. An answer under oath does not preclude an injunction in the Federal courts, where the oath of the respondent is waived in the bill according to Equity Rule 41. *Id.*

INSURANCE. See COMMERCE, 6; CONSPIRACY, 27.

INSURRECTION.

1. Insurrection is a rising against civil or political authority,—the open and active opposition of a number of persons to the execution of law in a city or state. *Re Charge to Grand Jury* (No. 2) (D. C. N. D. Ill.) 781

2. One who by speech, writing, or other inducements assists in setting on foot an insurrection or carrying it along, or who gives it aid or comfort, is guilty of a violation of law. *Id.*

3. Men who gather together to resist the civil or political power of the United States or to oppose the execution of its laws, in such force that the civil authorities are inadequate to put them down, and a considerable military force is needed to accomplish that result, become, with every person who knowingly incites, aids or abets them, with whatever motives, insurgents. *Id.*

4. To constitute an insurrection against the United States, it is not necessary that there should be blood shed, or that its dimensions should be so portentous as to insure probable success; but it is necessary that the rising should be in opposition to the execution of the laws of the United States, and should be so formidable as for the time being to defy the authority of the United States. *Id.*

5. Opposition to the arrest of persons who have willfully obstructed or retarded the mails, by such a number of persons as would constitute a general uprising in that particular locality, and as threatens for the time being the civil and political authority, constitutes an insurrection. *Id.*

INTERSTATE COMMERCE. See COMMERCE.

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INTERSTATE COMMERCE COMMISSION. See also ACTION OR SUIT, 8; CARRIERS, 83; COURTS, 7-11.

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1. The Act of Feb. 4, 1887, § 12, as amended in 1889 and 1891, is constitutional and valid, so far as it authorizes or requires the circuit courts of the United States to use their process in aid of inquiries before the Interstate Commerce Commission. *Interstate Commerce Commission v. Brimson* (U. S. Sup. Ct.) 545, Rev'g 315

2. A suit brought by the Interstate Commerce Commission in the United States circuit court to enforce an order of the Commission is an original and independent proceeding to be heard *de novo* upon proper pleadings and proof. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* (C. C. N. D. Ga.) 832, Rev'd on Other Grounds in 582

3. The provision of the Interstate Commerce Act, that the findings of fact of the Commission shall be prima facie evidence of the matters therein stated, does not make them conclusive in proceedings before the court to enforce the order of the Commission; but the court must consider all evidence submitted, and base its judgment thereon. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.* (C. C. S. D. Cal.) 323

4. When a carrier on complaint under the Act to Regulate Commerce, § 4, avers substantial dissimilarity in circumstances and conditions as justifying its greater charge for shorter hauls, it is concluded by its pleading, and must affirmatively show that the circumstances and conditions, of which it is entitled to judge in the first instance, are in fact substantially dissimilar; but upon an application for relief under the § 4 proviso the carrier is not limited by such a rule of evidence, and may present to the Commission every material reason for an order in its favor. *Trammell v. Clyde Steamship Co.* (Com.) 120

5. The fact that the property and affairs of a carrier have been placed by a United States court in the hands of a receiver does not affect the jurisdiction of the Interstate Commerce Commission under a complaint charging such carrier with violations of the Act to Regulate Commerce. *Troy Bd. of Trade v. Alabama Midland R. Co.* (Com.) 348

6. The bona fides of a complaint of discrimination by a carrier cannot be attacked in the circuit court by impeaching the good faith of those who in the first instance induced the Interstate Commerce Commission to take action under the provisions of the Interstate Commerce Law for the lodging by any person of complaints with the Commission, and that no complaint shall be dismissed because of the absence of direct damage to the complainant, but that the Commission may institute any inquiry on its own motion, and requiring the Commission, if the law has been violated, to notify the carrier to cease from further violation, and, in case of its refusal, to apply by petition to a circuit court in equity to enforce its order. *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* (C. C. W. D. Mich.) 723

7. The fact of a receivership for a defendant carrier subsequent to complaint should not interfere with the progress of a proceeding brought merely for the purpose of railway regulation. *Trammell v. Clyde Steamship Co.* (Com.) 120

8. If a railroad company is violating a proper order of the Interstate Commerce Commission, it should be restrained from doing so; and it cannot escape upon the objection that another wrongdoer is also violating it. *Interstate Commerce Commission v. Texas & P. R. Co.* (C. C. S. D. N. Y.) 114

9. When a local rate from a given point is alleged to be unreasonable, but it appears from the record that such local rate is also a proportion of through rates from that point, and as such is the real subject of controversy, the complaint should be directed against the aggregate through rate, not the share received by any initial carrier, and all the carriers composing the through line are necessary parties. *Minneapolis Chamber of Commerce v. Great Northern R. Co.* (Com.) 280

10. On failure of the petitioner to appear at the hearing, though duly notified thereof, or to offer proof in support of the information and belief upon which his allegations were made, the complaint must be dismissed. *Rice v. St. Louis S. W. R. Co.* (Com.) 321

11. Defendants are not entitled to a dismissal of a complaint of unlawful rates, on the ground that the petitioners, being merely commission merchants, can sustain no direct or material damage under the rates in question. *James v. Canadian P. R. Co.* (Com.) 274

12. Where a complainant has invoked the aid of the law to secure what he, with the acquiescence of the carrier had previously obtained in apparent contravention of the law, the carrier cannot plead violations of the law by complainant in bar of a decision on the merits, nor will the individual interests of the complainants be taken into consideration; but the Commission will examine the evidence and make such report thereon as, under the provisions of the law, the rights of other shippers and the public generally may require. *Page v. Delaware, L. & W. R. Co.* (Com.) 525

INTOXICATING LIQUORS. See COMMERCE, 89, 41; CONSTITUTIONAL LAW, 11.

JOINT RATE. See ACTION OR SUIT, 2.

JOINT TARIFF. See also CARRIERS, 141.
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JUDICIAL NOTICE. See EVIDENCE, 1, 2.

LABOR ORGANIZATION. See CONSPIRACY, 9, 11, 12; RECEIVERS, 5.

LICENSE. See also COMMERCE, 24-28, 30.

1. A license fee of \$200 for doing express business in a city of 15,000 inhabitants is not shown to be prohibitory or destructive of the business of express companies, even if it be that any judicial action could be based on such a showing. *Osborne v. State* (Fla.) 731

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2. A citizen doing a general business at the place of his domicile cannot escape payment of his share of the burdens of municipal government because the amount of his tax is arrived at by reference to his profits. *Ficklen v. Shelby County Taxing Dist.* (U. S. Sup. Ct.) 79

LIMITATION OF ACTIONS.

1. The statute of limitations of the state in which the offense was committed applies in actions under the Interstate Commerce Act to recover back freight paid to a carrier in excess of that charged other shippers. *Copp v. Louisville & N. R. Co.* (C. C. E. D. La.) 805

2. The concealment from a shipper of the fact that the rates charged him were excessive and that rebates were secretly given to others, and false representations as to these facts, do not take a cause of action for the recovery of the excess paid by him out of the statute of limitations, as the case is not based on fraud. *Murray v. Chicago & N. W. R. Co.* (C. C. N. D. Iowa) 806

3. An amendment to a declaration charging a common-law liability or implied contract obligation to repay money obtained by wrongful overcharges states a new cause of action within the rule as to the statute of limitations, where the original counts sought to recover treble damages as a statutory penalty. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 683

LONG AND SHORT HAUL. See CARRIERS, III. g.

MAILS. See POSTOFFICE.

MANDAMUS.

The duty enjoined upon the Union Pacific Railroad Company by the Act of Congress of Aug. 7, 1888, § 1, of operating by itself alone through its own corporate officers its telegraph lines, may and should be enforced by mandamus if in fact violated. *Union P. R. Co. v. United States* (C. C. App. 8th C.) 705

MARKETS. See COMMERCE, 34.

MASTER AND SERVANT. See also CONSPIRACY, 8, 10-17, 19-25; INJUNCTION, 5-10, 12; RECEIVERS, 2-13.

While every man has ordinarily the legal right to stop work and quit his employment whenever he chooses to do so, in the absence of a contract obliging him to continue for a definite time, no man has a legal or moral right while continuing in the employment of another to refuse to do the work he is employed and engaged to do. *Re Charge to Grand Jury* (No. 1) (D. C. S. D. Cal.) 777

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Ubi jus ibi remedium. *Southern California R. Co. v. Rutherford* (C. C. S. D. Cal.) 800

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NURSERY. See COMMERCE, 33.

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PARTY RATE. See CARRIERS, 70.

PEDDLERS. See COMMERCE, II.

PENALTY. See TELEGRAPHS, 1, 3.

PLEADING. See also ACTION OR SUIT, 4; INJUNCTION, 15; LIMITATION OF ACTIONS, 3.

1. The terms "carelessly, wrongfully, and negligently failed and neglected" to deliver a message, used in a complaint, import ordinary and simple negligence, and nothing more. *Butner v. Western U. Teleg. Co.* (Okla.) 770

2. The rule that the question of the illegality of the contract for breach of which an action is brought is not raised when not alleged in the answer does not apply when from plaintiff's own testimony the contract appears to be illegal. *Parks v. Jacob Dold Packing Co.* (Buff. Super. Ct.) 486

POLITICAL CONVENTION. See CARRIERS, 69.

POOLING. See CONTRACTS, 6-9.

POSTING.

Of Rates, see CARRIERS, III. c.

POSTOFFICE. See also CONSPIRACY, 19-25; INJUNCTION, 12; INSURRECTION, 5.

1. Failure of a railroad company to run any other trains than their regular passenger trains for carrying the mail is not a violation of law; but failure or refusal to carry mails on regular 4 INTER 8.

passenger trains, whether local or through trains, upon which they are required to carry mails, is unlawful. *Re Charge to Grand Jury* (No. 1) (D. C. S. D. Cal.) 777

2. Willful failure of railroad companies to carry the mails is within U. S. Rev. Stat. § 3995, making it an offense to unlawfully and willfully retard or obstruct the passage of the mail, although their employes refuse to move trains having certain sleeping cars thereon, where the situation is of an extraordinary character, and the interruption to commerce has been serious and long-continued, and the employes are willing to move trains without such cars. *Re Charge to Grand Jury* (No. 3) (D. C. N. D. Cal.) 784

PRESUMPTIONS. See EVIDENCE, 3-10.

PUBLIC BUSINESS. See CONSTITUTIONAL LAW, 7.

RAILROAD COMMISSIONERS. See also ACTION OR SUIT, 1; CONSTITUTIONAL LAW, 1, 8; CONTRACTS, 13; EVIDENCE, 12; INJUNCTION, 4.

1. The details of practice and pleading may be supplied by a railroad commission which is constituted a court of record, under the inherent power of every court of record to make such rules not inconsistent with the law as are necessary to the exercise of the powers conferred upon it. *Atlantic Exp. Co. v. Wilmington & W. R. Co.* (N. C.) 294

2. Authority is given to the railroad commission to hear and determine complaints of unjust discriminations and preferences, under the North Carolina Railroad Commission Act, which expressly provides that if a railroad company is guilty of a violation of the rules of the commission, and after due notice of such violation does not make full recompense for the wrong or injury done, it shall incur a penalty, and also constitutes such commission a court of record. *Id.*

RAILROADS. See ACTION OR SUIT, 3; CARRIERS; CONSTITUTIONAL LAW, 16; CONTRACTS, 5; TAXES, 5-10.

RATES.

For Lawfulness of, in General, see CARRIERS, III.

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REBATES. See CARRIERS, 75; CONTRACTS, 11, 12.

RECEIVERS. See also CONTEMPT, 2-6; CONTRACTS, 9; INJUNCTION, 6-11.

1. Advice and instructions to receivers on ap-

plication to the court, where *ex parte*, are probably binding only upon the receivers; but where there are parties in interest, and they have their day in court, the advice may be decisive. *Missouri P. R. Co. v. Texas & P. R. Co.* (C. C. E. D. La.) 484

2. When a court of equity undertakes, through a receiver, the conduct and operation of a railroad, the men engaged in conducting the business and operating the road become the employés of the court, and are subject to its orders in all matters relating to the discharge of their duties, and entitled to its protection. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 619

3. The rate of wages to be paid to employés of receivers must be left mainly to the receivers to manage. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 625

4. If employés of receivers do not receive enough compensation for the work they do they have the right to apply to the receivers or to the court to have their wages increased; and on a proper showing made, justice will be done. *Id.*

5. An order relative to wages of employés of a receiver should be for the benefit of all parties similarly situated, whether belonging to any of the labor organizations applying for it, or not. *Id.*

6. The recommendation of the majority of the receivers of a railroad will not be accepted by the court as conclusive upon the question of wage schedules, when such majority is not composed of practical railroad men. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 619

7. Wage schedules are not within the class of executory contracts which receivers can renounce while relying on the power of the court to compel the employés to continue in service. *Id.*

8. Receivers must give employés an opportunity to be heard before fixing wage schedules. *Id.*

9. Receivers in possession of a railroad will not be permitted to reduce the wages of employés without giving them notice and an opportunity to be heard, as required by the contract between the men and the company, although an opportunity is given to protest against the new schedules after they are prepared. *Id.*

10. Wages of the employés of a railroad in the hands of a receiver will not be reduced below what is reasonable and just in order to pay dividends on stock for which practically no value was paid, and interest on bonds which represent profit in construction. *Id.*

11. The diminished opportunity to earn wages, induced by the same conditions which forced the railroad into the hands of a receiver, should be considered when deciding the question of reduction or maintenance of the old wage schedule. *Id.*

12. The allowance of excess mileage by railroad receivers to employés will be approved by the court for portions of the road running through mountains and desert country, where competent men cannot be kept at regular rates, but where such course was entirely successful as employed by the company. *Id.*

13. Employés of the receiver of a railroad may lawfully confer together upon the subject of a proposed reduction of wages, and, if not restrained by their contract, may withdraw in a body from the receiver's service because of such reduction, although they expect that such action will inconvenience the receiver and the public. *Arthur v. Oakes* (C. C. App. 7th C.) 744

REHEARING.

Application for. 283, 369
Decision upon. 369

REMOVAL OF CAUSES.

1. The fact that a plaintiff rests his case on a common-law liability will not deprive defendant of the right to remove it, if he bases his defense on an Act of Congress. *Lowry v. Chicago, B. & Q. R. Co.* (C. C. D. Neb.) 435

2. The Federal court will remand a cause removed to it on the ground that the matter in dispute arose under the Constitution, laws, or treaties of the United States, where the only showing to that effect in the record is that a Federal question may arise if the evidence proves certain facts. *State v. Chicago, M. & St. P. R. Co.* (C. C. N. D. Iowa) 425

3. A suit to recover damages for acts which constitute a violation of the Interstate Commerce Act, the construction of which is in dispute between the parties, presents a Federal question for which it may be removed to a Federal court. *Lowry v. Chicago, B. & Q. R. Co.* (C. C. D. Neb.) 435

4. On a motion to remand, the court will not anticipate the trial of the case by deciding a Federal question for which the right of removal is claimed. *Id.*

5. A United States court in a case removed from a state court on the ground of diverse citizenship has no jurisdiction over a question as to the reasonableness of an interstate commerce rate. *Swift v. Philadelphia & R. R. Co.* (C. C. N. D. Ill.) 633

6. The right to take steps for the removal of a cause to the circuit court of the United States, on the ground of a separable controversy, is confined to the parties actually interested in such controversy. *Merchants' Cotton-Press & S. Co. v. Insurance Co. of North America* (U. S. Sup. Ct.) 499

7. In order to justify removal of a cause from a state court to the United States circuit court on the ground of a separable controversy between citizens of different states, the whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit. *Id.*

8. In a suit in equity in the nature of a creditors' bill brought by insurance companies against a railroad company and other companies who are made parties in aid of the relief asked against that company, if the suit is in fact a single cause of action against the railroad company, with incidental relief against the other companies, the railroad company is an indispensable party to the litigation, and

there is no separable controversy as to the other defendants which will allow a part of them to remove the cause from the state court to a Federal court. *Id.*

9. The voluntary joinder of parties has the same effect for purposes of jurisdiction as if they had been compelled to unite. *Id.*

10. The right of removal must be determined by the pleadings at the time the petition is filed. *Id.*

REPORT.

Eighth annual report of Commission. 863

SCHEDULE.

For Posting of Rates, see CARRIERS, III. c.

See also EVIDENCE, 10, 11.

Schedule; opinion as to. 698

SEED. See COMMERCE, 42.

SHIPPING. See CARRIERS, 157, 158.

SPECIFIC PERFORMANCE.

A contract to render personal service cannot be specifically enforced. *Ames v. Union P. R. Co.* (C. C. D. Neb.) 619

STATE.

A suit to restrain the enforcement by state officers of unjust and unreasonable rates fixed for carriers by state authority is not a suit against the state within the prohibition of the 11th amendment, since the state is interested only in a governmental, and not in a pecuniary, sense. *Reagan v. Farmers' Loan & T. Co.* (U. S. Sup. Ct.) 560

STATUTES. See also COURTS, 12, 13.

1. The title of "An Act to Regulate the Planting and Taking of Oysters in the Waters of the State" is sufficient to cover provisions against the taking of oysters by nonresidents, and the transportation out of the state by any person of oysters in shells. *State v. Harrub* (Ala.) 99

2. Provisions in a statute as to unlawful discrimination in rates will, even if unconstitutional, not make invalid other provisions as to reasonableness of rates. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 683

3. The provisions of the Kentucky statute requiring separate compartments or cars for white and colored passengers to be furnished by all railroad companies operating trains within the state, in respect to interstate commerce, cannot be separated from those relating to commerce wholly within the state, and render the whole act void. *Anderson v. Louisville & N. R. Co.* (C. C. D. Ky.) 764

4. A section of a statute prescribing penalties, and another section declaring the effect as evidence of rates fixed by commissioners, may be dropped as invalid without affecting the validity of the remainder of the statute, where it appears that its prime object was the establishment of rules for the operation of railroads and the regulation of their rates,

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which can be fully accomplished irrespective of the invalid sections. *Reagan v. Farmers' Loan & T. Co.* (U. S. Sup. Ct.) 560

5. A statute must be read in the light of all general laws upon the same subject in force at the time of its passage. *United States v. Trans-Missouri Freight Assn.* (C. C. App. 8th C.) 443

6. Words which have acquired a well-understood meaning by judicial interpretation must be presumed to be used in that sense in a subsequent statute, unless the contrary clearly appears. *Id.*

7. Common-law terms used in an Act of Congress creating an offense without defining the terms may be interpreted by the common law. *Id.*

8. A statute changing a rule of evidence is applicable to a pending action. *Chicago, B. & Q. R. Co. v. Jones* (Ill.) 683

STRIKE. See CONSPIRACY, 8-16; CONTEMPT, 4, 5; INJUNCTION, 6-11; MASTER AND SERVANT; RECEIVERS, 13.

SUNDAY. See COMMERCE, 13.

SUPREME COURT. See APPEAL AND ERROR, 2.

TARIFF.

For Freight Rates in General, see CARRIERS, III.

See also COURTS, 6.

TARIFF SCHEDULES.

Opinion as to. 698

TAXES. See also APPEAL AND ERROR, 2; COMMERCE, 30; INJUNCTION 2.

1. A state has power to tax all property having a situs within its limits, whether employed in interstate commerce or not. *Ficklen v. Shelby County Taxing Dist.* (U. S. Sup. Ct.) 79

2. A state cannot tax or regulate interstate commerce, or make the payment of a tax or the taking out of a license a condition precedent to carrying on interstate or foreign commerce. *Osborne v. State* (Fla.) 731

3. A tax levied only upon the franchise or business of a foreign corporation is not a tax on interstate commerce. *Horn Silver Min. Co. v. New York* (U. S. Sup. Ct.) 57

4. The statute of New York does not require that the whole business of a foreign corporation shall be done within the state, in order to subject it to the taxing power of the state. *Id.*

5. The law of Ohio requiring a corporation to pay the secretary of state for filing articles of agreement of consolidation of corporations a percentage on the capital stock of the new consolidated corporation created by such articles is valid and constitutional, when applied to the consolidation of foreign corporations with a domestic corporation of the state, forming a continuous line of railroad through several states. *Ashley v. Ryan* (U. S. Sup. Ct.) 664

6. Assessing that part of an interstate railroad which is within the state at its actual cash value on a mileage basis is not placing a burden upon interstate commerce beyond the power of the state, simply because the value of the railroad as a whole is created partly—and perhaps largely—by the interstate commerce which it is doing. *Cleveland, C. C. & St. L. R. Co. v. Backus* (U. S. Sup. Ct.) 677

7. The true value of a line of railroad for the purpose of taxation is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole. *Id.*

8. It is not necessary that the assessing board of a state, in order to keep within the limits of state jurisdiction, shall treat the part of a railroad within the state as an independent line disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road. *Id.*

9. Ascertaining the value of the whole line of a railroad as a single property, and then determining the value of that within the state upon a mileage basis, is not a valuation of property outside of the state, if no special circumstances exist to distinguish between the conditions in the two states,—such as terminal facilities of enormous value in one and not in another. *Id.*

10. A railroad corporation of a state is liable to taxation by such state upon its receipts, for the mileage within the state, from transportation by continuous carriage from a point in the state to another point in the state, but over a line which, in its course between those points, passes out of the state into another state and back again into the state. *Lehigh Valley R. Co. v. Pennsylvania* (U. S. Sup. Ct.) 87

TELEGRAPHS. See also ACTION OR SUIT, 3; COMMERCE, 18, 19, 29, 30; DAMAGES; PLEADING, 1.

1. Okla. Stat. 1890, § 543, imposing a penalty of \$50 upon carriers of messages for certain breaches of duty, does not apply to a failure to deliver a message, but only applies to the failure to receive or transmit messages in the order presented. It is a penal statute, and must be strictly construed. *Butner v. Western U. Teleg. Co.* (Okla.) 770

2. The sendee of a telegraphic message cannot maintain an action against the telegraph company for neglect, delay, or nondelivery of the message, in the absence of a showing that it was sent by his agent or was sent for his benefit, and that the carrier had actual or constructive notice that it was so sent for the benefit of the sendee. *Id.*

3. A person to whom a telegram is addressed can maintain an action for a penalty on account of failure to deliver it promptly, under Va. Code, § 1292, expressly providing that the forfeiture shall be to him or to the person sending the despatch. *Western U. Teleg. Co. v. Tyler* (Va.) 481

4. The Pacific Railroad Acts, requiring the railway companies to erect and maintain a line of telegraphs along their right of way, do 4 INTER 8.

not impose upon the company the duty of maintaining a separate line of poles upon which to string its wires, where a telegraph company lawfully in possession of a line of telegraph on the railroad right of way, and operating the same for commercial and other purposes, by contract with the railway company provides that the latter may maintain upon the former's poles wires devoted to its exclusive use, and the latter has offices at convenient points, and operators expressly required to send over such wires all such messages of a governmental or commercial character as are directed to be sent, and the right to string such additional wires as may be deemed essential or convenient. *Union P. R. Co. v. United States* (C. C. App. 8th C.) 705

5. The United States government as the holder of a lien upon the Pacific railroads and telegraph lines is entitled, under the Act of Congress of Aug. 7, 1888, to maintain a bill in equity to have its rights and equities in and to the telegraph property along the right of way of the Union Pacific Railway Company judicially ascertained, and to have the rights of other persons and corporations therein also ascertained and adjudicated, and, incidental thereto, to have set aside and annulled all provisions of contracts that are unlawful and in any manner impair the security of the United States, cloud its title, or prejudice its rights. *Id.*

6. The privilege given the United States Telegraph Company to erect and maintain a line of telegraph upon the rights of way of the Pacific railroad companies by Act of Congress of July 2, 1864, providing that such telegraph company "and their associates" may construct a line of telegraph between the Missouri River and San Francisco, and authorizing such railroad companies to enter into an arrangement with it for the transfer of its line to the line of the road in fulfillment of the obligation of the railroad companies to construct and maintain a line of telegraph,—is not personal, but may be shared by another corporation becoming lawfully associated with the United States Telegraph Company in the work of constructing a transcontinental line,—especially one with which such telegraph company became lawfully united by the process of consolidation. *Id.*

7. The privilege granted to the United States Telegraph Company by Act of Congress of July 2, 1864, to enter into arrangements with the Pacific railroad companies for the construction and maintenance of a line of telegraphs upon the railroad right of way, in discharge of the obligation of the railroad companies to construct and maintain such a line, must be presumed to have been conferred with full knowledge of the charter powers of the grantee to consolidate with other corporations engaged in like business, and is not personal so as to become lost by the merger of such telegraph company with the Western Union Telegraph Company, but passed to and became vested in the consolidated company. *Id.*

8. The provisions of the contract of July 1, 1881, between the Union Pacific Railway Company and the Western Union Telegraph Com-

pany, giving the latter access to the former's station-houses with some of its wires, and the right to avail itself of the service of the employes of the railway company, at most afford to the telegraph company some facilities for competing with the railway company in the matter of transacting a commercial business, which it would not enjoy if compelled to maintain independent offices, and do not amount to a transfer or surrender of the telegraphic franchise of the railway company, which, notwithstanding them, retains its right and capacity to do a commercial business. *Id.*

9. The provisions of the contract of July 1, 1881, between the Union Pacific Railway Company and the Western Union Telegraph Company looking to the exclusive right of the latter to maintain a line of telegraph upon the railroad right of way, do not render the contract voidable on the grounds of public policy, as they do not bind the railway company absolutely to exclude other telegraph companies from the right of way, or withhold all facilities for the construction of competing lines, as they provide for the grant of such exclusive right only to the extent that the railway company may legally do so. *Id.*

THROUGH RATES. See CARRIERS, 141, 142.

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TICKETS. See CARRIERS, 154, 155; COMMERCE, 15, 16; CONSTITUTIONAL LAW, 2, 10, 17.

TOLL. See BRIDGES, 2.

TRADES UNION. See CONSPIRACY, 9; INJUNCTION, 5.

TRIAL. See CONTEMPT, 1.

VARIANCE. See EVIDENCE, 23.

WAGES. See RECEIVERS, 3-13.

WATER COMPETITION. See CARRIERS, 111-113.

WEIGHT. See CARRIERS, 6.

WITNESSES. See also COURTS, 10.

To impeach a witness the evidence must reflect the opinions of the people in the community in which he lives. *United States v. Howell* (D. C. W. D. Mo.) 818

END OF VOLUME IV.

